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Constitutional arrangements

According to the pollsters and pundits, (in September when this editorial is being written) by the end of October New Zealand should have a change of administration. Prophecy however is a dangerous game, whether political or otherwise. It is also sobering to recall that in 1948 Tom Dewey was taught by Harry Truman that the poll that mattered was the poll on election day; and more recently Michael Dukakis started his election campaign 17 points ahead of George Bush. Finally, there is the reported Labour Party poll that is supposed to have shown that with Mike Moore as leader the Labour Party would win the election by 10%, and this poll was the reason why Geoffrey Palmer changed his mind and resigned from the office of Prime Minister.

If there is the expected change of administration however, as it seems likely there will be, there is a promise of some interesting constitutional changes. What they will be in practice cannot be foretold, but the talk runs the gamut of a longer Parliamentary term (in respect of which there is to be a referendum), a greater use of the referendum, proportional representation, and a Second Chamber. In an editorial before the 1987 election at [1987] NZLJ 233 the question of proportional representation was discussed. It is proposed in this editorial and succeeding ones to look rather at the question of a possible Second Chamber.

This issue can be divided into three questions. Why have a Second Chamber? How would it be constituted? What would its powers be?

There is an important preliminary point that needs to be made. These are not disparate questions. They are closely interrelated. It is an error to talk in principle of the need for a Second Chamber without at the same time considering the practical question of what should it do, and who should be in it. The answers to the two latter questions will largely determine the answer to the first.

Two criticisms of principle are usually made to the idea of a Second Chamber. The first is that it has been shown historically that the country can be governed without the need for such an expensive luxury; and secondly that its very existence would render our traditional form of government ineffective, that it would clog the ability of the government to act promptly to effect reform.

The answers to these points are in themselves compelling justifications for the existence of the Second Chamber. Historically it has been shown that our present first-past-the-post, single-member constituency system is not at all democratic. No government in New Zealand has been elected by 50% or more of the electorate since 1951 when National won. Secondly one has to have a blind faith in the inevitably beneficial effects of "reform" to believe that the present system of Cabinet government, an indirectly elected dictatorship, is the proper way to govern a democracy.

Back in 1951 National won 53.9% of the votes cast. This though, was only a turnout of 92.9% of the total number of electors. The most surprising historical fact about voting patterns however, is that according to the Appendix in the book *Changes? The 1990 Election* by Colin James and Alan McRobie, there have only been four elections out of the 23 between 1919 and 1987 when any political party has won 50% or more of the votes. These were 1938 for Labour and 1946, 1949 and 1951 for National. An extraordinary record in itself. And in two of the more recent elections, 1978 and 1981, Labour got more votes but National got more seats.

Whatever theory of democracy one may subscribe to, it is clear that the present system simply does not work in the sense of Parliament representing the general views of the electorate. Something has to be done. The obvious solution would appear to be some form of proportional representation. The 1986 Royal Commission on the Electoral System recommended a somewhat complicated system of proportional representation. This looked fine on paper but was politically unrealistic.

The real, basic problem, unstated of course by the protagonists, is that neither of the two major political parties wants effective proportional representation because the likely effect would be that the parties would break up into the factions that presently go to make them up. In Australia the Labour Party is divided into formal factions with Cabinet representation divided among them. They are held together by the joint enjoyment of shared political power. The Opposition consists of two formally distinct parties, the Liberal Party and the National Party. In New Zealand both of the two major parties have internal tensions resulting from the yoking together of often conflicting interest groups – exacerbated by the normal personality clashes that the pursuit or sharing of power inevitably creates.

In addition to this problem of the representative nature, or rather the unrepresentative nature, of Parliament as presently constituted, there is the problem of the way the system works after the triennial elections are over. *Unbridled Power*, in either of its editions, makes it clear that what exists is a dangerously centralised concentration

of power in the Cabinet.

Change then is necessary in our constitutional system. A Second Chamber properly constituted, and with reasonable but restricted powers would be a considerable benefit to the health of the body politic. Many suggestions have been made as to its composition and powers. It is intended here only to indicate a personal opinion on the possible constitution and powers of a Second Chamber. The details will be discussed in later editorials.

The previous Second Chamber, the Legislative Council, was simply an appointed body and was consequently controlled by the government of the day. It consequently had no status. It is suggested that a new Second Chamber should consist partly of elected members on a proportional representation basis, and partly of independently appointed members.

The elected members could be up to 50, who would be elected on a proportional basis of one member for every full 2% of the popular votes won by a party subject to a minimum of 6% so that no party would have less than three members in the Chamber. The people elected would be those with the highest number of votes within their party who did not get elected into the House of Representatives. One of the oddities of the present system is that some of the members are elected to Parliament with fewer votes than some members who do not get elected. In 1987, for instance, the unsuccessful National candidate for Yaldhurst got 8338 votes while the successful Labour candidates for West Coast and Wanganui got 7033 and 7007 respectively. The idea of seats being allocated from among "unsuccessful constituency candidates" seems to be considered an acceptable proposal by the Royal Commission on the Electoral System in paragraph 2.90 of its Report. Allowing for the broken percentages there would never be a full 50 members elected on the proportional system suggested, although nearly so.

The balance of the Chamber, say another 40 or more would be appointed to represent the various interest groups in the country. They would be appointed by the interest groups themselves in whatever way they determined. Groups represented could be Maoris (in a substantial number), Federated Farmers, Manufacturers, Trade Unions, Churches, Universities, Women, Local Bodies and so on. No group would appoint less than two and the terms of the individuals would expire at different times. Also they would have a fixed term and not be eligible for re-appointment. This would ensure an independent attitude. If the Parliamentary term remains at three years then they would serve three terms; if there is a four-year term then they would serve two terms. In other words they would have a fixed period of nine or eight years in office.

The benefits of this system are that every substantial serious political group could expect to be represented by proportional representation, and every substantial social and economic group would also have a direct involvement in the political process.

P J Downey

Recent Admissions

Barristers and Solicitors

Anderson P J	Christchurch	13 July 1990	Kessick M R	Dunedin	15 June 1990
Appleyard J M	Christchurch	13 July 1990	Leary I M	Wellington	22 June 1990
Au S H	Christchurch	13 July 1990	Lee B M	Dunedin	15 June 1990
Brennan A V	Christchurch	13 July 1990	Lim P T Y	Christchurch	13 July 1990
Bennett J M L	Dunedin	15 June 1990	Lloyd D M	Christchurch	13 July 1990
Brooks P-L	Dunedin	15 June 1990	Lomax M R	Christchurch	13 July 1990
Bunt E J	Dunedin	15 June 1990	Luoni D G	Dunedin	15 June 1990
Burson B L	Dunedin	15 June 1990	McClure J A	Wellington	22 June 1990
Butler J G	Dunedin	15 June 1990	McLoughlin R L	Christchurch	13 July 1990
Cheah S S M	Christchurch	13 July 1990	Mansfield R M	Dunedin	15 June 1990
Cohen R J	Auckland	9 July 1990	Manson A M	Wellington	22 June 1990
Coleman J H	Christchurch	13 July 1990	Mar V H	Dunedin	15 June 1990
Cook C L	Dunedin	15 June 1990	Mason B P	Wellington	15 June 1990
Cowie K A	Dunedin	15 June 1990	Matthews T R N	Wellington	22 June 1990
Daysh R G	Dunedin	15 June 1990	Miller D	Dunedin	15 June 1990
Dorrance P J P	Christchurch	13 July 1990	Meredith-Cullen A	Dunedin	15 June 1990
Evans H A	Christchurch	13 July 1990	Molyneux J G	Christchurch	13 July 1990
Fogarty C W J	Christchurch	13 July 1990	Mora P R	Christchurch	13 July 1990
Gerritsen N H	Christchurch	13 July 1990	Neilsen M J	New Plymouth	11 July 1990
Gordon B E R	Dunedin	15 June 1990	Ng K E	Christchurch	13 July 1990
Harvey W N	Wellington	22 June 1990	Perese S I	Wellington	22 June 1990
Hatzidakis K	Dunedin	15 June 1990	Rinkes E L	Wellington	22 June 1990
Hayward D O	Dunedin	15 June 1990	Robertson R B	Dunedin	15 June 1990
Heffernan F E	Christchurch	13 July 1990	San C Y	Dunedin	15 June 1990
Hobby G M	Christchurch	13 July 1990	Sawyer A J	Christchurch	13 July 1990
Irwin P J	Wellington	22 June 1990	Scott N R	Dunedin	15 June 1990
Joe S O W	Dunedin	15 June 1990	Semple L J	Dunedin	15 June 1990
Johnson J M	Wellington	22 June 1990	Shapira G	Dunedin	15 June 1990
Kemp S J	Wellington	12 June 1990	Smith R V	Christchurch	13 July 1990

Case and Comment

Nominee directors

A note on the case of Kuwait Asia Bank EC v National Mutual Life Nominees Ltd *[1990] BCL 1560 by Mr Andrew Beck was published at [1990] NZLJ 303. A small postscript has been supplied and is published herewith.*

The hearing in the Privy Council took place on 30 November 1989, but the reasons were only delivered on 21 May 1990. This has some interesting consequences because the High Court had in the meantime already decided the action against the other defendants (see below).

. . .

The development of the law is further illustrated by decisions after the Privy Council hearing. In the trial of the action against the directors in the present case (which took place in February and March 1990, with judgment on 30 April, reported as *National Mutual Life Nominees Ltd v Worn* (1990) 5 NZCLC 66,384) Henry J specifically questioned whether the traditional subjective standards applied to directors were an appropriate yardstick for the modern business world (at 66,406). Although it was not necessary to decide the point because of the fact that all the directors were experienced business persons, he found all the directors to be in breach of their duty of care. In *Public Trustee v Flower* [1990] BCL 1225 the Court relied on the fact that directors (inter alia) are generally regarded as a professional class to impose a duty on professional trustees and executors to exercise the standard of care of a reasonable and prudent trustee or executor (at 15-16).

Passing of property in goods

NZI Finance Ltd v Crosbie & Chignall [1990] BCL 1231

This recent case is another example of the importance of the operation of the rules regarding the passing of property in contracts for the sale of goods. In this case, the question was, as it often is, which of two parties whose conduct was honest and reasonable should suffer from the financial failure or default of others.

The first defendant, the owner of a Mercedes sports car, placed it with a licensed motor vehicle dealer with written instructions that the car be sold on his behalf for $32,000. The second defendant wished to purchase the car, and, for that purpose, completed several documents including a sale and purchase agreement with a price of $34,000, $9,000 of which was to be paid in cash, with the balance to be paid in two instalments, a bank authority being completed for this purpose. A hire purchase agreement was also executed, and this was subsequently assigned to the plaintiff finance company by the dealer. At the time of signing the documents, the second defendant gave the dealer a cheque for the cash deposit, indicating, however, that there were no funds in her bank to cover the cheque, and that presentation of the cheque should be delayed until funds were available. The dealer retained possession of the car, and the plaintiff gave to the dealer a cheque for $25,000. The dealer indicated to the first defendant that a purchaser had been found, but that, until the deposit cheque had been paid, the car would not be released to the purchaser, and the first defendant would not be paid. At a later date, having heard that the dealer was having financial difficulties, the first defendant retook possession of the car from the dealer, who raised no objection. The second defendant allowed $465.00 to be drawn from her bank account, but after that, she paid no more. The plaintiff claimed to be the true owner of the car and sought to challenge the first defendant's possession of it.

Thorp J pointed out that the plaintiff's case rested on two issues: first, whether the car had been in the hands of the dealer as a mercantile agent with the consent of the owner, and, second, whether the transaction between the dealer and the second defendant amounted to a sale or disposition such as to pass title to the second defendant and thence to the plaintiff.

The first question presented no difficulty, Thorp J relying on such well-known cases as *Paris v Goodwin* [1954] NZLR 823 and *Davey v Paine Brothers (Motors) Ltd* [1954] NZLR 1122 as indicating that it is now well-established that a licensed motor vehicle dealer is a mercantile agent. Further, the first defendant's submission that a sale by hire purchase could not be said to be a sale or disposition in the ordinary course of business of a mercantile agent was rejected; such transactions had nowadays became commonplace.

The second question was more difficult to answer. Thorp J noted that s 19 of the Sale of Goods Act 1908 provides that property passes when the parties so intend, but that, if their intention is not clear, s 201 provides that, in an unconditional contract for specific goods in a deliverable state, property passes at the time the contract is made, regardless of whether the time of payment or delivery or both, is postponed. Here, the conduct of the

parties did not point clearly in one direction; in particular, the dealer's acceptance of the $25,000 payment from the plaintiff was an indication that property had passed to the plaintiff, though this could be considered to be merely part of normal business practice. Similarly, the second defendant's failure to stop the first automatic payment pointed towards a completed sale. On the other hand, the dealer's belief that possession of the car should not be given until the deposit was paid, the wording of the documents indicating payment of the deposit should be made before delivery, and the dealer's return of the car to the first defendant without objection suggested there was no completed sale. It was held that these factors outweighed those which pointed to a contrary view, and, accordingly, property had not passed to the plaintiff.

Two observations may be made about this case. First, it is not clear why is was necessary to consider the question of whether the dealer was a mercantile agent and the transaction a sale or disposition in the ordinary course of his business. The dealer had been given express authority to sell the car, and so, it is submitted, his status as a dealer is quite irrelevant. The discussion of this question perhaps indicates some confusion between the rules which operate as exceptions to the *nemo dat* principle, and the rules which govern the passing of property. The only real question for decision should perhaps have been whether the owner's expressly authorised agent had entered into an agreement which was a contract of sale, which would pass property, or an agreement to sell, which would not.

On this latter point, the case is of interest for its consideration of the relationship between s 19 and s 20 r 1. Although s 20 r 1 provides that the postponement of time of payment is immaterial in considering whether property has passed under that rule, it may be that such postponement may provide evidence of the parties' intentions that property should not pass until payment is made. In such a case, s 20 r 1 will not apply, and the terms of s 19 will determine the matter.

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Family Proceedings Act 1980, s 182 — Was the claim brought within a reasonable time? Was it within s 182 at all?

McGirr v McGirr and others [1990] BCL 433 is noted here only upon the Court's observations concerning s 182 of the Family Proceedings Act 1980. Subsection (1) provides that on or within a reasonable time after the making of (inter alia) an order under Part IV of the Act (which deals with proceedings relating to the status of marriage, ie ss 27-44, and thus includes dissolution), a Family Court may inquire into the existence of any agreement between the parties to the marriage for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or the parties to the marriage or either of them, as the Court thinks fit.

The proceeding began in the Hamilton Family Court in October 1986 as an application by the former husband for orders under the Matrimonial Property Act 1976. In December 1986, the former wife initiated her own proceedings under that Act in the Hamilton High Court. In April 1987 a praecipe was filed to have the proceeding set down for a hearing before a Judge alone. In June 1987 the wife applied to join the second defendants and to file an amended statement of claim so as to extend the scope of the matrimonial property dispute to cover a fairly typical farmer's family trust – of which the second defendants were the trustees – which had been established for the benefit of the wife and the children of the marriage. The wife claimed that certain farm property owned by the trust was held by the trustees upon a constructive trust for the benefit of her and her husband. In short, she hoped to increase the pool of alleged matrimonial property available for distribution to her. In fact her claim failed in this respect, for Anderson J, after considering the facts and numerous authorities, found himself unable to find that there was any constructive trust.

The wife and husband were married in 1965 and there were three children of the marriage.

The above-mentioned trust was set up in 1976, the settlor being the mother of the husband. The trustees, of whom the husband was one, had an absolute discretion to pay or apply the whole or part of the annual income towards the maintenance, education or otherwise for the benefit of any child or children, or grandchild or grandchildren, of the spouses, and an absolute discretionary power to pay or apply the whole or any part or parts of the annual income thereafter remaining to the wife. Further relevant details of the trust deed appear from the judgment of Anderson J considered below. Various farms were in fact bought and sold by the trustees in circumstances that need not be described here.

The former spouses' proceedings were consolidated. Leave to claim against the trustees was granted and counsel was appointed to represent the children. Counsel for the wife, in the subsequent events which happened, sought leave to file an amended statement of claim. This was identical to the previous one except in the matter of the relief sought under s 182 of the 1980 Act. The husband objected to this on the ground, inter alia, that the Court's powers under s 182 were confined to a Family Court. This objection was, in the event, abandoned.

Anderson J gave the wife leave to file the second amended statement of claim incorporating the claim under s 182. This he did, not upon the basis of the merits of the claim – in which respect he found against the wife – but upon the basis that finality was desirable.

His Honour first considered the husband's point that the wife's application had not been made within a reasonable time after the dissolution of the parties' marriage. The application had, in fact, been made one year and ten months after the dissolution. The husband contended that the reasons for the delay had not been explained and that there was no "agreement" between the spouses for the payment of maintenance, or relating to their property, or that of either of them, and that there was no settlement on the parties.

Anderson J held that the issue whether the claim had been brought

within a reasonable time fell to be considered in the context of the litigation itself. He particularly noted that the spouses could not be said to have "proceeded robustly to trial" after each had initiated proceedings, and he adverted to the large number of affidavits and documents, to the parties' estimate of the time for the hearing having been "awry by at least 100 per cent", to the unrealistic stance taken by the husband that the wife should not get more than 25% of the matrimonial property – which must have exacerbated and prolonged the scope of the dispute – and to the fact that the proceedings themselves had been "unusually litigious". Even more important was the fact that, within nine months of the dissolution, the wife had issued a notice of proceeding against the trustees and filed an amended statement of claim putting in issue a claim for relief in relation to the trust assets. Although this claim was founded on equitable rather than statutory principles, litigation in relation to the trust property in the context of proceedings for the final determination of property issues arising from the former marriage of the husband and wife had been in train for some considerable time and still remained unresolved at the time the application for filing the second amended statement of claim was made. In all these circumstances, the Court concluded, the wife's application had been made within a reasonable time of the dissolution.

The next question for decision was whether the trust deed constituted an agreement for the payment of maintenance for the purposes of s 182. Anderson J held that it did not – because the trustees had, according to its terms, absolute discretionary powers as to payment of the annual income and, further, because the powers were exerciseable only after the trustees had made a determination in relation to the setting aside of the whole or any part or parts of the income towards the accumulation of a capital fund. He further observed that the trust had been established by a deed entered into between the husband's mother as settlor and the second defendants as trustees in relation to the settlement of $10 upon the latter by the former. Hence, it was decided, "not only is there a barrier in the form of an absolute trustees' discretion to any of the intended beneficiaries enforcing the payment of any part of the trust assets towards the maintenance of a beneficiary, but also the plaintiff [wife] was not a party to the deed. Accordingly, there are not the characteristics of "any agreement between the parties to the marriage for the payment of maintenance as required by s 182 . . ."

Similarly, Anderson J held, the deed did not constitute an agreement between the parties relating to the property of the parties or either of them for the purposes of s 182. The facts that the husband was one of the trustees and that the wife was one of the potential beneficiaries did not render her and the husband parties to an agreement. Nor did the deed, entered into after their marriage, constitute a "post-nuptial settlement made on the parties" within that section. The husband was not, unlike the husband in *Re Polkinghorne Trust, Kidd v Kidd* (1988) 4 NZFLR 756, a beneficiary under the trust, and the settlement, while post-nuptial, had not been made upon the spouses. One such necessary party was

> excluded from the benefice of the trust. The statutory necessity for both parties to be the donees of a settlement is reinforced by the words of s 182 themselves which refers, in relation to an agreement between the parties, to "the property of the parties or either of them", whereas in relation to ante-nuptial or post-nuptial settlements the words "or either of them" are omitted.

Anderson J mentioned that, even if he had found that the conditions permitting him to make orders under s 182 were present, he would have exercised his discretion against making such orders.

The decision may usefully be compared with *Brown v Cowlishaw* [1952] NZLR 603 and *Meldrum v Meldrum* [1970] 3 All ER 1084.

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Recent Admissions

Barristers and Solicitors

Anderson P J	Wellington	13 July 1990
Ascroft R G	Wellington	13 July 1990
Ashmore A E	Wellington	13 July 1990
Baigent B A	Wellington	13 July 1990
Bailey D J	Wellington	13 July 1990
Beck L M	Wellington	13 July 1990
Bloomfield C A	Wellington	13 July 1990
Brown F J	Wellington	13 July 1990
Clarke D T	Wellington	13 July 1990
Clayton G M	Wellington	13 July 1990
Cleary T P	Wellington	13 July 1990
Coll-Bassett C M	Wellington	13 July 1990
Digby G A	Wellington	13 July 1990
Ford R C	Wellington	13 July 1990
Grant P F W	Wellington	13 July 1990
Heaton C	Wellington	13 July 1990
Holborow D L	Wellington	13 July 1990
Hopkinson M C	Wellington	13 July 1990
Jagose U R	Wellington	13 July 1990
Kearns K C	Wellington	13 July 1990
Lockhart E C	Wellington	13 July 1990
Lockhart K M	Wellington	13 July 1990
Lynch J J	Wellington	13 July 1990
McKnight P W	Wellington	13 July 1990
McLaughlin J S	Wellington	13 July 1990
O'Neill C M	Wellington	13 July 1990
Snell A J S	Wellington	22 June 1990
Stewart P J B	Dunedin	15 June 1990
Thomas M J	Dunedin	15 June 1990
Thwaites G J	Christchurch	13 July 1990
Tiong L G	Christchurch	13 July 1990
Tobin S A	Dunedin	15 June 1990
Vello M A	Dunedin	16 June 1990
Wai A S H	Christchurch	13 July 1990
Wang W M	Christchurch	13 July 1990
West P A	Dunedin	15 June 1990
Wong C K	Dunedin	15 June 1990
Wright M L A	Dunedin	15 June 1990

The application of Article 9 of the Bill of Rights 1688

By David McGee, Clerk of the House of Representatives

New Zealand now has two Bills of Rights. There is the initial English one of 1688 under which a New Zealand Prime Minister was convicted of exceeding his powers [1976] 2 NZLR 615. Now in 1990 we have a Bill of Rights Act. In this article the author criticises a recent decision on the provision in the 1688 statute concerning the absolute freedom of speech of Members of Parliament, and whether this applied to documents provided by a Member in the furtherance of his public duties.

The Bill of Rights 1688 is in force in New Zealand by virtue of s 3(1) of, and the First Schedule to, the Imperial Laws Application Act 1988. Cases on it are not common. A judgment of Popplewell J in the Queen's Bench Division delivered on 1 February this year deals directly with the application of its provisions to a libel action brought by a member of Parliament. The case has recently been reported as *Rost v Edwards and Others* in [1990] 2 WLR at p 1280.

The plaintiff was a leading member of the House of Commons Select Committee on Energy. However, he also held consultancies with two energy organisations. An article published in *The Guardian* newspaper drew attention to these consultancies and to the fact that (at that date) the plaintiff had not registered them with the House of Commons' Registrar of Members' Interests. The plaintiff brought an action for libel against the journalist, the newspaper's editor and its publishers, claiming that the article implied that he had made improper use of information he had obtained as a result of his membership of the select committee. He sought to show that as a result of the article he had not been elected chairman of the select committee (an appointment he had expected to secure) and that he had been de-selected from another committee considering an energy bill. Further, both he and the defendants wished to establish facts as to the propriety or otherwise of the failure to register his energy consultancies.

The action reached the stage of a jury being sworn before submissions were made by counsel that led to the Court appreciating that questions of parliamentary privilege might be involved. (Two preliminary rulings made by Popplewell J and not reported concerned the asking of questions in the House on the article and an argument concerning the re-publication of the article in Parliament. At the time of the judgment these preliminary rulings were the subject of an appeal although the action seems subsequently to have been settled.)

In order to assist the Court, the matters in issue were referred to the Attorney-General and he was invited to appear to help to resolve any conflict between the privileges of Parliament and the rights of the parties to present their case in Court. The practice of a law officer assisting the Court has been followed in at least two other libel actions in the United Kingdom raising questions of parliamentary privilege in recent years. (*Dingle v Associated Newspapers Ltd* [1960] 2 QB 405; *Church of Scientology v Johnson Smith* [1972] 1 QB 522) In New Zealand counsel has been instructed by the Speaker to address the Court on any aspects of parliamentary privilege that might arise in a defamation action brought by a member of Parliament. (*Hansard*, 1989, Vol 500, p 11754) The action was subsequently settled. Accordingly, in *Rost v Edwards*, the Solicitor-General appeared for the Attorney-General and made submissions to the Court.

The matters before the Judge turned on the application of article 9 of the Bill of Rights to the facts of the case. Article 9 provides:

> The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

1 Meaning of "questioned"

The first matter which arose was whether merely leading evidence that certain events had occurred in the course of parliamentary proceedings fell within article 9 at all. Counsel for the plaintiff emphasised that he was not seeking to criticise what had happened in Parliament – the de-selection of the member from a committee and the failure to elect him to the chairmanship of another committee – he merely wished to establish that those events had indeed occurred.

Counsel further submitted that he was not alleging anything improper in the parliamentary proceedings which he wished to adduce in evidence and, for that reason, he was not calling them into question.

Popplewell J made it clear that he was personally sympathetic to the plaintiff's view that an infringement of the Bill of Rights only occurred if there was some allegation of improper motive. But the weight of authority was clearly the other way.

Questioning proceedings within the meaning of the Bill of Rights meant examining them in Court proceedings in a way that was more than simply asking the Court to take note of a certain fact. This would be impossible in relation to the evidence that the plaintiff wished to call in this case for the Court would have to examine the reason for the plaintiff's de-selection from the committee on the bill and his non-election as select committee chairman. The Court would then be judging why particular events in Parliament had occurred. Of its nature, evidence as to why certain events had occurred was not purely factual and would have led the Court to infringe article 9. The evidence was therefore inadmissible (subject to a point discussed in section 3 below).

There are some issues that arise from the determination.

It is quite clear that referring in Court to proceedings in Parliament is not *per se* inadmissible. It is only when proceedings are referred to for the purpose of impeaching or questioning those proceedings that the Bill of Rights prohibits such references. For example, s 30 of the Evidence Act 1908 not only contemplates that evidence of parliamentary proceedings may be given, it authorises the same by requiring the admission into evidence of properly published Journals of the Legislative Council and the House of Representatives.

What is important is not the fact that a proceeding in Parliament is sought to be adduced in evidence, but the reason for adducing it. Any extracts from proceedings that are used solely to prove as a fact that certain events occurred can be admitted. Examples of such admissible use of parliamentary proceedings can be contemplated. For example, it is a defence to an action for defamation that the words complained of were a fair and accurate report of proceedings in Parliament.[1] The only way of making out this defence is by giving in evidence an authenticated report of the proceedings themselves. This will usually be the *Hansard* report. The Court is not asked to draw any inference about the parliamentary proceedings (though it will have to reach a conclusion as to whether the outside report conforms to the official report) and so there is no questioning of proceedings in Parliament contrary to article 9 of the Bill of Rights.

However, it is difficult to reconcile the Bill of Rights with recent developments in the field of statutory interpretation whereby Courts have referred to statements made in Parliament at the time of the passing of a bill for the purposes of construing the resultant statute. Even in England the House of Lords has sanctioned a reference to proceedings in Parliament for the purpose of aiding the interpretation of, in that case, a statutory regulation.[2]

It was perhaps to the Bill of Rights that Lord Scarman was referring when, in enumerating the reasons why the Courts should refuse to have regard to what was said in Parliament as an aid to the interpretation of statutes, he stated:

> Secondly, counsel are not permitted to refer to Hansard in argument. So long as this rule is maintained by Parliament (it is not the creation of the judges), it must be wrong for the judge to make any judicial use of proceedings in Parliament for the purpose of interpreting statutes. (*Davis v Johnson* [1978] 1 All ER 1132, 1157)

If so, this objection to using proceedings in Parliament to interpret an Act may have disappeared.

In Australia the position has been regularised, and any apparent conflict with the Bill of Rights reconciled, by an express statutory provision authorising the Courts to refer to debates in Parliament (and to a range of other parliamentary materials) in interpreting an Act.[3] But there is no comparable provision in England or in New Zealand. It seems that cases of statutory interpretation may be regarded as *sui generis*. When construing an Act of Parliament the Courts are not restrained from using any materials that they consider relevant to elucidating the Act's meaning, even materials that would otherwise not be admissible before them because of the Bill of Rights.

2 Claims for damages

A subsidiary argument of counsel for the plaintiff in *Rost v Edwards* was that proceedings in Parliament were admissible when it was sought to use them not in support of a cause of action but in a submission as to damages. In the case of the evidence as to de-selection as a member and non-election as chairman, this went to the level of damages for the alleged libel and not to whether the article was libellous in the first place.

Popplewell J found no support for a rule distinguishing between the use of parliamentary proceedings to establish a cause of action and their use for the purpose of assessing damages. It is submitted that in principle there is indeed no justification for such a distinction, one is as equally a questioning of proceedings in Parliament as the other. The case that was cited to the Judge as supporting such a distinction concerned a report of evidence given before the Public Accounts Committee (*Blackshaw v Lord* [1984] QB 1), and was explained by Popplewell J on the basis that nobody there took the point that was now in issue (p 129H).

There is, however, authority in New Zealand which supports a special rule for damages evidence. This is *News Media Ownership v Finlay* [1970] NZLR 1089, which arose out of a retaliatory article defaming a member for a speech he had made in Parliament. Defamation was established but in assessing the damages the member should receive the Court of Appeal approved the Judge's action in leaving to the jury the "provocation" which the member gave by his speech in the House. (ibid at pp 1100 and 1102). Nothing could seem to be clearer than a breach of the principle of freedom of speech which article 9 is designed to protect, yet apparently no point as to parliamentary privilege was taken. The Privileges Committee of the House of Representatives has recently disagreed with this aspect of the decision in *News Media Ownership v Finlay*. (*Report of the Privileges Committee*, 1989, I 15B)

3 The power of the House to set article 9 aside

Having determined that the Bill of Rights applied to prohibit the

evidence as to the plaintiff's membership and potential chairmanship of the committees from being given, the Judge went on to suggest a cure. If the plaintiff wished to call evidence, he said, it would be necessary for him to petition the House of Commons itself (p 1291C). The Judge expressed the hope that the House would consider any such petition sympathetically. This raises the important question of to what extent the House of Commons, and in New Zealand the House of Representatives, can set aside article 9 of the Bill of Rights.

The answer is complicated by another practice which is often confused with the Bill of Rights provision, that of petitioning the House for authority to use parliamentary proceedings as evidence in legal proceedings. As has been stated above, evidence of parliamentary proceedings is not inadmissible in legal proceedings *per se*. What is inadmissible is the use of the parliamentary proceedings in a manner contrary to the Bill of Rights. But, notwithstanding that evidence of parliamentary proceedings may be legally admissible (because not contrary to the Bill of Rights), the practice of the House of Commons was, until recently, to receive petitions from litigants seeking the House's leave to refer to its debates or reports in Court. It is not entirely clear when or why this practice first arose but it may have resulted from a superabundance of caution on the part of litigants who wanted to ensure that they would not be held in contempt by the House of Commons for using evidence of its proceedings without authority. In New Zealand there have similarly been examples of petitions to the House of Representatives seeking its authority to use extracts from parliamentary proceedings in evidence in legal proceedings.

However, it is important to note that in granting permission to refer to its proceedings in Court, the House of Commons did not purport to set aside the Bill of Rights. It was authorising the fact of use; not absolving litigants from the statutory requirement not to call in question proceedings in Parliament outside Parliament. Indeed on the face of article 9 the House of Commons had no authority to waive its application. Article 9 is couched in absolute terms with no qualification for a "with authority" use of proceedings. It is trite law that a House of the legislature cannot by resolution change the law of the land. (*Bowles v Bank of England* [1913] 1 Ch 57) The House of Commons could not, by agreeing to a petition, sanction the use of its proceedings in a way contrary to the Bill of Rights.

In 1980 the House of Commons abolished the practice of having petitions presented to it for authority to refer to its proceedings in legal proceedings. The Australian Senate has since followed suit and last year the Standing Orders Committee recommended that the House of Representatives in New Zealand should also abolish the practice.[4] But the House of Commons resolution of 31 October 1980, dispensing with the need for a petition, expressly recognises that the Bill of Rights continues to restrict the use to which parliamentary proceedings may be put and does not purport to set article 9 aside, as indeed it could not do without a change to the law.

If, as the Judge in *Rost v Edwards* held, it is contrary to the Bill of Rights to lead evidence as to the plaintiff's de-selection from a committee and non-election as a chairman of another committee, could the House of Commons (or the House of Representatives) nevertheless authorise the tendering of that evidence? To hold that it could, would be to permit the House to set aside part of the statute law of the country. Even with a unicameral legislature there is a significant difference between a law passed by Parliament and a resolution passed by the House of Representatives.

An alternative view of Popplewell J's suggestion that a petition to the House of Commons would solve the plaintiff's problem is that article 9, when properly interpreted, is itself subject to waiver by the House of Commons. Popplewell J did not refer to this as a case of statutory re-interpretation of article 9 (indeed he was at pains to follow the established meaning of the provision) and the article in its terms gives no support for such a construction. However, so to interpret the provision is as objectionable as to regard the House as having power to override it. Many countries do have parliamentary immunity for parliamentarians with the right of the legislature to withdraw that immunity. In Britain and New Zealand this has not hitherto been regarded as being the position. The immunity is conferred by law in the public interest and cannot be withdrawn at will – although the House can itself punish its own members as the immunity applies only in regard to Courts and bodies outside Parliament. If the House can authorise evidence to be given by the plaintiff as to proceedings in Parliament in a manner contrary to the Bill of Rights, what is to stop it withdrawing the protection of the Bill of Rights altogether and authorising prosecution (impeachment) of a member on account of his or her conduct in Parliament? Such a right, if possessed by the House, could be used to undermine the very protection which the Bill of Rights seeks to confer.

It is submitted that if a House wishes to do this it must first persuade Parliament to change the law expressed in article 9 and that there is no present power vested in a House to override or waive compliance with that article. In suggesting that a petition to the House of Commons could authorise what he had already held to be an infringement of the Bill of Rights, Popplewell J appears to have been misled by the previous (non Bill of Rights) practice of the House of Commons concerning leave to refer to its proceedings in Court proceedings. (In the event no petition was presented to the House.)

4 Proceedings in Parliament

There was no real dispute before the Judge that the evidence which the plaintiff sought to adduce concerning his select committee positions was a proceeding in Parliament. This consisted of discussions that had taken place before the relevant committees and was clearly within the phrase "proceedings in Parliament". The Judge (although not required to rule on the point since he held that the evidence was irrelevant in any event) also expressed the view that letters

written by another member to the plaintiff and the Speaker about a question which that member raised in the House were protected as proceedings in Parliament (p 1291G). This latter echoes a statement made to the House of Representatives by the Speaker on 16 June 1988. This concerned the circulation to the Press Gallery by a member of a letter he had written to the Speaker alleging a breach of privilege by another member. The Speaker pointed out that while the letter to him was protected by parliamentary privilege, the copies sent to the Press Gallery were not. (*Hansard*, 1988, Vol 489, p 4436) In *Rost v Edwards* the letters were apparently not circulated beyond the Speaker and the plaintiff who was the member whom they concerned. Their circulation was confined to persons who received them in a parliamentary capacity and they therefore formed part of the proceedings in Parliament. However, members, in New Zealand at least, have been warned that circulation of letters dealing with parliamentary matters containing potentially defamatory material, otherwise than in the course of their parliamentary duties, is done without the protection of parliamentary privilege.

The more difficult question for the Judge on the definition of proceedings in Parliament was whether evidence relating to the registering of the consultancies in the Register of Members' Interests fell within it. Both parties wished to lead evidence and make submissions on the point: the plaintiff to explain why he had not registered the consultancies and the defendants to establish that, at the time of the publication of the article, no such interests had been registered. The Solicitor-General, however, poured cold water on the suggestion that this evidence could be admitted. He submitted that, as the register had been established by the House and was wholly administered under rules adopted by the House, the practice and procedure applying in respect of it was within the expression "proceedings in Parliament".

Popplewell J adopted a pragmatic approach. The register was a public document operating in a "grey" area. The jurisdiction of the Courts should be ousted only in the clearest of cases. This was not one of them. He therefore drew the line at excluding evidence concerning the Register of Members' Interests (p 1293E-H).

His decision on this particular point, while somewhat surprising, is of particular interest in view of the recent statement by the Prime Minister that a Register of Members' Interests is to be established in New Zealand. (Rt Hon Geoffrey Palmer MP, Post-Cabinet Press Conference, Tuesday 12 June 1990) However, one significant difference in this proposal compared to the House of Commons' register is that the proposed New Zealand register would be created by statute. This would seem to put it even further outside the ambit of proceedings in Parliament than (according to Popplewell J) is the House of Commons' register which was created by resolution of the House itself. If this is so, questions of the admissibility of evidence as to its compilation will depend on provisions in the statute which sets it up and will not be affected by the Bill of Rights. On the other hand, the Prime Minister's proposals do envisage failure to comply with the statute being subject only to punishment by the House as a contempt. The House's enforcement of such a statute would fall within that area which is, under the Bill of Rights, within the exclusive jurisdiction of the House. In this case the principle expressed in *Bradlaugh v Gossett* (1884) 12 QBD 271 would apply – that the Courts could not inquire into the application of a statute within the House itself. It would seem then that under the Prime Minister's proposals questions as to the compilation and maintenance of the register would not be proceedings in Parliament, but questions as to enforcement of the rules would be. □

1 Section 17 of, and the First Schedule to, the Defamation Act 1954.
2 *Pickstone v Freemans Plc* [1989] AC 66. On the grounds that the regulation was not subject to any process of amendment by Parliament.
3 Section 15AB(2) of the Acts Interpretation Act 1901 (Commonwealth) which was enacted in 1984.
4 *Report of the Standing Orders Committee on the law of Privilege and Related Matters*, November 1989, I. 18B.

Editorship of New Zealand Law Reports

The Council of Law Reporting and Butterworths are pleased to announce that Maurice O'Brien QC has accepted appointment as Editor of the *New Zealand Law Reports* for the 1991 volumes and thereafter. This is consequent on the resignation of Frances Wilson who is leaving New Zealand to live in Canada.

Maurice O'Brien will continue in practice as a Queen's Counsel from his present address, (61 Oban Street, Wellington, PO Box 3778, Telephone: (04) 725-775) in addition to his duties as Editor of the *New Zealand Law Reports*.

Mr O'Brien has had a distinguished career at the Bar. He has also been active in community work. In the course of his professional life he has been a Council member and then President of the Wellington District Law Society. He has also been a member of the Council of the New Zealand Law Society, and of several of its Committees including the Disciplinary Committee. He has himself served on the Council of Law Reporting.

Both the Council and Butterworths know that with Mr O'Brien having accepted this position of Editor the profession can have full confidence in the standard of the *New Zealand Law Reports* as the authoritative official law report series for this country. □

Diversion of Christchurch offenders: An update

By Peter Spiller, Senior Lecturer in Law, University of Canterbury

The police diversion scheme now seems to have become a permanent part of the New Zealand criminal justice system, whether with or without the authority of Parliament. This present article is a follow-up to that published at [1989] NZLJ 313.

In September 1989, the *New Zealand Law Journal* published my survey of the Christchurch police scheme of diversion of minor offenders ([1989] NZLJ 313). This survey covered the one-year period from the scheme's commencement in July 1988. Diversion offers to minor and (usually) first-time offenders who admit their guilt, the chance of being dealt with outside of the normal Court process and thus of avoiding the stigma of a Court conviction. In my article, I reported on the benefits which diversion appeared to offer all parties concerned. A year later, it is time to review the operation of the scheme during its second year of operation in Christchurch, especially in the light of the changes which have occurred.

The diversion scheme has continued to fill an important gap for those offences which fall between those which are so trivial as simply to warrant a police warning and those which are seen to be so serious as to require prosecution in the Court system. The classic case has remained that of the middle-aged or elderly shop-lifter who is caught after having deliberately stolen an article of small value. The deliberate and manifest nature of the theft takes this beyond a case of simple warning, and yet the characteristics of the offender and the trivial amount involved make prosecution appear unduly punitive. In cases such as this, diversion has continued to appear as the most appropriate response. Analysis of the cases over the past year shows that those diverted have almost invariably been first offenders, charged with shop-lifting or with less serious cases of wilful damage, being unlawfully in possession of property and minor assault. The important development over the past year has been the dramatic increase in the number of those being diverted: of the persons whose offences were recorded in 1988, 64 were diverted; of those in 1989, 347 were diverted; and for the period January to June 1990, the number is 208. (This development is placing enormous demands on the time of the head of police prosecutions, who is responsible for administering the scheme.)

Much of the procedure involved in diverting offenders has been retained. A person is normally diverted because the head of police prosecutions (an inspector) has selected him/her as being eligible for the diversion scheme. In due course, the person is interviewed by the head of prosecutions, and at the interview the conditions of diversion are settled between the inspector and the offender. These have remained as follows: (1) the offender is warned against future offending and advised that any future offending would be dealt with only by Court action (while no conviction is recorded, a record of the diversion is retained in the police files); (2) the offender is required to write a letter of apology to the victim; (3) the offender has to pay the victim full compensation for property losses suffered (in the case of shop-lifting where the item is recovered on detection, the offender is required to pay $50 to the store concerned, as a contribution to the expenses of maintaining the security system); (4) the offender has to make a donation (usually $150) to the charity of his/her choice or (an option less commonly chosen) perform community work; and (5) the offender (in rare instances) may be required to undergo professional counselling for personal or addictive problems.

In the latter part of last year, two important changes were introduced to the diversion scheme. These were prompted by an editorial in the September 1989 edition of the *New Zealand Law Journal*, which was critical of the diversion scheme. Until that time, the offender was required, not only to fulfil the conditions listed above, but also to write a letter of apology to the policeman in charge of the case. This letter was intended to be a symbolic acknowledgment that the offender had been a nuisance to the state and had wasted police resources which could have been better utilised elsewhere. The editor of the *New Zealand Law Journal* commented on the unacceptable power which the scheme gave to the police to "order humiliation and require self-abasement", and claimed that the "most extraordinary" feature of the scheme was the letter of apology to the police constable ([1989] NZLJ 301-2). As a result, the head of prosecutions in Christchurch rightly came to the view that this requirement was unnecessarily punitive.

More questionable is the other major change introduced towards the end of last year. Prior to that time, most diversion cases by-passed the Courts completely. The norm in first-offence shop-lifting and similar cases was for the matter simply to be reported by the local policeman to his superior, and the head of prosecutions would decide whether or not to divert the case. The editor of the *New Zealand Law Journal* claimed that the diversion scheme as practised in Christchurch was "an arrogation by the Police to themselves of essentially judicial function" ([1989] NZLJ 302). In

response to this criticism, in October 1989, the Regional Commander of the Christchurch Police force instructed the head of prosecutions to ensure that all offenders appeared in Court. As a result of this, the procedure followed up to the present is as follows. Those selected by the police for diversion are summonsed to appear in Court, and on the due date the police prosecutor recommends diversion, at which point the Judge remands the case for (usually) a month. The interview follows, the conditions for diversion are settled and duly completed, and the head of prosecutions endorses the offender's file "withdraw, diversion complete". The offender then again appears in Court, on the remand date, the police prosecutor reports that the conditions for diversion have been completed, and the matter is withdrawn.

The new procedure requiring two Court appearances has drawn a mixed reaction. On the one hand it has been said that there is a need for a formal Court sanction of diversion by the police, as a safeguard against the abuse or misuse by the police of powers which are essentially judicial. Once this is admitted, it is claimed, the second Court appearance must also follow, as legally "all defendants are before the Court until such time as they have been discharged by the Court". On the other hand, it has been observed that the two Court appearances undermine some of the positive features of the diversion scheme: that it provides a chance for minor adult offenders to avoid the trauma of a Court encounter, and that it frees the time and energies of the Court which can be used for more serious matters. One commentator has likened the second appearance of the offender to a person sentenced to imprisonment being brought before the Court, at the end of his/her sentence, for a formal discharge. Other commentators have noted that, while there is a need to "build in" to the diversion scheme greater police accountability, the two formal Court appearances do not achieve this. It is argued that the crucial stages in the process are the selection of offenders for diversion and the interview of the offender by the police to settle the diversion requirements, and that there should be provision for involvement by other (non-police bodies) at these stages.

Leaving aside the question of the administration of the diversion scheme, the *concept* of diversion continues to offer an attractive alternative to the traditional administration of criminal justice. The personalised interview, the charitable donation/community service, and the letter of apology to the victim, mean that the offender is made to take "ownership" of his/her wrongdoing, in a way that takes account of the victim, to a far greater degree than is usually achieved by a Court conviction. (This aspect might be even further emphasised if the victim were to be invited to attend the interview with the offender, along the lines of a new children and young persons' family group conference.) The impact of the diversion scheme on the offender may help to explain the remarkably low rate of recorded re-offending amongst those directed: of the 619 offenders processed in Christchurch over the past two years, only six have been charged for subsequent offences. □

Books

European Civil Practice

By Stephen O'Malley and Alexander Layton
Published by Sweet & Maxwell, London 1989 (price £195.00)

Reviewed by P J Downey

It is a charge sometimes made against reviewers that they do not read the books that they review. I plead guilty to the fact that I have not read the 1900 odd pages of this work, and I have no intention of ever doing so. The purpose in reviewing it is merely to draw the attention of practitioners to the existence of the work should they at any time have occasion to be concerned about – or just be curious about – aspects of European Court procedures.

In their Preface, the authors explain that they took a long time to write the book. It would seem to have taken them about 10 years. They say that what has evolved is a book in three parts. The first part they describe as being designed to guide the ordinary English practitioner through the difficulties which may arise in proceedings in England and Wales which have a foreign, but more particularly a European, element. They argue that the Civil Jurisdiction and Judgments Act 1982 fundamentally altered the basis of the civil jurisdiction of English Courts in that the rules of practice are not based on principles that have their origins in Continental legal systems.

The second part of the book is said to be a commentary on the 1968 Brussels Convention on Jurisdiction and the English Statute of 1982 giving effect to it. The third part of the book contains comparative jurisdictions of the legal systems and the rules of jurisdiction and civil procedures of the various countries that have acceded to the 1968 Brussels Convention. The authors explain that this part of the book is intended to be a starting point for lawyers familiar with one system of law and procedure who then find themselves having to advise clients whose disputes are to be litigated in another country that is a party to the Brussels Convention.

The existence of the book is interesting in itself because it does indicate the fact that English law, as we have known it in the past, is going in a new direction; and while it will undoubtedly have an influence indirectly on our own legal system, there may be more and more obvious differences and distinctions to be made. It is probable that we will have to look more closely to Australia in the future, at least for procedural matters in terms of the development of the common law, rather than to the United Kingdom, as we have so closely in the past. □

Ninth Commonwealth Law Conference April 1990

The Butterworth Lectures

Judicial Reasoning: Myths and mysteries

Chief Justice Dumbutshena

My task is an easy one. I have distinguished speakers. Professor Christopher Weeramantry is a prolific writer. He has written so many books that I can't read them all — the titles, I mean.

His subject is very interesting. I remember in Tasmania in 1981, when I attended the Australian Legal Convention, the merits of the Civil System of Law as practised on the continent of Europe and our Common Law was hotly debated, there was only one person who supported the Civil Law and the Professor is going to try his best to convert us.

The next speaker will be Mr Don Dugdale. Another author, he is a local legal practitioner. His field of specialisation is commercial litigation.

Well, he has divided the Judges into three types: the A group, the B group, the C group, and each group reasons differently. And it will be interesting to find out how he has classified us into those groups.

I am not in the habit of introducing Judges of distinction. I think it is an insult to introduce a distinguished Judge telling the people what he or she has done and so forth. But for the commentary today, we have — now, I'm not sure — is it His Honour or the Honourable — Madame Bertha Wilson, Judge of the Supreme Court of Canada. And those of us who read the *Canadian Law Reports* will be familiar with her judgments.

Professor Weeramantry

Judged by any standard, the work of the common law Judges must rank as one of the great legal achievements of all time. There have, indeed, been comparable achievements on the juristic side, but on the judicial side, one would search the pages of legal history in vain for a comparable achievement. Now such an achievement commands enormous respect and this respect if strengthened also by the fact that it has had 700 years of continuous operation, and the system has now been adopted in over half a hundred countries across the world. Enjoying, as it does, this flood tide of success, it tends sometimes to be accepted without sufficient questioning of the areas in which it may perhaps be found wanting.

It would be less than wise to ignore the shortcomings, such as they are, of this great system, and that is what I have tried to do in this paper. I have tried to analyse these shortcomings under a few heads. I have selected nine heads, but there are probably many more, I shall deal with them under those nine heads.

Now it has been said about common law Judges that while they appear to be gliding majestically over the water, below the surface their legs are paddling furiously. This is because there are powerful competing currents pulling them this way and that, and to pursue a course of forward motion in the face of all these competing forces is indeed a very difficult task, a task which our common law Judges have performed with distinction. Nevertheless, as I said, we have got to be critical and, however great our legal system, complacency can be its greatest enemy.

I recall reading about that epoch-making lecture of Roscoe Pound at the beginning of this century. Roscoe Pound, the doyen of American jurists, was at that time a fairly obscure young Professor at the University of Nebraska. The American Bar Association was an august body which wined and dined once a year and complimented itself on the great work it was doing for the American people. There was a custom that there should be an invited guest to speak after dinner at these annual functions, and it so happened that Roscoe Pound was selected. Well, one can imagine these successful middle-aged gentlemen, after their sumptuous dinner, lighting up their cigars, collecting their glasses of port, and settling down comfortably to listen to what they expected was a laudatory address by this young Professor. But instead of a catalogue of their achievements, there was a litany of criticism. Roscoe Pound said: "Gentlemen, the American Bar Association, of which you are members, has been for so long furthering the interests of the rich, who are a very small section of the American public. Legal accessibility is denied to the poor, justice has been denied, justice has been delayed, justice is so formalistic that it is beyond the reach of the average person; it is sometimes a negation of justice."

These gentlemen became a bit restless. They became indignant and eventually the meeting ended in confusion. But although the meeting ended in confusion, it was productive of great good. Because thereafter, there was a great deal of soul-searching by the American legal profession. They asked themselves, is there something in what this young man has said? Is it correct that we are, in fact, defeating the cause of justice? Is there something more we can do?

There were a number of committees that were formed, formally and informally, and a great deal of work was done, and the movement of sociological jurisprudence in America received a great fillip.

Now that was at the beginning of the century. We are now nearly at the end of the century and it is time to ask ourselves: have we, that is, have the common lawyers on both sides of the Atlantic and throughout the British Commonwealth, have the common lawyers, in the course of this century, righted those faults which Roscoe Pound so cleverly isolated? Because we are moving into a century very shortly which is going to be the most critical, the best informed, and the most impatient of fictions and inefficiencies that the common law has ever met, if the common law does not now brace itself to meet that situation, it will be in trouble indeed. Now the first of the items that I have selected for criticism is what I call shortcomings of logical form. By this, I mean that the common law has been structured upon the basis that it proceeds by a logical process of building precedent upon precedent, and the whole towering structure rests upon a foundation of logic.

Now that is an adequate description of the common law, and mark you, that is still the official version of how the common law operates. One is reminded in this context of that famous statement of Lord Wright's which, in jurisprudence, is described as Lord Wright's conundrum, which is this. He says: "How can a legal system which was devised for the age of feudalism do duty efficiently in the age of the atom, unless indeed it has been built upon, and who has done that building? And if the Judges say they have not built upon it but are only going on prior precedent, how come that we have this feudalistic system transformed into one which is adequate for the age of the atom? Obviously, there has been a concealed building process going on which the common law Judges have not admitted, and as Lord Radcliffe has said, if the law is to stand for the future as it has in the past as a sustaining pillar of society, it must find a point of reference more universal than its own internal logic. So there is something other than the purely logical process which the Judges use. What is this?

The judicial mix

Justice Cardozo analysed a number of these items that go into the judicial mix. He said there is no recipe for this mixture. All these forces go into the mix; logic is one, but there is history and philosophy and tradition and sociology, and he said that there could be no possibility of isolating these and trying to work out in the case of an individual judgment what particular mix of the ingredients went into the resulting formula.

Now the result of this fiction about the logical form is that the common law Judge is a prisoner of this fiction. He lives within this facade, within this pretence that he does his work by logical deduction from prior work or by induction, and occasionally, when he wants to make his judgment accord more with the needs of society, he ventures out steadily. And when he is caught in the act by the sentries, the searchlights of the sentries might catch the Judge in the act of doing something other than the purely logical process of building on prior precedents, he scurries back to his place of confinement and then continues the pretence that he is doing it purely by logic.

Now that is not a dignified role for a Judge to play, and my submission is that there is no need for the Judges to play this role because it is quite clear that a number of factors must enter the judicial decision which, although they have not been sufficiently acknowledged, thus far must be more readily acknowledged and that we must have more frankness on behalf of the judiciary that they are, in fact, using extra-logical materials for constructing their results.

But this logical habit has become so engrained in the Judges that they can not give it up, even where there is a situation where they have a case of first impression — I have cited in my paper *MLC v Evatt* where the Australian Judges had a unique opportunity of finding out what the law was that suited Australia. But what did they do? The bulk of them — four out of five of them — went on researching the English precedents to find out what was the logical deduction from the English case law. And it was Barwick CJ alone who said — where no authority binds, it is not enough to say what the law is, but we must decide what it ought to be. And Judges, I submit, must take into account this responsibility on their part to state what the law ought to be and not merely to pretend to decide what the law is.

A useful analysis of the judicial function has been given to us by Richard Wasserstrom, the American jurist, who says that in the decision making process, there are in fact two elements. There is the factor of making the decision; how the Judge arrives at that decision, the Judge alone knows. But thereafter, there is a second process — the process of justification of the decision once reached. Now justification is a very different process from decision making, and if what we read in the judgments is the process of justification, not the process of decision making. Consequently, it would be fair to say that there are a number of elements that enter into the process of actual decision making which are not reflected in the judgment.

Wasserstrom gives illustrations — for example, a company director may decide that he would like to make a donation to a political party and he does that for reasons that the company would benefit from it. But when he justifies the decision on paper, he does not put it that way. He gives a number of other reasons justifying that decision. But the decision was reached for other reasons. Now likewise Judges give a number of justifications building upon precedent, whereas the real fact of the matter may well be that there are a number of social and other considerations which they think are pertinent to their decision which they take into account and which make a very real contribution to the process of decision. Actually, logic plays only, sometimes, a comparatively minor role and we sometimes would be deceiving ourselves if we thought that logic was the way by which we reached our decision.

Leeways of choice

A similar work on this subject of logic not being the criterion by which judgments and decisions are reached is, of course, Julius Stone's work, and he, in very great detail, set out what he called categories of illusory reference where he pointed,

under six or eight different categories, to the fact that Judges were under the impression that they were using logic, but the logic would not stand scrutiny if it was pure logic that was a deciding factor. And sometimes logic will not give us the way in which a question can be answered.

So Stone used this phrase "leeways of choice". Judges have many, many "leeways of choice", even within the hard logic of precedent. And when they exercise their choice among these different leeways, a number of other considerations — sociological, traditional, and so on, come into play which is a factor that we do not really receive. He gives, for example, the case of *Hazeldene v Dore* where a lessor of a block of flats had reserved to himself the right to control and service the elevators. Now somebody was injured in this elevator while he was being carried, and the question arose, was it a question of occupier's liability, or was it the higher standard of liability associated with common carriers, because that person was being carried from one point to another? Though vertically, he was being carried. Was it the lesser standard of occupier's liability, or the higher standard of common carrier's? Now either way, you could build a very strong body of logical precedents and so on on on which you could base your judgments, but where both possibilities are equally open, which one does the Judge choose? How does he choose them? There would be no precedent which would tell the Judge which of these two competing lines of authority he could choose. So that is one of the his categories, what he calls the category of competing reference — two alternative lines of authority equally applicable. The Judge has to choose it on grounds other than logic.

Then again, there is the case of *Donoghue v Stevenson* which he gives as an example of circular reasoning. This is, of course, a very simplified analysis of *Donoghue v Stevenson* but Stone's analysis is this.

Question: To whom do I owe a duty?
Answer: To my neighbour.
Question: Who is my neighbour?
Answer: A person to whom I owe a duty.

Now that is, of course, a very simplified analysis of *Donoghue v Stevenson*, but the neighbour analogy is useful. That is an example of circular reasoning. Then again, he talks of categories of meaningless reference and Dr De Bono would be very interested in those.

The question of, for example, how you categorise a given situation. There is a garage attendant pouring petrol, and he smokes while pouring petrol. Now is he smoking while pouring petrol, or is he pouring petrol while smoking? Because, if he is smoking while pouring petrol, then he is about his employer's business. But if he is pouring petrol while smoking, then he may not be on his employer's business and there would be then a different consequence that follows from that totally meaningless difference. There is an Australian case on that — *Lu v Deeton*, where a barmaid was displeased with a customer and threw beer at the customer. Was this a case of negligent barmaiding, or a negligent way of frolicking with customers?

So you have this difficulty of classification. One and the same act can be looked at differently, and sometimes we lawyers make meaningless distinctions in trying to categorise them. So still, of course, we follow this business of saying that we are doing it on the basis of logic, and Justice Cardozo puts it very expressively:

> Judges march, at times, to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial right. They perform it nonetheless with averted gaze, convinced as they plunge in the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

So we can have justice miscarrying if we pay too much attention to the question of logical form. This is a question of common law.

Nightmare or noble dream?

Decision making has also been referred to by Professor Hart in that very expressive analogy of the nightmare and the noble dream. The nightmare is the feeling that if you release the Judges from this doctrine of precedent, there would be no binding precedent, they would be able to carry on without any restraint which is a nightmare; and the noble dream, namely that there is a precedent for every situation and he says, if you are to have a sound night's sleep as a Judge, you must adopt an intermediate position between the nightmare and the noble dream. I would go further and say that our Judges would sleep sounder still if they realised, as Stone did, the leeways of choice that are, in fact, available to them.

I had the privilege of teaching a course in jurisprudence for the Masters degree at Monash, along with Professor Julius Stone for some years, and he always related this story which takes a minute or two to relate, but it is worth relating about the judicial process. He said that Judges sometimes are not fully aware of this tremendous combination of factors operating on their minds, consciously and unconsciously, and he said it is good to tell them, but again at the same time there may be dangers in telling them. He said there were individuals, Mr Toad and Mr Millipede. Mr Toad was a disagreeable character. Mr Millipede was a fine gentleman and Mr Millipede would go for his constitutional walk. Twirling his walking stick and with his 1000 legs he would regularly go on his walk. It so happened for 40 days and 40 nights it rained, and he could not get out of his hole in the ground. But one day the sun came up, the dew was glistening on the leaves, and out came Mr Millipede from his hole in the ground, twirling his walking stick and walking with his 1000 legs when he met Mr Toad. And Mr Toad said: "Excuse me, Mr Millipede, can I ask you one question? Can you please explain to me how you co-ordinate the movement of your 1000 legs?" Mr Millipede sat down to work that out and he could never walk again.

So he says it may be that the Judges are in that situation, but all the same he says it is good that these various processes that go into the judicial mix must come out into the open and be more openly discussed by Judges.

Now other shortcomings in the Common Law system. Our

Common Law systems tends to be disciplinary in an age when everything is inter-disciplinary, and the insights available from other disciplines – anthropology, linguistics, economics – they are not used. We do not have the machinery in our common law to get this material before the Judges. The Indian Supreme Court has various initiatives by which social legal commissions of enquiry can be used to research materials and bring them before the Court. The Supreme Court of Japan has a judicial research arm of 40 trained officers who prepare a detailed brief for the Justices on all the surrounding disciplines that might be relevant to a case before them, but we do not have that, and I think it is most important that we have some kind of realisation that all these disciplines have something to contribute and therefore we arrange ways in which our Judges can get the benefits of these different disciplines.

A Universalistic Age

Now shortcomings regarding other legal systems. The common law has traditionally been an isolated one. It never has been happy to borrow the wisdom of other systems – the civil law system it has always resisted – and we know the way in which Lord Mansfield was heavily criticised by his colleagues for trying to bring into the common law the wisdom of the civil law. So the common law has shut out from its purview the perspectives and the wisdom available from other systems.

I submit we cannot afford to do that much longer. We are moving into a universalistic age. The world is shrinking and we cannot tend to be isolated in the way we have been before. We must draw the wisdom of all these systems – African traditional law has the great wisdom of looking upon the human community as comprising the past, the present and the future – we have responsibilities to those who come after us; the Pacific has great traditions of the sacrosanct nature of land – land must not be treated as, a witness once said, a six-sided box which you can sell like an article of commerce. It is something of intrinsic value which must be respected in its own right because we have it on trust for posterity. The European Economic Community and European law are beginning to fertilise English law and we have many insights coming to us which we must use. Maitland, in describing the common law attitude to foreign law, was very critical. He said that there was a very complete and traditionally consecrated ignorance of common lawyers in regard to all other systems, and I think we should ask ourselves that question again – is that so easy in this day and age? And we find, for example, this resistance has gone on for a long time. When William Jones, the English civil servant, translated the *Laws of Manu* in 1794 and showed a surprised European world the sophistication of other legal systems, he created a revolution in comparative law and triggered off the discipline of comparative law. But this was mainly done by continental scholars, and it passed the common lawyers by. Now why is that, and can we correct that now?

The shortcomings in social perspectives is another one. Sir Owen Dixon, the Chief Justice of Australia, responding to the address of welcome by members of the Bar in 1952 was able to say this:

> Lawyers are often criticised because their work is not constructive. It is not their business to contribute to the constructive activities of the community, but to keep the framework steady.

Now that is orthodox legal thinking not so long ago, but I venture to say that no Judge in the world today could say that. That the lawyer ought not to contribute to the constructive activities of the community, but should confine himself to his craft. Law is much more than a narrow discipline, a narrow craft of that sort. So there are many fictions which prevent us from seeing the social perspectives: the fiction of bargaining in equality which underlies the common law system; that people who come to a Court of law have equality of bargaining power and equality of access to the Court of law. The whole adversarial system is based upon that fiction – we all know it is not true, but it is still the order of the day. The concept of absolute ownership – that I can do with my property what I please because it is my property, even though it be land, even though I be ruining that land for future generations, for generations to come. Those concepts have to be revised, and the social perspectives, which other systems provide, must be used by common law Judges. However reluctant they may be, they should see that there is such wisdom which, in a universalistic age, we must bring into the common law.

Human rights

Likewise in regard to human rights. Human rights is a universalistic discipline. We have, today, a fairly universally accepted set of human rights norms. When I was a young practitioner, if I cited the Universal Declaration of Human Rights to a Judge, I would have been asked: "Are you serious in this citation? Are you seriously suggesting that this is the law of the land?" And I would have looked very foolish. But today you can cite human rights declarations.

The Courts have caught up, perhaps with the Universal Declaration of Human Rights, but there are 50 other major human rights documents which Courts must take into account, and if we think that our Courts are Courts of Equity – equity, after all, is nothing more than the means of mitigating the rigours of the common law – English Judges have been insular in drawing upon equity to supplement the rigours of the English common law. But equity and good conscience today cannot be viewed in an insular way. Equity and good conscience today must be the civilised conscience of humanity and the norms of the international human rights discourse represents the civilised conscience of humanity. So that even a common law Judge administering equity, as all Judges do, should, in my submission, be entitled to draw upon the whole richness of human rights jurisprudence which, I submit they should be doing much more than they do at present.

Jurisprudence

Other heads which I have spoken of are shortcomings in jurisprudence, where jurisprudential perspectives are not taken into account. We had Dr de Bono talking this morning about the Gang of Three. Now it so happens that many of our Judges

today, and many of our law schools turning out the Judges of tomorrow, do not even expose them to one line of original jurisprudential thinking. Because jurisprudence is not compulsory in the law schools now as it used to be in the old days.

These are the Judges of the future who may never have read a line of Plato or Aristotle, nothing of Aquinas, not even Bentham, Hobbes, or Locke, Rousseau or Kant. Now those are writers who have discussed those broad seminal issues concerning society which will provide the policy perspectives for the important decisions which the Judges will have to make in the future. And I think we have got to look hard at our legal education which neglects this perspective and turns out people altogether ignorant of this. I have said in my paper the philosopher kings are receding from view and we have seated on the throne of our philosopher kings the man on the Clapham omnibus, and that is not good enough. We should have better perspectives with which our Judges' decisions will be illuminated.

Procedures

There are also shortcomings in procedures. The procedural system based upon the adversarial system only concentrates on the two parties and the broad social perspectives are not seen. The adversarial system is mixed up with the procedures of the jury trial. For example, the exclusion of hearsay rule; the rule that evidence comes by question and answer; the rule that there should be one continuous hearing, is a legacy of the jury system. But the jury system is dying out, certainly as far as civil juries are concerned. But we still retain the rules. We still preserve our concentration on the two parties to the exclusion of all else. We certainly are not delivering justice to the community if that is all we are concerned with. There must be many more perspectives that we can take into account which the adversarial system tends to block.

Attitudes towards legislation is the next head, where again there has been the traditional refusal to look at the sources of legislation and to understand them through ancillary materials, such as *Hansard* and so on. That is dying out in many jurisdictions. We have legislation that has corrected that, but still we find that same attitude of not being willing to look further afield in the work of our Judges.

Lastly, shortcomings regarding advances in technology. We are moving into a highly scientific age. An increasing proportion of the disputes of the future will be science oriented, and the science involved will sometimes be so profound that it is well beyond the layman's comprehension. How will our Courts be able to handle this material? We had a good example in the Chamberlain case in Australia where there was evidence in regard to foetal blood which went to the very frontiers of the science of immunology and protein chemistry. Some of the witnesses in that case said that it would require two weeks of instruction to a class of medical students to make them understand the sophisticated technology involved. How could a jury understand the technology? And there was a miscarriage of justice in that case.

The search for scientific truth cannot depend upon our procedures of the adversarial system. It cannot depend upon rules, such as estoppel or standing or pleading. Whatever the rules of estoppel or standing or pleading may say, the search for scientific truth must proceed independently of those and, for the age of science, this technique is not good enough. Our concepts of privacy — how can privacy stand in the case of electronic surveillance, unless we revamp our concepts of privacy. Our concepts of sovereignty — how can they stand when the global impact of technology is so apparent that what happens in country A affects all the world, not merely countries B and C. How can our concepts of land ownership stand in the face of environmental pollution? All these need to be revised, and it may be that we may need a scientific section or a division of the judiciary specially trained in matters of science to understand and deal with the very complex issues that will arise in those fields.

So this is a very short survey of nine areas where there are substantial shortcomings, in my view, in the common law approach, and the conclusion must necessarily be that we have got to take stock of our inadequacies in each of these areas. There may well be many more. And as Cardozo says, "the great tides and currents which engulf the rest of man do not pass the Judges by."

In the next century, we shall have swirling currents surrounding the judiciary. Conceptual and institutional frameworks which protected them will no longer hold good, and as the common law in its grand progress through the ages enters a brand new century, it will need more than ever before to take stock of its concepts and methods. Complacency can damage it irretrievably. Critical examination can ensure its robust survival.

Donald Dugdale

It is important that we, who are all cogs of one sort or another in the machinery of justice, should understand just how essential it is that the system of justice should retain the confidence of the public. What our fellow citizens expect from the judiciary is a degree of objectivity, of suppression of individual preconceptions.

If there was ever a justification for judicial fancy dress, it lay in the idea that wigs and gowns helped to obscure the fact that here on the Bench beneath all the finery is an ordinary mortal with, like everyone else, his peculiar quirks and prejudices. In this respect, anthropologists would no doubt tell us that wigs and gowns have precisely the same function as the ritual masks of witchdoctors. With the spread of popular education, dressing up has become ineffectual. It is judicial reasoning that matters. What the public are entitled to expect is that disputes should be determined by the objective application of rules that are settled as far as is humanly possible. There is, in New Zealand at least, enormous confidence in the Courts. This confidence is a precious thing, built up over the generations. The great fear is that that confidence may be dissipated by the indiscipline of contemporary Judges.

In a paper prepared for this Conference, the President of the New Zealand Court of Appeal, an intermediate Court, said:

> The great majority of New Zealand Judges, perhaps all, now openly recognise, albeit, no doubt, in varying degrees, that

> the inevitable duty of the Courts is to make law and that this is what all of us do every day. Doubtless, some make more than others, but it could not seriously be contended that Judges at any level are merely applying black and white rules.

It rather seemed to me that this morning, in his oral presentation [see [1990] NZLJ 261], the learned President somewhat softened that rather brash observation. No doubt the President of the New Zealand Court of Appeal for the time being is an extreme case, but such a claim made by such an officer, which is essentially, I suggest, a claim that Judges are entitled to make up the law as they go along, suggests an approach to a Judge's responsibilities which can only be erosive of public confidence in the law.

Almost as erosive is the tendency of those to whom in my paper I refer as "Class B Judges" to determine matters on the basis of their gut reactions, rather than the law, and it is, I suggest, no answer to say, as Professor Weeramantry just has to you, that it is possible to distinguish between the process of arriving at the decision, and the apologia for the decision subsequently tendered.

It is not easy to discuss these matters, partly because any attempt to do so may be dismissed by superficial observers as gratuitously offensive; partly because such a discussion, if too frank and open, may itself be erosive of public confidence. No doubt my paper is redolent of the justified cynicism of the elderly practitioner, but I believe the issues I was asked to discuss, and there did discuss, are important and I suggest in particular that the respective proportions of class A, B and C Judges in the Dugdale formulation is a fair measure of the health of any country's legal system at any particular time.

That's all I want to say about my paper. And now I want to turn to Professor Weeramantry whose paper was, of course, impressive, awesome. His legal erudition is one that we have to bend the knee to.

My quarrel with him, I think, is twofold. The first point is that he underestimates the extent to which some of the changes he advocates are, in fact, taking place. Secondly, and more importantly, I believe that he is quite wrong to see the Judges as the instruments of change. The role, the sort of change that he wants, is the role not of the Judges but of the legislature. I can speak only for New Zealand, but let us look at some of the areas that Professor Weeramantry touched upon.

Professor Weeramantry

Thank you for those two questions. In regard to the first observation the learned speaker made, I think what is said indeed proves the point that I was trying to make. That the common law Judges ought to be doing this. He gave an instance of incorporation of principle, as well as an example of an incorporational principle from Arab jurisprudence. Fine. But my complaint is that that is not done often enough, and the very two examples he gave are a pointer to what we expect the common law Judges to do. My complaint is that that is not done often enough, and I commend the course taken by the Court in those two cases.

Now in relation to the second point, I was asked what I see as the judicial function. Now I am not for a moment advocating that Judges try to alter the law. They cannot do that. That is not their function. They have no power to do that.

But the point I made, which perhaps I did not make clearly enough, was this. That there are numerous instances where the Judges have leeways of choice that is within the law, as it has been proclaimed and stated. There are many alternatives available to the Judge. In that case, do not slavishly go upon prior precedent. You have a number of alternatives available. Choose what you think the law ought to be, and if you do not do that, I think you are failing in the judicial function. If you merely pronounce what, under a facade of logic, which very often is not correct, what you think is a logical deduction from the past, I say use your judicial creativity. Be a little more creative. Contribute to the growth of the law and say what the law ought to be without, in any way, trespassing beyond your province.

Justice Rogers, (Australia)

I think they are all in well entrenched positions — nobody's going to convince anybody else. But can we move forward a bit.

Underneath it all, Mr Dugdale actually had a good point in one respect, and that was that Judges truly are not fully equipped in regard to changing the law. The President, who you described as the President for the time being, said this morning that he would like counsel to explore every alternative. Madame Justice Wilson, as I understood it, sought to cover that situation by having interveners and people representing the various viewpoints.

Question: Should we achieve our aim (that's excluding Mr Dugdale) by having something like the Brandeis brief in at least ultimate Courts of Appeal so that truly we can go about the task of ensuring that we do change the law in the best possible way, fully informed? I would really be very appreciative to hear Madame Justice Wilson's views on that, and may I say before I sit down, I am so sorry that you'll never have the opportunity of reversing me — it would be so nice.

Madame Justice Wilson

Yes. My answer is it is desirable to have such things as Brandeis briefs, and indeed this is the direction in which we are moving in Canada in cases under our Charter of Rights. Because once it has been established by the citizen that one of his or her rights has been violated under the Charter, then the onus moves to the government, which is supporting the legislation that commits that violation, to establish that this legislation is meeting a pressing social concern, and therefore should be supported, despite the fact that it violates the rights of the citizen.

And in that connection, we have been making an earnest plea to counsel for lots of material to explain exactly what this problem is that they are trying to deal with through their legislation, tell us what efforts they have made in the past that have not been adequate, so that it is necessary in effect to violate citizens rights in order to achieve this desirable legislative objective. Then we also, in addition to requiring lots of material to be filed by the government in support of the impugned legislation, we also encourage our interveners to submit material showing how, whichever way the decision goes on the issue

under the Charter, how it will affect them.

For example, in cases of equality, dealing with the principle of equality, the issue may arise in the context of one particular right – perhaps equality of the sexes – but it's equally vital for us to know how our judgment will apply in other contexts where equality might not be provided. So, for example, we would accord intervener status to an association for disabled persons to show us the impact of our judgment on that totally different group, because we realise, of course, that once we have made a pronouncement about the content of the particular right, since [the Charter of Rights] it is entrenched. Amendment or repeal is not easy. We are going to have to live with what we say. Therefore, it is absolutely vital that we appreciate the broader impact of it on all groups. Hence the desirability of bringing in these interveners to submit quite exhaustive briefs on the impact of any judgment we might make. So yes, I think this is a desirable thing, and I am sure that our Court will move more and more in that direction.

Donald Dugdale
I was carefully excluded from the question, Mr Chairman, but I think we have to keep in mind that the already high costs of litigation would obviously be increased if we introduced Brandeis briefs. That is the first point.

The second point is that there is an assumption, which I do not share, that lawyers are the best people to make the sort of social decisions to which a Brandeis brief would be appropriate.

Professor Weeramantry
May I add a brief comment, Mr Chairman. I, too, am in favour of Brandeis briefs and I think that if the Bench stimulates the Bar to produce that kind of material, the Bar would be only too ready to do so. This kind of material is not placed before the Judges because the Bar has the idea that the Judges do not want that material. So, as in Canada, if the Bar is stimulated to produce that material, it would certainly help the Judges a great deal. And the more background information the Judges have, the better.

May I just give you this example from Japan. There was a famous case in Japan known as the *Aionada Textbook* case where a Professor of Politics had written a textbook for schools and the Education Department had struck a blue pencil across a number of paragraphs. The Professor insisted on his right of freedom of speech and took this all the way up to the Supreme Court. Now when the Supreme Court heard the case, the judicial research arm of the Supreme Court had prepared a brief telling the Supreme Court what the practice was in every country where there was an Education Department. So when the Judges came to the Bench, they had a full background brief in regard to universal practice on this matter, and that would certainly have been of great assistance to them.

So, as we learned from Mr De Bono today, the greater your frames of reference, the more information you have, the more likely it will be that your decision will be a correct one, and Brandeis briefs promote that enormously.

Unidentified (India)
Sir, the professor mentioned that there are more pretensions of following precedents rather than following them, when certain situations arise. I do not think the Indian Supreme Court resorted to any pretensions. For example in the Bhopal tragedy case, they said in such cases, the liability is absolute. There is no question of following the English precedent. They resorted to the procedure of saying this is an absolute liability, and no manufacturer can avoid that liability as a kind of a new tort that has been innovated in deciding a case, not dependent upon precedent, but laying down something which will be a precedent for the future. This is one aspect.

Then in the matter of labour legislation, labour legislation does not deal with all aspects of management labour welfare matters. Our Supreme Court and our High Courts have gone to the length of covering all areas where the welfare measures, the amenities, and the conditions of work are not covered by statute. By a process of interpretation of the constitution, what the social obligations of the employer are. They said this ought to be the minimum standard of conditions which ought to be observed. This is practically common law.

Then in the area of constitutional law also, our Article 14 provides for equality. Now equality by itself one cannot conceive that reasonableness and inarbitrariness is part of Article 14. No. It was not thought to be so until the other day. Similarly, with regard to Article 21, what is life? Life is not just physical existence, it is meaningful existence. This is the manner in which the new concept of the Article of Equality carrying with it the element of unarbitrary inarbitrariness. Then also in regard to Article 21, which provides now as interpreted by the Constitution, the moral is common law interpreted by our Courts. It is held now that life is not just animal existence, but it embraces a meaningful, real existence. And that is the manner is which the Supreme Court has tried to interpret, by laying down what is virtually common law, although in the process of interpretation, this is, in effect, a common law interpretation which they have placed upon these articles of the constitution. I think we have something to offer to our learned Supreme Court Judges, the Canadian Supreme Court, that you can also perhaps look at some of our judgments in addition to judgments of New Zealand and Australia.

Unidentified
I suppose one thing which is apparent from the discussion today is that it depends where one stands what one's perspective is, and I have always noticed myself how variable the quality of individual Judges is. And occasionally when one gets a winning judgment, it is quite apparent, of course, that that Judge shows great logic and wisdom in coming to the conclusion which they have come to. But I am startled, then, when I get a losing judgment from the same Judge and realise how illogical and lacking in wisdom that same Judge can be. So it does seem to depend on one's perspective. □

Judicial Hui

This brief piece has been supplied by Mr Justice Gallen and is published for the information of the legal profession.

At the request of a number of Judges of the High Court, a Hui was arranged this year to consider and discuss aspects of what was described as the Maori dimension in New Zealand Society. The Hui was held at Te Herenga Waka at Victoria University on Saturday 8 September. High Court Judges attended from all round New Zealand and the Hui was also attended by Judges from the Court of Appeal. The importance with which Judges viewed the opportunity is indicated by the substantial number who attended.

The gathering was welcomed by the *tangata whenua* of the Marae represented in particular by Professor Mead, Mr Pou Temara and Mr Tamati Cairns, all of whom participated in the Hui, as well as in the welcome. The discussions were initiated and conducted by Wharehuia Milroy from Waikato University with Chief Judge Durie, Sir Norman Perry and Professor Karetu.

Amongst the subjects discussed were ceremonial, relationship to and association with land, the importance of the past and aspirations for the future. Sir Norman Perry spoke of bridge building and the opportunities which exist for building on those good things which exist in our present society, as well as meeting the serious problems which are also there. Students from the University looked after those present and were also present during the discussions. There was a general feeling that the day was far too short to deal with the matters which were raised and an indication of its success can be gauged from the fact that there have already been a number of requests for further opportunities to extend the experience and to take the matters raised further. □

Farewell to Dicey and Parliamentary sovereignty

. . . last month in the Spanish fishing vessels case (*R v Secretary of State for Transport, ex parte Factortame Ltd*), the European Court has confirmed that Acts of Parliament must yield to conflicting case law of the European Community.

The court has established that a UK court can suspend the application of any Act of Parliament on the grounds of its alleged incompatibility with EEC law. . . .

The court ruled that the national court's duty to give effective judicial protection to the rights conferred on the individual by community law, where the relevant requirements of direct applicability were satisfied, must embrace the interim protection of rights pending final adjudication of the case. . . .

So Parliament is no longer supreme. But is that really so much of a shock? Surely when Britain joined the EEC it understood the community's ideas of shared sovereignty and common institutions and that the exercise of all power by political institutions in the implementation of community law within Member States was fully subject to the rule of law. The surprise in many respects is that the conflict which has for so long been predicted between community law and Acts of Parliament failed to materialise. The truth is that it is well established by case law that national courts of Member States were required to give complete and effective judicial protection to individuals on whom rights were conferred by directly effective provisions of EC law. Any national provision that precludes the court from giving "full effect" to community provisions is incompatible with Community law.

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The status of the District Court

By Seonaid Abernethy, District Solicitor, Department of Social Welfare, Henderson

The changes that have occurred in the jurisdiction of the District Court over recent years mean that the status of that Court is an important issue. In this article the author who was a Judges' Clerk in the District Court in 1987 discusses such questions as the meaning of an inferior Court that has no inherent jurisdiction and of Courts that have particular jurisdiction. She also discusses the question of the power of the District Court to punish for contempt outside the Court as distinct from contempt in the face of the Court during proceedings.

The nature of its inferior status and its vernacular character have not been mentioned in recent judicial and literary discussions of the District Court's inherent powers.[1] An understanding of the status of the District Court suffers from these omissions. An inferior Court has no inherent jurisdiction, yet, the District Court is also a Court of particular jurisdiction and it is not axiomatic that a Court of particular jurisdiction is always of inferior status.

Moreover, the particular jurisdiction of the District Court is more than just a collection of prescriptions as to actions, parties and relief. The Court has been called "the People's Court" by the learned authors of the classic texts on the District Court – *Summary Proceedings and Police Court Practice*[2] and *District Courts Practice (Civil Jurisdiction)*[3]. The sociability of "the people" has its own historical tradition, so beloved of the literary genius of Shakespeare, Cervantes, Dickens, Balzac. Yet this is governed by a regime which is logical, analytical and learned, for the District Court is not confined to the customary laws of the iwi, hapu or whanau, the county or province, the maunga or awa, the cultural group, the guild or merchant. On the contrary, it administers modern technical legality. This requires a practical wisdom of the Aristotelian kind – a comprehension of a multitude of distinctions in occupation, locality, religion, race and gender as well as in the formal law it applies.

The idea that a Court of particular jurisdiction has an inferior status in the judicial hierarchy is often accounted for simply in terms of a limited statutory jurisdiction. Yet, any brief analysis of the District Court's statutory jurisdiction would find paradoxes – extensions of jurisdiction in some areas and apparently inconsistent confinements in others. Why has no such Benthamite inquiry been undertaken?[4] Although analysis of statutory jurisdiction of the narrow type (action, parties, relief, place) might affect the wider inherent jurisdiction by identifying areas of unlimited jurisdiction and explaining conflicts and concurrencies, that is not the subject of this paper. Instead, the concept of inferiority, being crucial to any investigation of jurisdiction, will be examined as it appears in statute and case law.

It will be seen that the common law does not attempt to subjugate any paradoxes in statutory jurisdiction to a general rule that a Court of particular jurisdiction is invariably of inferior status. The common law, without analysing the exact extent of statutory jurisdiction, is unsettled as to its determination of superior/inferior Court status. A persistent ambiguity shadows the District Court in these questions of jurisdiction and inferior status.

1 The approach to status — through inherent jurisdiction

Halsbury states that

> By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction extends or it may partake of both these characteristics. (4 *Halsburys Laws of England* 10 para 715)

In *Garthwaite v Garthwaite* [1964] P 356 this view of jurisdiction was refined. Two types of jurisdiction were found. In its narrow sense, jurisdiction was held to be the limitation upon the power to hear and determine issues. The limit may relate to the subject-matter of the issue, the parties to the issue, the relief sought or any combination of these factors. But there was another type of jurisdiction. This wider sense of jurisdiction was held to be the settled practice of the Court as to the way in which it will exercise its jurisdiction in the narrow sense above. Inherent jurisdiction then, is the power to decide the *manner* in which the Court will adjudicate upon a subject-matter, adjudicate between parties, decide upon relief or decide upon any combination of these factors.

The *Garthwaite* phrase, the "settled practice of the Court as to the way in which it will exercise its narrow sense jurisdiction" (at p 387 per Diplock LJ) is inherent jurisdiction. The usual forms in which this inherent jurisdiction manifests itself are the power to

control abuse of process and the power to punish for contempt of Court. Inherent jurisdiction has been identified in an essay on the inherent jurisdiction of a Court by the Master of the English High Court, Master Jacob, in these two forms – control over process and power to punish for contempt. (Jacob, "The Inherent Jurisdiction of the Court", (1970) *Current Legal Problems*, 23, 32 et seq.)

The New Zealand District Court has an inherent power to control abuse of process. This much has been well explained. (see fn 1 below.) Its power to punish for contempt is less aired. It is a singular fact that if the District Court is possessed of a power to control process, then the reason why it has no inherent jurisdiction must be that it has no common law power regarding distant contempts. Certainly, it has a statutory power to punish for a contempt committed in the face of the Court – s 112 of the District Courts Act 1947. Inferior Courts, however, do not have a power to punish for contempt committed outside the Court unless that contempt is so close that it amounts to a physical interruption with judicial proceedings. (*Bodden v Commissioner of Police of the Metropolis* [1989] 3 All ER 833 (CA)) They must rely upon the protective power of a superior Court to discipline distant contempts for them.[5]

In the English cases concerning the inferiority of various Courts and tribunals, the potential reliance upon a superior Court to punish for distant contempts does not figure as an essential component. In truth, a steady arrangement of constitutive elements is yet to be devised. The most attractive decisions conclude that there is no clear pattern to inferiority but that this will fluctuate according to factors such as the relief sought, the particular relation of the Court or tribunal to other Courts, and the subject matter at issue.

2 The precise status of the New Zealand District Court as inferior Court

In two of the most influential reported New Zealand cases on the inherent powers of the District Court, *McMenamin v The Attorney-General* [1985] 2 NZLR 274, 276 (CA) and *Bosch v The Ministry of Transport* [1979] 1 NZLR 502,509 (SC), the District Court is referred to as an inferior Court. These Appeal Court decisions relied upon *Connelly v The Director of Public Prosecutions* [1964] 2 All ER 401 in which the House of Lords considered the powers of the English Central Criminal Court, to make and enforce rules of practice. Yet, the Central Criminal Court is not an inferior Court. It was not termed so by any of the Law Lords in that case. Lord Morris of Borth-y-Gest called it a "Court endowed with a particular jurisdiction" (at p 409), Lords Devlin (at p 438) and Pearce (at p 447) considered it part of the High Court while Lords Hodson and Reid did not make any classification as to the Courts which are entitled to control their own process. The specialised function of the Central Criminal Court (to which Lord Morris referred) was that of hearing all indictable offences. It will be seen that this specialisation does not require that it be classified as an inferior Court.

Connelly's case did not make any helpful suggestions as to the nature of an inferior Court. Unfortunately, a similar silence obtains in the cases cited as authorities for the rule that an inferior Court has inherent powers but no inherent jurisdiction.[6] Consequently, the precise nature of the District Court as inferior Court must be sought outside those cases which are authorities for the scope of its inherent powers.

(a) The statutes

There are only two statutes which characterise a New Zealand District Court as inferior. One is the Inferior Courts Procedure Act 1909 which makes itself applicable to the District Court by s 2 although no definition of inferior Court is given.

The 1909 Act regards a District Court as inferior for the purposes of creating within it a liberality in procedure without which its process might become choked with technicality. The allowances made by the Act include the waiving of the necessity to show jurisdiction on the face of the record (s 4), the waiving of the necessity to negative exemptions in proceedings (s 5), the waiving of the necessity to completely describe an offence (s 6). In addition, parties can waive errors which do not affect jurisdiction (s 3). The 1909 Act attempts to banish "dead-letter formalism" and so reminds us of the living justice of the seignorial Courts of mediaeval England, described by the great legal historian, Vinogradoff in *Villainage in England* (1982 reprint, p 367).

The other relevant statute is the Judicature Act 1908 in which s 2 implies that the District Court is an inferior Court when it states that an inferior Court means any Court of Judicature within New Zealand which is of inferior jurisdiction to the High Court. Jurisdiction here is not defined. Most probably, it means the narrow sense of jurisdiction; the limits as to action, parties, place, relief. There are no reported cases that the author could find, on the application of this section to the District Court.

Other Acts are no greater help. The Acts Interpretation Act 1924 does not give any definition of the District Court. The District Courts Act 1947 makes no reference to the Inferior Courts Procedure Act 1909. Section 3 is the interesting part of the 1947 Act. The District Court is created a Court of record, yet this characteristic is not a distinguishing mark of a superior Court.[7] It is important too that the jurisdiction is both criminal and civil (s 3) for this is a relevant distinction as regards the use of comparisons with the English statutory regimes such as the Magistrates Courts Act 1980 and the County Courts Act 1984. In respect of the criminal jurisdiction, the Summary Proceedings Act 1957 contains part of the source of power for the District Court yet no inferiority is mentioned here. There is only a reference back to the 1947 Act for the definition of the Court. Neither does the Judicature Amendment Act 1972 specify the District Court as inferior although its decisions are clearly reviewable under that Act as the exercise of a "statutory power" or a "statutory power of decision". But, there is nothing to suggest in that Act that the decisions of the High Court are not similarly reviewable.

Other Courts which join the criminal and civil jurisdictions to comprise the whole of the District Court are the Family Court and Youth Court. Neither the Family Court Act 1980 nor the Children, Young Persons and Their Families

Act 1989 refer to the District Court or their own Courts as inferior. Clearly they are Courts of particular jurisdiction but the precise points at which their jurisdiction may be said to be limited or unlimited is yet uncharted.

(b) Inferior Courts at Common Law

(i) The definition of inferior Court

The expressions "superior" and "inferior Courts" are said in *Halsbury* (4 *Halsbury* 10, paras 710-712) to be used in different senses but that a superior Court need not state on the face of its proceedings that it acts within its jurisdiction, this being presumed. The District Court is also exempted from this requirement by s 4 of the Inferior Courts Procedure Act 1909. Inferior Courts, their historical origins (by analogy) in the English vernacular Courts (the Court baron, the hundred Court, the borough and local Courts, the special and county Courts) causing them to be suspect in legality were called "inferior" because it was a part of the inherent jurisdiction enjoyed by the King's Bench to examine and correct all their errors, whether legal or jurisdictional.

There appears to be no New Zealand case which defines "inferior Court" and only one which defines "superior Court". This is *Belmont Finance Ltd v Fitzpatrick* [1973] 2 NZLR 532, where Wilson J stated (obiter) that it meant a Court of unlimited jurisdiction. This attempt to register a judgment of the District Court of Perth, Australia, in the Supreme Court of New Zealand under the Reciprocal Enforcement of Judgments Act 1934, failed because the Perth Court had not been listed as a superior Court by a New Zealand Order in Council.

In *Quality Pizzas Ltd v The Canterbury Hotel Employees Industrial Union* [1983] NZLR 612, the Court of Appeal held that the Arbitration Court was an inferior Court for the purposes of s 2 of the Judicature Act 1908 and therefore a distant contempt of it could be disciplined by the High Court. The only inquiry into the nature of inferiority took the form of remarks upon the fact that a Court remains inferior although it is a Court of record (p 617) and that although the District Court had the power to enforce fines and penalties of the Arbitration Court yet it was the High Court alone which had the power to punish for distant contempts of inferior tribunals.

The English decisions on "inferior Court" are helpful. The classic authority is *R v The Chancellor of St Edmundsbury and Ipswich Diocese* [1948] 1 KB 195, where the Court of Appeal found that a Court of particular or limited jurisdiction (an ecclesiastical Court) might be inferior in one sense but superior in another, thus exhibiting both characters at different times. The question in that case was whether certiorari would issue from the Court of Queen's Bench regarding an act of an ecclesiastical Court. The Court of Appeal decided that it would not. The ecclesiastical Court might be inferior in the sense that prohibition would lie to prevent it from exceeding its jurisdiction but that in questions of certiorari, it was not amenable to control because it administered a system of law essentially foreign to that of the common law. The two legal systems of material common law and spiritual law had no affinity and therefore certiorari to examine the record of the ecclesiastical Court would be of no practical use since the common law Judges even with that record in front of them, would be unable to set it to rights. They would know nothing of a spiritual law.

R v The Chancellor of St Edmundsbury has been given attention in the most compelling case on inferior Courts this decade, that of the *Attorney-General v The British Broadcasting Corporation* [1980] 3 All ER 161. The House of Lords in this latter case, held that a local Valuation Court (established under a General Rate Act 1967) was not an inferior Court for the purposes of allowing the Court of Queen's Bench to punish the BBC for contempt when the latter's proposed broadcast of a television programme threatened to interfere with the Valuation Court. The House of Lords held unanimously that the Court was really a tribunal. Its functions were administrative, not judicial. The title "Court" was not decisive.

> At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hallmark by which a "Court" or "inferior Court" may unerringly be identified. (per Edmund-Davies LJ at 175).

In the Court of Appeal decision in the same case [1979] 3 All ER 45, one of three Judges, Sir Stanley Rees, cited a number of cases on the status of specialised Courts and tribunals[8] although of these, only one gave much attention to the question of inferiority. This was *R v Clarke, ex parte Crippen*, (1910) 103 LT Rep 636 where Pickford J observed that the inability of an inferior Court to protect itself from attacks was the corollary of its weaker narrow-sense jurisdiction in relation to a superior Court (at p 641).

Since the *Attorney-General v British Broadcasting Corporation* supra, there have been other relevant decisions. In *Badry v DPP of Mauritius* [1982] 3 All ER 973, the Privy Council, citing the *A-G v BBC* has held that a single-Judge Commission of Inquiry is not an inferior Court as it is not a Court of justice in the full sense of the word (per Hodson LJ at 981). The protective contempt power was not therefore available to a superior Court in respect of this Commission.

In *R v The Surrey Coroner, ex parte Campbell* [1982] 2 All ER 545, the Queen's Bench Division held that a Coroners Court was an inferior Court (along with the County Court, the Crown Court, and the Magistrates Court (per Watkins LJ at 554), so that administrative supervisory powers were not available to quash the coroner's verdict.

In *R v Cripps, ex parte Muldoon* [1983] 3 All ER 72, The Queen's Bench Division held that a local Election Court was an inferior Court for the purposes of judicial review because of its constitution, powers and relationship with the High Court. Robert Goff LJ considered the nature of an inferior Court by looking at the status of both the Crown Court and the County Court. After an analysis of relevant constituting statutes and the common law with due weight given to the ambiguity of the ecclesiastical Court in *R v The Chancellor of St Edmundsbury* (at p 81), he made the following observations:

> that the Crown Court is treated as an inferior Court except when it is exercising its jurisdiction in matters relating to trial on indictment. It is therefore something of a hybrid . . . the County Courts Act 1959 make it plain that a County Court is an inferior Court: . . . But there have been occasions when a County Court has performed functions which resulted in the Court being treated as a superior Court. This occurred when a County Court exercised jurisdiction under the Bankruptcy Acts 1883 and 1890. (*Skinner v North Allerton County Court Judge* [1899] AC 439, 441.)

Goff LJ went on to say that in such bankruptcy jurisdiction, the House of Lords had decided that a County Court was not subject to judicial review. (*R v Cripps*, supra, at p 82. He was citing *Skinner v North Allerton County Court Judge* [1899] AC 439, 441.)

Goff LJ finished by saying:

> From these cases it is difficult to extract any precise principle. The most that can be said is that it is necessary to look at all the relevant features of the tribunal in question, including its constitution, jurisdiction, and powers and its relationship with the High Court in order to decide whether the tribunal should properly be regarded as inferior to the High Court, so that its activities may appropriately be the subject of judicial review by the High Court. (p 83)

It appears then, that there is no irresistible pronouncement that the District Court's specialised particular jurisdictions are inevitably and in all cases, of an inferior nature. In the absence of high authority and adequate statutory analysis, there are the English cases available here for serious argument.

(ii) The power to punish for contempt outside the Court

The cases on the power of a Court to punish for a contempt committed outside the Court is one which is said to mark a superior Court. There are a number of cases which assert the powerlessness of an inferior Court to do this and for these purposes, a District Court (New Zealand) and a County Court (England) have been almost universally acknowledged as inferior.[9]

The English Court of Appeal has disagreed with this view. In *Danchevsky v Danchevsky* [1974] 3 All ER 934, it held that a county Court has inherent jurisdiction to punish for a contempt committed outside the Court. Here a defiant husband refused to obey a County Court divorce order that he vacate the matrimonial home. He was committed to prison by the County Court on application. Its power to do this was upheld. Lord Scarman said at p 939:

> It is important to observe that this is part of the inherent jurisdiction of the Court. There is no statute saying that the High Court has this power. The High Court has it because it is part of its own inherent power to prevent the abuse of its own process. There can be no reason why the County Court should not have in respect of its own process, precisely the same power as the High Court and I agree with Lord Denning MR that the County Court does have inherently the power to punish contempt by a fixed term of imprisonment in the appropriate case and that this power is additional to the power — which of course is recognised in the County Court Rules — of punishing contempt by an order of imprisonment for an indefinite time until contempt be purged.

The surprise engendered by *Danchevsky* was tempered, however, by *Bush v Green* [1985] 3 All ER 721 (CA). Here, a domestic dispute impelled a common law wife to remove the contents of a house. It was returned on Court order, after which (but before substantive "matrimonial" property proceedings had been heard) the defendant wife gave information to journalists. This resulted in articles appearing in two newpapers. The County Court Judge considered that the articles were incorrect and prejudicial to the forthcoming hearing, that the defendant was in contempt and invited the plaintiff to apply to commit the defendant for contempt. In the contempt proceedings, the Judge found the defendant guilty but awarded costs only. The defendant appealed, saying the County Court had no jurisdiction to deal with a contempt action.

The English Court of Appeal agreed that the County Court had no jurisdiction to discipline a distant contempt under the English equivalents of the ancillary powers provision of the District Courts Act 1947 (ss 41 and 42). The reasons given were technical. Under the s 41 equivalent (ancillary power of a Court), the committal application was not justified for it did not "arise out of a cause of action for the time being within the Court's jurisdiction". Presumably, if the wife had acted during the course of the property hearing, s 41 would then have authorised a contempt action by the Court on the husband's application. The ancillary power of the Judge (our s 42) could not be invoked either because this only gave a Judge power to do that which a Queen's Bench Judge might do in chambers. As a committal application must be decided in open Court, the Judge had no power under the English equivalent of s 42 to commit for contempt.

The pale observation that a County Court had no power to commit for distant contempts was made, apparently per incuriam of *Danchevsky*. Both cases are of the Court of Appeal ranking, although *Bush v Green* had only two Judges, May and Kerr LJJ while *Danchevsky* was decided by three, Lord Denning MR, Buckley and Gorman LJJ.

New Zealand is conservative too and likely to remain so. The most recent New Zealand case on the subject is *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) where Quality Pizzas refused to obey an order of the Arbitration Court to supply a union with a list of names of staff members covered by an industrial award. The High Court ordered the supply of the list and later ordered compliance. Disobedience continued. The High Court ordered sequestration of property. The Court of Appeal held that the High Court had such an inherent jurisdiction (there was no provision in the Code for this) to punish for the contempts of an inferior Court such as the

Arbitration Court. The fact that the Arbitration Court was a Court of record did not lift its inferior status. Although it is the District Court which has the power to enforce fines and penalties of the Arbitration Court yet it was the sole province of the High Court, not the District Court, to punish for contempts.

In conclusion, it can be seen that if the District Court has no power to punish for distant contempts, then this is assumed to be because it is an inferior Court. Legislatively, it is assumed to be universally an inferior Court by virtue of the implication in s 2 of the Judicature Act 1908 and the definition in s 2 of the Inferior Courts Procedure Act 1909.

Yet, within the English common law, there has been a more subtle investigation. There, the exact meaning of an inferior Court remains ambiguous. Among a variety of inferior Courts and tribunals, the County Court has been seen as a Court of particular jurisdiction which has meant that in its special spheres and for those special purposes, the Court has a certain quality of unlimited jurisdiction. Good statutory analysis of narrow sense jurisdiction would help to identify such areas for the District Court.

The social prominence of and established specialisation of the District Court requires an effective authority. The route to this authority might be by way of some of the issues here – statutory analysis, ambiguity in status and precedents on the power to commit for distant contempts. □

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1 *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA); *Bosch v Ministry of Transport* [1979] 1 NZLR 502. See also, Kovacevich J, "The Inherent Power of the District Court" [1989] NZLJ 184.

2 T G Maxwell, *Summary Proceedings and Police Court Practice* 1985, p 24.

3 Blackwood, Cadenhead, Willy, *District Courts Practice (Civil Jurisdiction)*, 1988, s 29-30 "Waiver of Irregularities", p 1055.

4 McGechan, "Trial by Triad – District Courts, Summary Proceedings and Crimes Amendment (No 2) Acts 1980", 1982, (10)*NZULR* 17, is an interesting step towards this.

5 *Thomas v Nield* (1911) 30 NZLR 1208 (SC), *Attorney-General v Blundell and Glover* [1942] NZLR 287 (SC), *Attorney-General v Butler* [1953] NZLR 944 (SC), *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA), *Bush v Green* [1985] 3 All ER 721 (CA). 4 *Halsbury* 9 para 47.

6 In none of the usually cited cases on the inherent powers of the District Court, has the question of inferiority and its consequences been examined; *Bosch v The Ministry of Transport* [1979] NZLR 509, *Moevao v The Department of Labour* [1980] 1 NZLR 464 (CA), *Bryant v The Collector of Customs* [1984] 1 NZLR 280 (CA), *McMenamin v The Attorney-General* [1985] 2 NZLR 274 (CA), *Ferris v Police* [1985] 1 NZLR 314; *The DPP v Humphreys* [1976] 2 All ER 497, *R v Sang* [1979] 2 All ER 1222, *Hunter v The Chief Constable of the West Midlands Police* [1981] 3 All ER 727.

7 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 said that this was immaterial for the purposes of disciplining distant contempts of inferior Courts (p 615-616).

8 Ibid, at p 57. These were as follows – a London City Council Licensing Committee was not a Court at all, (*Royal Aquarium v Parkinson* [1892] 1 QB 431; A Magistrates Court about to hear depositions was an inferior Court, (*R v Davies* [1906] 1 KB 32); a Court-Martial for desertion from the army was an inferior Court, (*R v Daily Mail* [1921] 2 KB 733); an ecclesiastical consistory Court meeting was an inferior Court, (*R v Daily Herald* [1932] 2 KB 402); a Court of Referees under an Unemployment Insurance Act was not an inferior Court, (*Collins v Henry* [1927] 2 KB 378). All of these cases turned upon the administrative/judicial distinction in decision-making.

9 See the cases cited at fn 5. See also the classic authority, *The Queen v Lefroy* [1873] VIII KB 134 (QBD).

Judge Douglas Wetmore, of the County Court of Vancouver, BC, Canada, was the winner of the Butterworths Anniversary Cup at a golf tournament sponsored by WANG and the ASB Bank during the Commonwealth Law Conference in Auckland.

Public Welfare/ Regulatory offences: Judicial criteria for definition and classification (II)

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

The first part of this article published at [1990] NZLJ 236 was concerned with the question of what is a public welfare regulatory offence, and in particular the strict liability (MacKenzie) *category of offence (class 2) with its borderlines on both the mens rea category (class 1) and the absolute liability category (class 3). This final part of the article centres discussion on the absolute liability category of public welfare regulatory offences, and also draws some conclusions.*

Class 3: Absolute liability

Richardson J delivering the majority judgment in *CAD v MacKenzie* [1983] NZLR 78, stated:

> In the case of public welfare regulatory offences . . . a defence of total absence of fault is available unless clearly excluded in the terms of the legislature.

In *Millar v Ministry of Transport* [1986] 1 NZLR 660, the majority considered:

> There is a good deal less room for absolute liability once it is accepted that [there] is an available alternative under which the onus is on the defendant of proving total absence of fault.

So as noted in part one of this article public welfare offences are prima facie of strict liability unless there is clear legislative intention that an offence should be absolute. This means the Courts are involved in the difficult task of ascertaining that elusive concept, the intention of the legislature.

Dickson J in *R v City of Sault Ste Marie* [1978] 85 DLR (3d) 161 gave some guidance regarding factors that could point to absolute liability. He said:

> Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation [unfortunately he did not give examples of this] . . . the importance of the penalty [presumably the more serious the penalty the less likely absolute liability would be imposed?] . . . and the precision of the language used will be primary considerations in determining whether the offence falls into the third category. (*Sault Ste Marie* at 182.)

To return then to the Road User Charges Act 1977 left at the end of part one of this article. Did the legislature make it clear that guilt would follow proof merely of the proscribed act? The answer is no, defences were provided in s 23(3) and (4). In *McLaren Transport v Ministry of Transport* [1986] 2 NZLR 81, Hardie Boys J found the offences under s 23(2) of operating a vehicle when the gross weight exceeded the maximum for which it was licensed (overloading) and that of operating a vehicle when its distance recorder is not in good working order, to be of absolute liability subject only to the statutory defences in s 23(3) and (4). To hold otherwise, Hardie Boys J said would subvert the "avenues of escape" prescribed by the statute. The District Court Judge had followed Ellis J in *Savill v Ministry of Transport* [1986] 1 NZLR 653 and found the offence to be of strict liability with total absence of fault a defence generally. In *Millar* the Court of Appeal majority noted that *MacKenzie* had been applied to operating a vehicle which was overweight (presumably referring to *Savill*) and saw no reason to doubt this was correct. But as Hardie Boys J pointed out in *McLaren* Ellis J had assumed the statutory defence did not apply to overloading. District Court Judges are now faced with two conflicting decisions on the Road User Charges Act 1977. While it quite clearly creates public welfare regulatory offences it will be necessary for the Court of Appeal to decide whether these are of strict or absolute liability (subject only to the statutory defences).

Hardie Boys J's approach was adopted in *Tony Galbraith v Ministry of Transport* [1989] BCL 1347, by Wylie J, although his terminology was different. Wylie J upheld a conviction for operating a vehicle in such a manner that the driver spent more than 11 hours in a 24-hour period driving, contrary to s 70(1)(b) of the Transport Act 1962. He said:

> Clearly the purpose of the statutory restriction on driving hours is to promote road safety.

And he thought this was a clear example of a public welfare regulatory offence where it would be unreasonable to suppose that the prosecution would be able to acquire any accurate knowledge of

the workings of the defendant's business organisation. The Judge found the provision to be the "very embodiment of strict liability with opportunity for the defendant to escape liability by showing a particular and limited lack of fault" – as specified by the statutory defence. The more general *MacKenzie* "no fault" defence was not available. This accords with Hardie Boys J's decision in *McLaren* but Hardie Boys J's nomenclature ("absolute subject only to the statutory defence") is less confusing.[1]

Although there is now supposed to be little room for absolute liability several High Court decisions have confirmed the existence of the class in particular for offences traditionally held to be absolute, as Simon France has pointed out.[2]

One such is *Murray v Ongoongo* [1985] BCL 1843, Hillyer J held that s 14(5)(b) of the Immigration Act created an offence (overstaying) of absolute liability and a defence of reliance in good faith on the purported extension of a temporary permit was not available. Hillyer J based his conclusion on the words of the section supported by the interpretation of Richardson J in several Court of Appeal cases (albeit obiter). The section was amended after Mahon J, in *Labour Department v Aloua* [1975] 1 NZLR 507, had held a charge of overstaying a temporary permit can be dismissed if the defendant can point to evidence creating doubt as to whether he had a guilty mind. The new section provided that a person who remained in New Zealand after the expiry of an extended temporary permit, without having applied for and been granted an extension, committed an offence, "whether or not he knows that the period or extended period has expired, and whether or not he knows that no application for an extension or further extension has been made on his behalf or granted".

Thus the legislation did seem to show an intention that the offence should be of strict liability at least, though it is debatable whether or not absolute liability was intended.

Another example is *AHI Operations v Department of Labour* [1986] 1 NZLR 645, a decision of Heron J to the effect that s 17(1) of the Machinery Act created an offence (failure to ensure dangerous machinery was securely fenced), of absolute liability. In so concluding Heron J was largely influenced by judicial precedent. He followed *Ralph v Henderson and Pollard* [1968] NZLR 759 and a "long line of authority" which found statutory provisions designed to protect both competent, careful and careless workmen to be absolute. In his view it was the only way to set the requisite high standards to prevent immediate permanent and dreadful injuries. And he found it was Parliament's intent that such provisions be absolute – in particular the obligation (to fence machinery) was to be "duly and faithfully complied with", the word "duly" indicating:

> . . . an absolute liability approach to the duties of owners of machinery in an employer/employee environment. (at 649)

He thought there was to be a significance of degree between the present offence and the offence of dangerous flying at issue in *MacKenzie*. And the penalties (maximum $2,500 and $100 per day for a continuing offence):

> . . . whilst relatively severe do not – on their own prevent them from being regarded as inappropriate for offences of absolute liability.

In these circumstances, it seems that judicial precedent rather than the "intention of the legislature" is likely to be the "clinching consideration" (as Barker J put it in *Waikato Carbonisation* (supra – see Part one of this article)).

The intention of the legislature was also the main reason why Barker J found the offence of failing to file an income tax return contrary to s 416(1)(a) of the Income Tax Act 1976, to be of absolute liability, in *IRD v Thomas* [1989] BCL 2160.

His reason for rebutting the mens rea presumption is fairly convincing – that s 416(1)(a) refers to a "failure" simpliciter, whereas related sections refer to a "knowing" failure (sed quaere: "fail" has been held to imply a fault element in taxation cases in the past – see for example *Robertson v CIR*, 26 October 1983, M 797/83, High Court, Auckland, per Casey J). It is questionable whether a taxation statute was intended to create public welfare/regulatory offences. However, in *Thomas* Barker J dismissed the possibility of mens rea as an ingredient of failing to file a return, stating:

> In the present case, it is clear as both counsel accepted that the object of the statute is sufficiently weighty to displace the ordinary presumption of mens rea.

He then proceeded to dismiss strict liability on the basis that the object of the legislation indicated absolute liability as did "the clear wording of the statute". Also a similarly worded section in South Australia had been held to create an offence of absolute liability, and unless absolute liability was imposed "the taxpayer would have a good defence every time he could show . . . he had entrusted his affairs to an accountant". This I think is a non sequitur. Even if the offence was a mens rea offence it should still generally be no defence to blame one's accountants. Taxpayers have an individual liability in respect of their returns. If the offence were to have been classified as strict liability (as it was in the District Court) the *MacKenzie* no fault or all due diligence defence would be available where –

> . . . the defendant has the burden of showing on the balance of probabilities that he and all those for whom he is responsible acted honestly and with all due diligence . . .

(per Cooke P and Richardson J, describing the *MacKenzie* defence in *Millar* at 665). The strict liability classification would be more in accordance with *Millar* and would endorse Lord Reid's universal principle that if a penal provision is reasonably capable of two interpretations that interpretation which is most favourable to the accused must be adopted (*Sweet v Parsley* [1970] AC 132, cited in *Millar* at 668).

Conclusions

What then are the judicial criteria for classification of offences?

First and foremost is the presumption that mens rea is an ingredient of all offences as was strongly confirmed in *Millar* by the

Court of Appeal. The presumption is most firm where the offence is in the "truly criminal" category, that is generally to say, it is a crime similar to the Crimes Act offences, an offence against a person or individual interests rather than against public interests (see Wright J in *Sherras v de Rutzen* [1985] 1 QB 918, and Dickson J in *Sault Ste Marie* supra, at 172).

Where the presumption of mens rea applies the prosecution has the onus of proving mens rea generally as to all elements of the offence, but in some cases the doing of the prohibited act itself imports mens rea and the defendant has the burden of raising evidence to negate this inference: *Strawbridge* without reasonable grounds, as discussed in *Millar*.

Secondly, the presumption of mens rea may be rebutted by the legislation. The presumption is likely to be rebutted if the offence is of the public welfare/regulatory type, that is, it is an environmental offence, like pollution, or one affecting the public generally rather than a few individuals, or one that is regulatory (such as some traffic offences). These public welfare offences have been called offences against public health and safety (*Sault Ste Marie* and *MacKenzie*).

Factors indicative of public welfare offences are:

(1) The purpose of the legislation is to protect public health and safety (the aim of many Transport Act and Regulations offences, Machinery Act and Water and Soil Conservation Act offences — see for example *Ministry of Transport v Strong, Hastings City Council v Simons* and *AHI Operations v Department of Labour*, cases all discussed in Part one of this article).

If the policy behind the legislation is to ensure compliance with an objective standard of behaviour this leads to the public welfare category, per Chilwell J in *Browne v Auckland City Council* (supra — in Part one).

(2) The defendant is likely to be in a far better position than the prosecution to know how the breach of the law occurred. This usually applies where the prosecution is not in a position to acquire accurate knowledge of the defendant's business organisation (as for example in *Galbraith v Ministry of Transport*).

(3) The penalty is generally a fine, and especially if it is a relatively light fine for a breach of a regulation this can rebut the normal presumption of mens rea (see Chilwell J's reasons in *Browne v Auckland City Council* for classifying a Traffic Regulations offence as in the public welfare category).

(4) The words used may be of assistance. Words like "refusal" and generally "failure" indicate a mens rea element (see however Barker J's decision in *IRD v Thomas*, supra). "Causing" and "permitting" are more problematic terms (compare dicta of Chilwell J in *Browne v Auckland City Council* with Dickson J's opinion in *Sault Ste Marie*).

Thirdly, having decided on the public welfare rather than the mens rea category, the next question is whether the offence is of strict liability (that is it attracts the *MacKenzie* "no fault" or "all due diligence" defence) or of absolute liability.

Since *MacKenzie*, public welfare offences are prima facie of strict liability (per Richardson J). Only if the legislature has clearly indicated absolute liability was intended should the offence fall into this class. This should mean as Cooke P and Richardson J said in *Millar* that there is a great deal less room for absolute liability.

Factors indicative of absolute liability are:

(1) The overall regulatory pattern adopted by the legislature;
(2) The subject matter of the legislation;
(3) The importance of penalty [presumably the higher penalty should point to strict rather than absolute liability], and
(4) Precision of language. (per Dickson J in *Sault Ste Marie*.)

It would be most helpful if the legislature precisely stated when an absolute liability offence has been created. There is at the moment the additional problem too that sometimes Parliament does specify certain defences to offences. This may mean, as Hardie Boys J concluded in *McLaren Transport*, that the offence is otherwise absolute.

As the intention of the legislature is crucial in deciding whether an offence is of strict or absolute liability it is to be hoped that Parliamentary draftsmen will become increasingly clear in expressing legislative intent. Until this happens it seems likely that judicial precedent will continue to be the most important factor (see *Blair v Department of Labour*, CA 18/88 and Chilwell J in *Waikato Carbonisation* and Heron J in *AHI Operations*, who followed long lines of established authority in concluding offences were absolute).

As can be seen, although there is judicial guidance towards categorising offences where the legislature has not expressed a mental element it is not always of assistance especially in borderline cases, for example, driving with excess blood alcohol and overloading. This is really because the "truly criminal"/public welfare dichotomy is too indistinct.

As Professor Orchard predicted:

> The conceptual basis of *MacKenzie* is so vague that there is a serious danger that offences which have hitherto been classified as requiring mens rea will now be held to be "[no] fault" offences with the burden of proof on the defendant.[3]

This has already happened, to the offence of driving with excess blood alcohol (see *Ministry of Transport v Strong* and *Ministry of Transport v Crawford*).

Further more precise judicial criteria for classification are needed, particularly to clarify the borderline areas, at least until Parliament makes clear, in legislation creating offences, the nature of the criminal liability. □

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1 For a more detailed discussion see [1989] NZLJ 371.
2 "Absolute Liability Since *MacKenzie*" [1987] NZLJ 50.
3 "The Judicial Categorisation of Offences" by Gerald Orchard, LLM, PhD, *Canterbury Law Review*, Vol 2 [1983] 81.

Barring dissolution for lack of satisfactory arrangements in respect of children

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

Divorce, or dissolution of marriage, is now commonly regarded as a mere formality. Those partners who are parents, however cannot too lightly avoid the responsibilities that this extra relationship imposes. The law requires that satisfactory arrangements must be made for the children. This article considers two recent decisions on this issue.

Section 45 of the Family Proceedings Act 1980, as those practising in the field of dissolution of marriage will be well aware, bars dissolution if satisfactory arrangements have not been made for the custody, maintenance and welfare of the children of the relevant marriage. By far the majority of cases do not raise this issue and there is consequently a certain dearth of authority concerning this provision and its predecessor, s 49 of the Matrimonial Proceedings Act 1963.

Two cases heard by Judge B D Inglis QC earlier this year, however, did raise the issue of the application of s 45. It is desirable to set out the terms of the section in full before proceeding to analyse the cases. It reads thus:

45. Arrangements for welfare of children on dissolution of marriage – (1) A Family Court shall not make an order dissolving a marriage unless it is satisfied that –

(a) Arrangements have been made for the custody, maintenance, and other aspects of the welfare of every child of the marriage who is under the age of 16 years (or, in special circumstances, of or over that age) and those arrangements are satisfactory or are the best that can be devised in the circumstances; or

(b) It is impracticable for the party or parties appearing before the Court to make any such arrangement; or

(c) There are special circumstances justifying the making of an order dissolving the marriage, notwithstanding that the Court is not satisfied that any such arrangements have been made.

(2) A Family Court shall not make an order dissolving a marriage, in reliance on any special circumstances referred to in subsection (1)(c) of this section, unless it has obtained a satisfactory undertaking from either or both of the parties to the proceedings to bring before the Court within a specified time the question of the arrangements for every child of the marriage.

(3) No order dissolving a marriage shall be invalid solely on the ground that –

(a) Any provision of subsections (1) and (2) of this section has not been complied with; or

(b) Any information that is relevant for the purposes of these subsections has not been supplied to the Court; or

(c) Any information that has been supplied is incomplete, incorrect, or misleading; or

(d) Any undertaking that is given under subsection (2) of this section has not been carried out.

The first case was *Ranson v Ranson* (Family Court, Levin; FP 031/195/87; 24 January 1990), a defended application for dissolution. The material facts, briefly put, were that the applicant husband had earlier sought an order defining access to the parties' child, then aged 11 months. This was referred to counselling, as a result of which the parties agreed (i) on a separation, (ii) that the respondent wife should have custody of the child and (iii) that the husband should have appropriate access. Subsequently the Court made a consent order to this effect. It also made a consent order disposing entirely of all matrimonial property issues.

The dissolution proceedings that were initiated by the husband were defended by the wife on the ground (inter alia) that "the criteria, as laid down in s 45 of the Family Proceedings Act 1980, have not been resolved." Counsel for the husband argued that the hearing ought to proceed, observing that he expected the evidence to show that the wife, in seeking to defend, only wanted to pressurise the husband to settle a further matrimonial property claim she had mounted (though not before the Court) after the consent order. In the event, counsel for the wife based his defence on the ground that the husband had not put forward any proposals for the child's maintenance and on the difficulties in achieving a settlement on the post-consent order matrimonial property issue. It was on these two issues that s 45 became relevant.

Judge Inglis QC considered that:

(a) Section 45(3) was not to be seen as effectively neutralising s 45(1) and (2), since s 45(2) laid a positive duty on the Court to be satisfied, before granting a dissolution order, that the interests of any children of the marriage are appropriately protected. "The interests of such children are not", it was said, "to be brushed aside simply because the applicant wants the marriage

dissolved, for whatever urgent personal reasons. Nor is a notice of defence, raising the issue of the children's interests, to be brushed aside simply because it may seem that the respondent's motive in filing a defence is focused elsewhere than on the children's interests." The question of whether or not to make a dissolution order here must thus be approached on the footing that the Court must be "positively" satisfied of the matters specifically referred to in s 45(1) and (2).

(b) He was satisfied that appropriate arrangements had been made as to the custody, maintenance and other aspects of the child's welfare. Neither party had questioned the consent custody order and there was no future problem of guardianship that could not be resolved pursuant to s 13 of the Guardianship Act 1968 or otherwise. Nor was there any such issue requiring settlement as a condition of dissolving the marriage.

(c) The respondent, as custodial parent, was receiving a DPB, so there was, at least for the time being, no unresolved child maintenance issue. While that situation prevailed, any maintenance obligation on the applicant husband's part was suspended by virtue of s 27J of the Social Security Act 1964. Though the wife could apply for a child maintenance order while receiving the DPB – by virtue of s 27J(4) and (5) of the 1964 Act – she had not done so, and it was impossible to see how the wife's unexercised right to do so could be invoked so as to suggest that appropriate maintenance arrangements had not been made for the child. Further, it was irrelevant that it had been proved that the Department of Social Welfare had determined that the husband should pay nothing under the LPC scheme on the ground of hardship, since it could not affect the amount payable by the State for the child's support.

(d) Nothing formal and immediate had been done to attack or reopen the matrimonial property consent order. No event had happened after it was made that was unpredictable or which invalidated the basis, or a fundamental assumption, on which it was made. In any event, the time for appeal had long expired. "If . . . any impact on the child's interests," the Court observed, "of the consent order is too remote to allow s 45(1)(a) of the Family Proceedings Act to be invoked, the binding effect of the consent order as *res judicata* and the consequent difficulty in attacking it make it remoter still for the purposes of s 45." It was also indicated that, even if it could be said that the dispute about the consent matrimonial property order had an impact on the child's welfare that could be recognised as a relevant factor in terms of s 45(1), then it would have to be said also that the dispute about the order had arisen because of the wife's refusal to accept it as binding on her despite her consent to it, and that any relevant financial hardship affecting her since it was made had resulted from the refusal by her to accept the agreed sum which had been tendered to her in terms of the order.

A dissolution order was accordingly made, the grounds having been made out.

The second case is *Church v Church (No 2)* (Family Court, Napier; FP 041/303/89 23 February 1990). The respondent wife claimed that proper arrangements had not been made for the parties' five-year-old girl as the husband had "ignored" her attempts to obtain maintenance from him for the child. The child had been in the respondent wife's care since birth, which occurred not long after the parties' separation in 1984. The child was to remain in such custody. There was no suggestion that there was anything unsatisfactory in this. After the parties' separation, the wife went on to the DPB, remaining on it until the child went to school. The husband was levied under the LPC scheme at $28 per week. The wife later obtained paid employment and came off the DPB, thus freeing the husband from liability under the LPC scheme. Negotiations concerning maintenance for the child came effectively to nought: if the wife wanted more than $20 per week for the child, she was going to have to apply to the Family Court. The husband operated a business which, according to him, ran at a loss. No figures were produced in support of this. His financial affairs were not disclosed and there was no evidence about how his commitment (if any) to his partner and her three children affected his liability to maintain the child in question.

At an earlier hearing, the applicant husband, having doubtless been advised about s 45, said he would accept an interim child maintenance order against him in the weekly sum of $20. This was, it seems, acceptable to counsel for the wife as an interim measure pending the hearing of her cross-application for maintenance contained in her notice of defence.

It might well be thought that the wife could lose little by accepting the $20 per week on an interim basis and by later claiming past and future maintenance to the extent of the difference between $20 and the amount finally fixed. If that line of thinking were acceptable to the Court, then the dissolution application could proceed unimpeded.

The judgment of Judge Inglis QC goes into even more fine detail with regard to s 45 in the child maintenance context. These are the main points that he made:

(a) The requirement of s 45(1) ("shall") is imperative.

(b) Section 45(3) does not diminish the force of s 45(1). Its aim is to prevent a dissolution order being reopened after the event because the Court had been unaware at the time of matters in terms of s 45(1) and (2) which would have prevented the grant of the order.

(c) The intent is "quite clear". A dissolution order is not to be made unless it is shown that the parties have made arrangements for the future of their children which are "satisfactory" or "the best that can be devised in the circumstances", unless it can be shown that it is impracticable for them to make any such arrangements, or unless special circumstances require the marriage to be dissolved without such arrangements in which case the Court must be satisfied that the parties will place the question of the arrangements for the children before the Court within a specified time. The Court is empowered by s 46 to require a report to be obtained on the parties' proposed arrangements for the children. That was, in the Court's opinion, "plainly a convenient way of providing an independent means by which the

Court can be satisfied whether or not the s 45 requirements have been or can be met".

(d) Section 45 appears as the first provision in Part V of the 1980 Act under the sub-heading "Welfare of Children" and it and s 46 were designed to ensure that the welfare of the children of the marriage was not overlooked when the parents wish, or one of them wishes, to have the marriage dissolved. The intent of the sections is to ensure that not only the parents but also the Court give the children's welfare and interests "a significant degree of priority" on an application for the dissolution of the parents' marriage. Section 45(1) and (2) oblige the Court to satisfy itself that that the children's welfare and interests are appropriately safeguarded, to the extent even of ordering an inquiry and report in terms of s 46(1). It is implicit in s 46(3)-(5) that there is to be a hearing once the report has been furnished to the Court.

(e) The Court cannot be bound by any agreement reached by the parties under pressure of a deadline to meet the s 45(1) requirements. It had to satisfy itself that such agreement, or any proposal advanced by the parties or either of them, meets those requirements. It is not a question of acceptability or convenience for the parties. It is a question whether the arrangements are "satisfactory" or "the best that can be devised in the circumstances". Those are objective tests. Any arrangements which parties have devised have to be measured and assessed against them.

Further observations were made by the Court which merit attention. It was pointed out that $20 per week was an unusually low sum for a working parent to contribute. No concrete evidence had been given from which it could be determined whether that sum was the most that the husband could possibly pay or whether it represented "his opening offer" or an indifference to his duty to help support his child. It could not be said that such proposed arrangement was "satisfactory" or "the best that can be devised in the circumstances".

It was also observed that it could be said that there had been insufficient time for exploring the maintenance issue sufficiently thoroughly so that the proposal could be labelled "the best that can be devised in the circumstances" or that it was "impracticable" to reach a satisfactory arrangement at this stage. This approach, it was held, must be rejected as robbing s 45(1) of effect. The section intended that a spouse must come to Court with a "satisfactory" plan for the custody, maintenance and welfare of any child affected by the dissolution he or she sought. Here the husband's planning "consisted of a last minute proposal produced when it was realised that appropriate child maintenance arangements had to be made." The evidence showed that the husband knew before the hearing of his dissolution application, and probably before he filed it, that the child maintenance issue would be raised. If the husband needed more time to prove his $20 offer was "satisfactory" or "the best that can be devised in the circumstances", he could have sought adjournment of the dissolution proceedings until he could furnish the proof.

Further, the present interim offer, leaving a definitive finding under s 72 of the 1980 Act on the proper level of maintenance to some indeterminate future time, could not be said to be the "best" arrangement that could be devised in the circumstances. The "circumstances" included, first, a lack of action by the husband on the maintenance issue until action was forced on him, and, secondly, a proposal ex facie inadequate with no supporting evidence justifying it.

An apparently reasonable way of solving the impasse was this: the wife would accept the interim payments and bring her child maintenance application on for hearing later. The husband's liability from the time when the wife went off the benefit could be determined and suitable undertakings in terms of s 45(2) could be framed without difficulty to secure the position. The Court rejected this solution also, stating that an insuperable difficulty was created by the opening words of s 45(1)(c) in as much as there were no "special circumstances" justifying the making of a dissolution order in the absence of satisfactory child maintenance arrangements. The mere facts that the husband understandably wanted his marriage dissolved after nearly six years' separation and that the respondent accepted that the marriage should be dissolved could not alone amount to special "circumstances." Nor could the fact that the dissolution application came on for hearing before the husband was ready to make satisfactory arrangements for the child's maintenance or that maintenance proceedings were before the Court. "That would be to ride roughshod over the clear intent of s 45 as a whole." There was therefore no way in which s 45(1)(c) and (2) could operate here.

Could it, finally, be said that the public interest could not be damaged in any way if the marriage were to be dissolved now and the parties were left to litigate the child maintenance issue later? The Court held that it could not, saying:

> It is not open to this Court, on the grounds of fairness, reasonableness or social enlightenment to relax the strict and mandatory requirements laid down . . . in s 45. The fact is that as the present case stands no arrangements have been made for the child's maintenance which are satisfactory or the best that can be devised in the circumstances; it has not been and is not impracticable for the parties to make such arrangements; there are no special circumstances justifying dissolution of the marriage in the absence of compliance with s 45(1)(a) and (b).

Strictly speaking, therefore, the dissolution application should have been dismissed, even though the grounds for dissolution had been established. The Court did not, however, take this step. In view of the fact that the wife did not oppose dissolution provided the child's financial position was protected, the dissolution application was adjourned so that it could be heard together with her cross-application for child maintenance.

The two cases (which may profitably be compared with *Strachan v Strachan* and *Rawat v Rawat*, both noted in (1989) 2 *Fam Law Bull* 43) appear to have done much to remedy the dearth of jurisprudence, and to highlight the pitfalls, in the context of s 45. Judge

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Child sexual abuse (I): Incidence, epidemiology, cause, diagnosis and effects — a critique of the literature

By David C Geddis, Nicola J Taylor and R Mark Henaghan

This series of three articles has been written by people trained in the disciplines of medicine, social work and law. It focuses on criminal offences where evidence of sexual abuse is the crucial issue. In the first article, a broad overview of the topic is provided. The second article deals with ways in which accurate testimony can be obtained from child victims. Finally, the law reforms which came into effect on 1 January 1990 are addressed and an evaluation made of their impact.

Introduction

Child sexual abuse is a reality. Over recent years the number of allegations being made has increased. The topic generates intense emotions and in such an atmosphere it is difficult to form a balanced view. In this article we endeavour to provide a broad overview of the topic. It is now possible to provide answers to some questions. However it will be apparent to readers of the following text that definitive answers to some questions cannot be provided at this time.

Definition

Any attempt to define "child sexual abuse" is fraught with difficulties. Whenever a study of "child sexual abuse" is being examined it is crucial to carefully check what the authors of the study consider to be "child sexual abuse".

The criminal law does not provide a definition of child sexual abuse. Rather, ss 127-142 Crimes Act 1961 deal with offences of a sexual nature and provide a framework of prohibited acts from the criminal law's point of view.

Categories

Child sexual abuse is usually characterised as either intra-familial or extra-familial.

(a) Intra-familial sexual abuse encompasses any form of sexual activity imposed by any family member upon a child. It includes incest — sexual intercourse between relatives within the prohibited degrees of relationship defined by the law. It also includes sexual activity imposed by a person in a parenting relationship with a child even if there is no blood or legal relationship.

(b) Extra-familial abuse is any form of sexual activity imposed on a child by an adult who is unrelated. Occasionally the offending adult is unknown to the child. More often however, he or she is known and is in a position of trust. [1,2]

Incidence

The true incidence of child sexual abuse is not known. Leaving aside the fact that because of the very nature of the problem it is impossible to obtain an accurate figure, all studies that have attempted to explore the incidence of child sexual abuse can be criticised on one or more methodological grounds.[3] These criticisms — which also apply to the majority of the literature that deals specifically with epidemiology — are:

(1) Vagueness of definition of what exactly is being included under the term "child sexual abuse".[4]
(2) Studies are retrospective.[5]
(3) The samples are generally small and not random. [6, 7]
(4) Failure to clarify which findings relate to which form of abuse.[8]

Given these limitations the most reliable figures place the incidence of serious sexual abuse of girls under the age of 14 years around 10-15%,[9] and the incidence of serious sexual abuse of boys under the age of 14 years around 5-10%. [10, 11] Serious sexual abuse consists of experiences that involve physical contact between victim and offender. This can range from kissing to full intercourse but does not include such experiences as indecent phone calls or indecent exposure.

Estimates of the incidence of child sexual abuse tend to come from one of two sources — either documented or reported cases received by various agencies or, survey studies of adults that ask about previous molestation

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Inglis QC indeed made a very just observation at the end of his judgment in the *Church* case:

> Some might think that this is hard on the [husband], who may not have been aware of Parliament's requirements as laid down in s 45, though he must have been aware that maintenance for his child was in issue. Of course, s 45 [as such] has been on the statute book for 10 years, and the fact that it has not featured prominently or at all in the reported judgments of the Family Court does not mean that it can be disregarded or ignored. □

experiences. Incidence figures based on reported cases have to be called in question – they must be falsely low. On the other hand, some of the groups used for survey samples can lead to falsely high estimates being made.

Results from the few studies presently available that have adequately addressed the criticisms outlined above suggest that around 1% of girls under the age of 14 years may experience intrafamilial sexual abuse involving full or attempted intercourse.[9,11]

Epidemiology

The literature relating to the epidemiology of child sexual abuse suffers from the same methodological flaws as are found in the literature relating to incidence. Because of the selected nature of the samples, specific epidemiological findings cannot be extrapolated to the general population. Furthermore, the widely varying nature of the samples results in findings that are at best diverse and at worst incompatible. It is frequently impossible to untangle specific epidemiological features one from the other. Some studies do not identify the relationship (if any) of the perpetrator to the victim;[12] while others do not even state the age of the victim at the time of the experience.[13] These shortcomings make any comparison between studies impossible and any interpretation of findings difficult and potentially misleading.

However, with these shortcomings recognised, the literature reviewed;[14-19] suggests that of all sexual abuse victims:

(1) 80% are female.

(2) The median age of abuse is 9-10 years for female victims, and 7-8 years for male victims.

(3) 80% of offenders are known to the child – of which fathers, stepfathers and de facto fathers, comprise 40% and other relatives and acquaintances 40%.

(4) The younger the victim, the more likely the child is to be assaulted repetitively by someone known to them at home and to experience less physical force in the process.

(5) Male victims are more often subjected to physical violence and less often victimised within the family.

(6) The nature of the victim/offender relationship is the most powerful factor influencing disclosure and means of presentation of the child victim ie the earlier the child presents after the assault the less likely it is that the perpetrator is known to the child.

Why are children sexually abused?

A variety of theories have been offered to explain why men sexually abuse children (there are virtually no studies of female perpetrators). Each theory is presented from the author's own experience and particular field of expertise. The theories include:

1 *Individual Psychopathology*[20]
Men who sexually abuse children possess certain personality characteristics which are interpreted as "causing" the sexual abuse. These characteristics include deviant patterns of sexual arousal, feelings of personal and social inadequacy (which are compensated by selecting weaker sex partners who can be dominated), sexual repression, and arrest of psychological development at a juvenile level. Although the specific causal agents differ, these studies interpret child sexual abuse as a product of individual psychopathology.

2 *Individual adverse social factors*[21]
Certain circumstantial factors have also been identified in theories which focus at the individual level. They break down control and the usual inhibitions against child sexual abuse. These factors include alcohol and drug abuse, great personal stress such as unemployment or the death of a close relative, and the availability of opportunity resulting from overcrowding or paternal unemployment.

3 *Family systems theory*[22, 23]
Family systems theory offers an explanation for intrafamilial child sexual abuse, especially in cases of father-daughter incest in two-parent homes. These theorists understand incest as serving the function of keeping the family together. Victimised children in these families are frequently described as "parentified" or assuming what is usually parental responsibility for meeting emotional and physical needs of family members. These children may be expected not only to meet a parent's sexual needs, but may also take major responsibility for household tasks and care of younger children. The parent who is not engaged in sexual acts (mother) may be unavailable or unable to protect the child for a variety of reasons including illness, depression or marital breakdown.

4 *Social conditioning*[24]
The widespread existence of child sexual abuse has forced some workers away from specific theories of deviancy and towards a more general examination of social and cultural patterns. Theorists suggest that the sexual abuse of children can be seen in part as an extension of male socialisation to be dominant. In this context it is demonstrated by their selection of smaller, younger, and weaker sex partners. Children are also viewed as possessions to be used for the gratification of their "owner". As we come to understand how widespread the sexual abuse of children is, and the range of behaviours it encompasses, we are forced to recognise the limitations of what is known.[25] Each theory may appear to hold merit within the author's clinical expertise/experience and may seem to adequately explain the range of cases seen by that author. However not even the full combination of these theories enables us to definitively answer the question – "Why does child sexual abuse occur?"

The effects of child sexual abuse

All the studies reviewed had faced an impossible task – that of establishing a causal link between child sexual abuse and any

particular factor subsequently found in a victim.[26] Unfortunately some studies fail even to acknowledge, let alone address, this problem. However the consistency with which certain findings are reported in different samples of victims is striking and lends considerable support to suggestions that these findings are linked to the abuse.

A review of the literature,[27-33] leads to the conclusion that the majority of children are adversely affected in some way by sexual abuse. However the nature, duration and severity of any particular effect varies with the individual victim.

While any particular adverse effect of sexual abuse cannot be simplistically related to any one specific factor, those which influence the impact of abusive acts upon a child include:

1 Child's age.
2 Stage of psychosexual development.
3 Nature of the abusive act.
4 Frequency of repetition.
5 Amount of aggression involved.
6 Relationship of abused to the abuser.
7 Nature of relationship with non-abusive care taker.
8 Degree of difficulty experienced by the child in revealing abuse.
9 Reaction of those in whom the child confides.
10 Degree of family support given to the child after abuse is disclosed.

A child can suffer trauma during the course of the abuse, immediately following disclosure, and for many years after.

An exhaustive list of short and medium term effects is provided in Mrazek and Mrazek's excellent review article.[25] They list the effects under the following headings:

(a) Problems in sexual adjustment.
(b) Interpersonal problems.
(c) Educational problems.
(d) Other psychological problems.

Any of these effects can persist throughout the victim's life with detrimental results, particularly in the sphere of interpersonal relationships. Another equally comprehensive review is provided under the chapter heading: "Effects of Sexual Abuse on Children" in the book by K MacFarlane and J Waterman *Sexual Abuse of Young Children.*[34]

The diagnosis of child sexual abuse

The diagnosis of child sexual abuse is rarely simple and seldom straightforward. It requires a careful history-taking from the child, a thorough physical examination and a complete psychosocial evaluation of the family. The child (usually, but not exclusively, female) may present in one of several ways. One of the least common presentations is paradoxically one of the easiest to diagnose. This is the situation where the child has been the victim of a sudden, violent sexual attack. In such cases the procedure to follow is similar to that for an adult rape victim. Outside that situation, the diagnosis of sexual abuse in a child is difficult since the most frequent and common situation involves repeated episodes of abuse over a fairly lengthy period of months or years by an adult known to the child and possibly from within his/her own immediate family. These cases present the most difficult diagnostic problems because:

(i) Usually the only witnesses to the alleged events are the child and the perpetrator;
(ii) The child may be too young and too intimidated to provide a coherent history;
(iii) The child's parent(s) may be either unaware of what is going on or anxious to conceal the information;
(iv) The presenting symptoms are frequently non-specific;
(v) Physical findings may be few or entirely absent.

The possibility of child sexual abuse may come to attention in one of several ways. In the first instance a child may spontaneously report to someone that he or she is a victim of sexual abuse. When a child alleges some form of sexual mistreatment, their story should always be taken seriously and never be dismissed in a cursory fashion. It is an entrenched myth that such allegations are frequently false. While it is not possible to state definitively that false allegations are never made, children are more likely to falsely recant true allegations of abuse than to falsely assert them in the first place.[35]

A child may be referred to a medical practitioner on account of some particular physical complaint. However the fact of abuse may be concealed in the history, and instead the doctor is simply faced with one of a variety of presenting symptoms. They range from the specific through to the fairly non-specific. A vaginal discharge may reveal the presence of venereal disease. This is diagnostic of child sexual abuse. The literature has hitherto been less specific over the finding of chondylomata acuminata (venereal warts). A Task Force on Paediatric Dermatology was established to examine this issue. In their report the members concluded:

> Even though we recognise that there is an association between genital and anal warts and child abuse, we are not able to be quite as certain of the frequency of the association as we are with gonorrhoea. The exact numbers are not known but it seems, based on the articles written and the experience of those involved with such cases, that the association is significant.[36]

It is to be hoped that greater precision with respect to their association with abuse will become possible with DNA typing of different strains.[37]

Behavioural symptoms such as precocious or inappropriate sexual activity or complaints of vaginal discharge or bleeding should make one consider the diagnosis of child sexual abuse. Care must be taken to avoid confusing the uncommon dermatological condition, lichen sclerosis et atrophicus with evidence of genital trauma.[38]

Various other presenting features have been described.[39] Because these features can be associated with a wide range of conditions they can only be considered to be non-specific symptoms. The list is long and includes:

(1) Physical complaints – headaches, abdominal pain, obesity.
(2) Mood disturbances – anxiety, depression, social withdrawal, low self-esteem, attempted suicide.
(3) Disorders of behaviour – lying, stealing, running away, defiance.
(4) School-related problems – truancy, deteriorating school performance.

Interviewing a child victim of sexual

abuse is an extremely skilled task. So far as possible the task of gathering evidence should be separated from the process of treatment. Such a pure separation is rarely possible in practice. In reality, it is not easy to balance the need of obtaining a full history (and in so doing begin the therapeutic task of healing the child) against the strictures of the current rules of evidence. This issue is discussed in greater detail in our second paper, "Obtaining Accurate Testimony from Child Victims of Sexual Abuse".

A full physical examination should be carried out in a sensitive fashion by an experienced doctor. In a female, careful inspection of the hymen is mandatory. Clear cut hymenal damage or disruptions consisting of tears, scars, and/or hymenal bruising are strongly indicative that sexual abuse has occurred. However it must be noted that definitive conclusions, based on hymenal findings alone, are potentially misleading because there is no adequate description of the normal variation of the hymen. Some would contend that adequate examination of the hymen requires colposcopic examination. [40, 41] Unfortunately its use can cause added emotional stress to the victim. In recent years attempts have been made to correlate allegations of sexual abuse with measurements of vaginal opening size. Such attempts have been hampered by the startling discovery that data on normal variations at different ages are not available. Some authors have reported that in the absence of a clear history of accidental trauma, a finding of a vaginal opening of greater than 4 mm is strong supportive evidence of sexual abuse. [42, 43, 44] Conclusions based solely on such measurements are potentially confusing since one of the authors has reported in a follow-up study that the findings change over time-in one case a 3 mm change over five days. [45] Thus a fair summary of the present position would be that while some correlations have been described, it has to be acknowledged that at this time it is not possible to state definitively that any one specific genital measurement is conclusive evidence that child sexual abuse has or has not occurred. The same can be said of specific anal physical findings.

In the United Kingdom an attempt to use anal findings as pathognomic of sexual assault led to what is generally referred to as the Cleveland Affair. The sequence of events are worth tracing in some detail since valuable lessons can be learned.

In 1986 the *Lancet* published an article entitled "Buggery in Childhood – A Common Syndrome of Child Abuse".[46] The authors recorded details of anal findings which they claimed established the diagnosis of sexual abuse. The most important physical sign was held to be that of anal dilatation. This is elicited by separating the buttocks, preferably with the patient in the knee to elbow position, whereupon after several seconds the anal canal opens and allows a view of the rectum. The more cautious clinician would have stopped short of total acceptance of the diagnostic certainty claimed by the authors for this and the other reported findngs. Such an approach would appear to have been prudent since two paediatricians who ardently embraced the validity of the findings reported in the *Lancet*, have now been judged overzealous in their actions. Those actions had led to some incredible happenings in the South Tees Health District in which they worked. Over a short space of time they made the diagnosis of sexual abuse in some 125 children (both male and female) – in some cases on no other evidence whatsoever except "abnormal" anal findings. The local police surgeon disputed many of the diagnoses so steps were taken to exclude him from the evaluation process. Unprecedented numbers of children were admitted to hospital causing acute accommodation problems. Nursing staff and field social workers became increasingly anxious about the diagnoses. Parents organised themselves into a protest group and the affair spilled over into the public arena with the popular press running a series of sensational stories and the local police surgeon announcing in a television interview that he disputed the diagnosis in a particular case.

All this led to the establishment of a statutory inquiry. It was conducted by a High Court Judge. Her report has received widespread praise from many quarters.[47] Some of the findings and recommendations have particular relevance to the New Zealand situation and they have yet to be adequately addressed.

1 The assessment of child sexual abuse needs the specialised skills of different professionals working together. These include doctors, police officers, social workers and lawyers.
2 The use of supporting materials (such as anatomically correct dolls) by those interviewing children requires special experience to avoid a misinterpretation of the findings.
3 Children should not be subjected to repeated interviews or medical examinations, and they should be examined in a suitable and sensitive environment.
4 Each case should be evaluated in its initial stages by a skilled multidisciplinary group. Such a team should have sufficient authority to co-ordinate the investigation of cases.

It is outside the scope of this paper to address these issues in any detail. However it can be noted that while many individuals in this country attempt to operate within such sensible guidelines, the present system inhibits such an approach. These specific deficiencies and the reforms required were covered in some detail in a recent comprehensive report on Child Sexual Abuse in New Zealand. The report noted that

> There is a general lack of co-ordination to the investigative process. There is a lack of understanding and expertise with respect to detection, and, using the analogy of one author, the prosecution process can be likened to the child victim participating in a game of snakes and ladders – where it is all snakes and no ladders.[48]

As well as those predominantly administrative reforms that report also addressed the necessity for judicial changes. It is pleasing to note that a number of such reforms have come into effect as a result of the Evidence Amendment (No 104) Act which came into force on 1 January 1990. In our third paper we evaluate the impact of these measures. □

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Statutory interpretation

In Lord Denning's words: "The literal method [of statutory interpretation] is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach' ": *Notham v Barnet Council* [1978] 1 WLR 220.

It is now more than a decade since those confident words were uttered. Too confident, alas. With certain notable exceptions there has been a drift back to the literalism so deprecated by Lord Denning. This is actually worse than a full-scale return to literalism, which would at least have the virtue of certainty if not of justice. The situation has now been reached where it is impossible for a lawyer to know in advance whether the Court before which his case comes will read the law purposively or through the myopic eyes of a bygone age.

Michael Arnheim
Solicitors Journal
15 June 1990

Blasphemy and religious belief

There is no firm evidence that the majority of the British population would oppose an extension of the blasphemy law. Platitudinous opinion no doubt presumes that the secular authorities in Britain so prize the right of freedom of speech that they would not countenance the extension of statute law to diminish its enriching licence. However, it is difficult to believe that this is true, since in recent years Parliament has happily endorsed the promulgation of the Race Discrimination Act which severely curtails the rights of British citizens to insult and abuse each other—as, for that matter, does the Public Order Act.

In other words, freedom of speech, *per se*, is not the issue. No doubt the question of practicality is important. Put bluntly: if Islam, then why not Scientology? But underlying that rhetorical question—the nightmare of the thin-end-of-the-legislative-wedge—is an ever-present fear. It is not merely that the law of blasphemy might be extended to include a very large number of religions and be invoked by their representatives in order to bring cases of blasphemous libel against numerous abusers of the "right" to free speech, but that such cases would actually be successful. And that, suddenly, Britain might begin to look like a rather illiberal society. . .

The *Gay News* trial [arising from the portrayal of Jesus Christ as a sodomist] revived the application and the penalties of a law that seemed to many to be in abeyance; it had not been invoked for nearly a century prior to Mrs Whitehouse's ingenious and tenacious invocation of its purposes. The success of her prosecution astounded the liberal Left. But it revealed no more than informed sociological analysis could have told them: that a sense of the sacred in holy things and scriptural persons extends far beyond that minority who actually attend religious services; extends, indeed, beyond their belief in the inviolability of free speech. For only about one in three Britons admits to having "no religious beliefs", and only about one in ten is committed to doctrinal atheism. In other words, it just might be that prosecutions for blasphemy have succeeded in Britain, and may succeed in future, because the law protects something which sufficient numbers of persons deem worthy of protection. Imagine, then, what could happen if that law were extended to other religions. . . .

The dilemma of the British state and of British society is acute. Any religious concessions, moral concessions, and particularly educational concessions which are made to conservative religious groups, Christian or non-Christian, indigenous or non-indigenous, will inevitably be interpreted as an expression of weakness, or at worst an example of official collusion in illiberal and inegalitarian social policies. Yet a blank refusal to make any concessions, even those which would, to religious conservatives, constitute no more than an extension of equal civil rights, will equally inevitably be interpreted as yet further proof of the hostility of central authority to religious values, or even as an assertion of covert racism or ethnic superiority by English liberal culture against all other cultures in modern Britain.

That dilemma, of course, is largely of the state's own making. It has insisted upon retaining its right not to draw a distinction between Church and State, even in a multi-religious society. Yet, so conservatives of every religious variety firmly believe, it has also chosen, subtly but repeatedly, to repudiate the religious bases of its own society.

British society has embarked upon a self-conscious pursuit of "cultural diversity", at least in and through its educational system, without committing itself to honour all—or indeed any— of the actual forms of cultural difference which have emerged in Britain during the last half-century. Hence it appears peculiarly resistant to real cultural pluralism, and the state especially contemptuous of real religious commitment in a way that is not true of American society and the US Constitution. This is the agony of a liberal society which neither believes unequivocally in its own values, nor in the honest implications of its pluralistic rhetoric.

The implications of that equivocation and dishonesty are truly frightening. For the one concession which liberal society's most fervent champions wish it to make to inflamed religious opinion—abolition *in toto* of the blasphemy laws—is the least likely to assuage that opinion. On the contrary, it would in their eyes be evidence of innate decadence rather than of liberality.

Conversely, the one concession which is most reasonably demanded by conservative religious groups—the extension of effective denominational status to other religious "minorities" for pedagogical purposes—is the least likely to be permitted by those self-consciously liberal forces in society, whether among the literary intelligentsia or among the teaching unions, which are most deeply committed to extending its secular purposes.

S J D Green,
Fellow of All Souls,
from "Beyond *The Satanic Verses*"
in *Encounter*, June 1990

Abolishing blasphemy

In two judgments delivered on April 9 the Court of Appeal has clarified the law in the difficult areas of blasphemy, sedition and public order offences. I suggest the way of reform is now plain to see: abolish blasphemy but strengthen the law, if indeed it be thought necessary, by including words of insult or abuse against another's religion as an offence under Section 4, sub-section 1, of the Public Order Act 1986 if the words are likely to provoke violence or public disorder. I have a confession to make. In *Lemon* (the *Gay News* case) I floated the idea of extending the law of blasphemy to include other religions as well as the Christian.

On further reflection I agree with the Law Commission that this is neither desirable nor possible. Such an extension would result in uncertainty (How many religions? What is a religion?) and would lead to further restriction upon freedom of expression.

In a plural society pledged to the protection of human rights the only acceptable restriction is if the insult is likely to provoke violence or public disorder. Let us consign blasphemy to the legal historian and concentrate on public order.

Lord Scarman
in the *Daily Telegraph*

Riot first, "justice" afterwards? Surely not! —*Ed*