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State sector employment policy

The New World Order which President Bush claimed was heralded by the United Nations action against Iraq encompasses New Zealand. Without the Gulf crisis, it would still have been so.

New Zealand in the 1990s is once again trying to establish itself as surely as it was in the first half of the 19th century. In our less-than-stable society, laws are created, experimented with and discarded. The dogma "government shall be of Laws, and not of Men" has been disestablished here.

Much of what is written therefore in the field of industrial law is for that reason quickly out-moded. What I am about to say may already be scheduled to be out of date.

In a recent case *Ministry of Defence v New Zealand Public Service Association*, ALC 5/91, 8 February 1991, my attention was drawn to ss 32 and 33 of the State Sector Act 1988. I am writing simply to draw those sections to the attention of a wider audience. They are as follows:

> 32. Principal responsibilities — The chief executive of a Department shall be responsible to the appropriate Minister for —
> (a) The carrying out of the functions and duties of the Department (including those imposed by Act or by the policies of the Government); and
> (b) The tendering of advice to the appropriate Minister and other Ministers of the Crown; and
> (c) The general conduct of the Department; and
> (d) The efficient, effective, and economical management of the activities of the Department.
>
> 33. Duty to act independently — Notwithstanding anything in section 32 of this Act, but subject to sections 51 and 52 of this Act, in matters relating to decisions on individual employees (whether matters relating to the appointment, promotion, demotion, transfer, disciplining, or the cessation of the employment of any employee, or other matters), the chief executive of a Department shall not be responsible to the appropriate Minister but shall act independently.

These sections have not so far as I am aware been judicially interpreted. Their plain meaning however is clear. In the State sector, workers enjoy not only the additional benefit of an employer bound by statute to be a "good employer"; they are entitled to have their employment contracts administered entirely independently of State policy.

The question is, is this another advantage enjoyed by workers in the State sector, or is it simply redress of a disadvantage that would otherwise have been imposed upon them?

I incline to think that it is simply an equaliser, putting them on an even footing with workers in the private sector. This is illustrated by the outcome in my recent case. A sudden change occurred in government policy — a decision to reduce expenditure by 10% by a certain date. This was claimed by the State sector employer as an unforeseen circumstance which justified breach of a clear and detailed contractual obligation to give three months' notice of redundancy.

Because of the change in policy, initiated in the Cabinet, it was said that there would be no funds to employ the workers concerned after a certain date, which was well before the end of the three month period that was provided in the relevant industrial document. The employment of the workers concerned therefore was terminated before the period had expired. It was not argued in the case, but it seemed to me that the Chief Executive Officer of the Ministry of Defence had a statutory obligation to apply normally accepted principles of equity and good conscience, and to take no account of the change in government policy. Had the Chief Executive Officer elected to abide by the registered agreement, and refused to discharge the workers concerned after Cabinet had decreed that the money to pay them would no longer be available, the results would have been at least interesting.

The guest editorial this month is a piece by Judge D D Finnigan of the Labour Court on a provision of the State Sector Act 1988 which may become of considerable significance in the changing climate of industrial law in New Zealand.

Judge D D Finnigan
Labour Court

Case and Comment

Bankers beware

Pacific Industrial Corporation v Bank of New Zealand [1990] BCL 2047; *C & F Chan v The BNZ* [1990] BCL 1735; *Prophecy Mining No Liability v Atkinson* [1990] BCL 1714

The *Pacific Industrial Corporation v Bank of New Zealand* [1990] BCL 2047 case is an important one. Thomas J granted an interim injunction restraining the BNZ from exercising mortgagee powers and expressed the view that specific performance of a contract of loan could be granted. The banks have historically taken some comfort from the contrary general rule. Moreover, it was felt that the BNZ may have entered into a fiduciary relationship with the borrower – to date also a relationship that has been resisted.

One unusual feature of this case was the willingness of other lenders to condemn the BNZ's actions. Otherwise, the arrangements were typical of any restructuring of funding. In our view, the fact which tripped the bank was that it had for a period been dealing with two companies concerned in the restructuring, then purported to withdraw the offer of finance, proposed another offer of finance but this time dealing only with one of the parties. The party who was left out of the new discussions was the one with the ability to implement a restructured funding arrangement. The BNZ then took action on the basis that there had been no agreement concerning funding restructuring by the second offer.

This case is in direct contrast to another taken earlier against the BNZ, namely *C & F Chan v The BNZ* [1990] BCL 1735. In this case, Doogue J rejected arguments based (in particular) on fiduciary duty, joint venture and estoppel and refused an interim injunction. The plaintiffs had sought to restrain mortgagee action and to require the BNZ to provide the funding necessary to complete the relevant project.

While it may be that Doogue J was not persuaded that an injunction would be a worthwhile remedy – as liabilities exceeded assets by $9.4m – the decision is important as upholding the general rule that a contract of loan will not be enforced.

Yet another decision suggests that the BNZ in the *Chan* case may have been somewhat fortunate to escape. In *Prophecy Mining No Liability v Atkinson* [1990] BCL 1714 the Court required a joint venture partner to provide a funding commitment that had earlier been agreed. Thomas J felt the parties were obliged to deal with each other in good faith. It was a breach of that obligation to endeavour to avoid an obligation to provide a funding commitment simply because the economic climate had changed to make the venture unattractive.

We believe the plaintiffs in the *Chan* case were unfortunate not to have obtained their injunction. The bank had clearly gone well beyond simply being a lender. The *Pacific Industrial* and *Prophecy Mining* cases demonstrate the dangers of fiduciary relationships to banks and we believe these three cases demonstrate a need for caution by lenders.

We suggest that all loan offers contain a specific clause to the effect that the offer, even if accepted, is under no circumstances enforceable or to constitute an obligation to provide funding. The banks could also state the hitherto obvious – "the relationship which you enter with us upon accepting a loan offer as one of debtor/creditor. This relationship can only be changed by the written and separate agreement of all parties."

Robert Fardell
and
Kerry Fulton
Auckland

Non-application of the homestead provisions (s 12) of the Matrimonial Property Act 1976 — a finely balanced case.

Gooch v Gooch (Unreported, High Court, Napier; M No 48; 26 June 1990; Neazor J) reveals that, despite the decisions of the Court of Appeal in *Evers v Evers* [1985] 2 NZLR 209 and *Jack v Jack* [1987] 1 NZLR 205, the Courts continue to be bedevilled by the question whether or not the homestead provisions of the 1976 Act apply to a particular property.

In the *Gooch* case the relevant property, bought and occupied by the spouses in 1978, was 8.18 ha in area. It was owned by them as tenants in common in equal shares. There was basically, a house on this land, a garden, and a barn some 121 sq m in area. This barn had been converted from a storage place into a workshop where the husband carried on a foundry business. His office, however, was in the house.

The rest of the land had originally been in paddocks. While the spouses lived in the house, a 2.9 ha vineyard was started. In the Family Court, the Judge regarded this vineyard as a not very successful venture which had been allowed, (as will be seen), to lapse, considered that the spouses and the children of the family had carried out work associated with it, that work connected with running some sheep and cattle on the property was shared by the family, and concluded that the main reason for embarking on these activities was one of family life-style rather than separate and distinct ventures from the household or that they were significant in their own right. It was held that the entire property fell outside s 12 and was the matrimonial home. The fact that the foundry was operated in a building on it, did not, in that Court's opinion, alter the position.

The husband appealed, inter alia,

upon this matter, pointing to the establishment of the vineyard, the establishment and operation of the foundry and the small stock business, and arguing that there was no, or no significant, household/recreational use of the property apart from the homestead.

Neazor J found that the husband intended to run his foundry business on the property and to develop the land, and that the vineyard was established in the hope and expectancy of producing extra income. The wife deposed that both had done equal work in developing it, but that it had all been largely for nothing since the vines had been pulled up after the parties' separation and the property left to revert to its original state. The husband agreed that the family unit had planted the vines and erected posts and wire, but maintained that the venture was run as a business and that a tractor and implements had been purchased for work on it.

The only income from the farm was, evidently, from wool. At peak there were nearly 100 sheep and eight to ten head of cattle. Local contractors did the shearing. There were no significant sales of stock. Indeed, the farm income was never in excess of $1,000 per annum.

The wife agreed that they had wanted the vineyard to be income-producing. McWilliams Ltd had been consulted about the grapes, but it seems that the spouses never had a contract under which that company would buy their grapes. According to her, the first two years' work on the agricultural side was done by hand, and, as far as she saw it, the viticulture side was run as a hobby, all the family working on it, each having rows of grapes to tend. The family income was not secured, in her view, from agriculture or viticulture. As against this, the husband said that considerable time had been put into the viticulture but that the parties had got nowhere because it went backwards rather than forwards and it was an "expensive experiment."

Both spouses worked in the foundry business, which an accountant's evidence showed to be a "by no means insignificant" one. In 1980, some $30,000 was produced by way of income, rising to $35,000 or more in 1983, though it fell off to $22,000 in 1985. The barn in which it was conducted was some 30 m from the house. There were a few other buildings on the property, eg, sheds for storing feed and wool, a lean-to for the tractor and implements and yards for mustering and shearing. These last were built while the parties were living on the property. A border fence round the lawn divided the home from the rest of the property; about one-fifth of an acre was, according to the husband, within this fencing. The barn, he also said, was fenced off to keep out stock.

Counsel for the wife relied on a statement by the husband when giving evidence:

> I accept what Mrs Gooch says that the entire property was treated as our home, that means including the land apart from the home and gardens, where the vineyard was and where the stock was run. The whole property was our matrimonial home.

The husband had, moreover, been asked in cross-examination whether it would be fair to say that, in fact, the lifestyle carried on at the farm was perhaps an expanded version of the good life where the family mucked in and milked cows, looked after the sheep, and did all the things around the place that needed to be done. To this he had replied, as Neazor J carefully noted: "That would be a fair assumption I think."

His Honour noted *Tonkin v Tonkin* (1978) 1 MPC 211, the *Evers* and *Jack* cases, supra, *Fairmaid v Otago District Land Registrar* [1952] NZLR 782; *Ridling v Ridling* (1978) 4 MPC 172 and *Martin v Martin* [1988] 1 NZLR 722 and held that the Family Court's decision in the present case was unassailable. His view was that an attempt had unquestionably been made to get a commercial viticultural operation under way and that vines had been planted and tended by all the family, but that it was equally beyond question that the operation had never become a commercial one. The matter might be finally balanced, but he could see no circumstance, particularly in view of the tenor of the evidence of the husband in respect of it, to differ from the Court below. In so far as the husband thought that the foundry operation should shift the balance, he was wrong. The foundry occupied one building of 121 square metres on a property of 8.18 ha. Neazor J said:

> I have no difficulty in accepting that the localised user for commercial purposes should not be seen as bringing the bulk of the land within the description in the definition of "homestead" of unsubdivided land that is not used wholly or principally for the purposes of the household.

P R H Webb
University of Auckland

Independent legal advice and s 21 agreements again — certifying solicitor a friend of the parties

In *Ward v Ward* (Unreported, High Court, Palmerston North, M 48/85, 4 September 1990, Ellis J) the husband was seeking to enforce an agreement made pursuant to s 21 of the Matrimonial Property Act 1976. His wife was seeking to have it set aside under s 21(5) for lack of independent legal advice, and, under s 21(8) as being unjust. In essence, the agreement provided that she should transfer her interest in the matrimonial home to her husband. Suffice it to say here that (i) apart from the agreement, the situation was an equal sharing one and (ii) bearing in mind the totality of the assets and liabilities, the disparity between her entitlement under the agreement and her rights under the 1976 Act was "considerable". Indeed, Ellis J was able, without much difficulty, to describe the agreement as unfair at the time it was entered into and unfair at the time of the hearing. As at the date of signing the agreement, the wife was conceding some $26,000 on the basis that the home was worth some $85,500. As at the date of hearing the home was valued at about $135,000.

The salient features of the case that are of particular interest here were as follows: a Mr T had been the Ward family's solicitor and was, furthermore, a personal friend of the parties, so the parties took separate advice. The husband was advised by a Mr A and the wife by a Mr B. Mr A drew up the agreement upon the husband's instructions. Mr B, (who was ill for a long time), advised the

wife not to sign as it involved her giving up virtually the whole of her share in the matrimonial property.

In the events which happened, however, both spouses actually attended the office of Mr T's firm, where Mr T witnessed the wife's signature on the agreement, and certified that he had given her independent legal advice. Mr A later did likewise for the husband. Mr T, what is more, placed on record, in a letter to Mr A, his concern at the circumstances in which he had been asked to witness the wife's signature.

Ellis J commented thus on the state of affairs described above:—

> I have had the advantage of reading the judgment of Smellie J in *C v C* (1985) 5 NZFLR 1 and the report of the judgment of Doogue J in *Odlum v Odlum* [1989] *NZ Recent Law* 259 [and noted also in [1989] NZLJ 198] and I agree that in assessing whether there has been independent advice, the quality and depth of that advice is an important factor. It is not sufficient merely to establish that the wife in this case knew she was surrendering all her rights to the matrimonial home. The adviser must be aware and properly informed of the facts of the case and must also ensure as best as may be that the spouse concerned not only appreciates the advice, but that he or she is in a fit state to make up his or her own mind. In other words if the situation is one, as here, fraught with tensions, distress and upset over matters relating to the welfare of the children of the marriage, the advice should include an appropriate warning that this is not the occasion upon which to conclude a property agreement patently or potentially one sided in its benefits. That is not to say that the party must accept the advice, but it should be given. In this case [Mr T] did not have the facts and figures before him and so was unable to quantify the concessions being made by the wife. His independence too was undermined by his friendship and professional relationship with both husband and wife, and the pressure applied by the very presence of the husband. His letter . . . is a careful and timely account of what happened and I think it would be only confirming his own assessment that not only was he not in a position to give independent advice, but he was not able to give more than formal advice on the terms of the agreement on the assumption that [Mr B] had dealt with the substance.
>
> In my view this is a clear case where independent advice could not be and was not given. Under the circumstances [Mr T] should not have signed the certificate. He was put under quite improper pressure by his friends. On this ground alone the provisions of the agreement relating to matrimonial property are accordingly void.

A cautionary tale indeed.

P R H Webb
University of Auckland

Appointment of new Queen's Counsel

On 12th March 1991 the Attorney-General announced the appointment of six senior barristers as Queen's Counsel. In announcing the new appointments the Attorney-General commented briefly on the background and professional experience of each of them as follows:—

Mr Paul Thomas Cavanagh of Auckland. Mr Cavanagh is aged 52 and was admitted to the bar in 1963. He practised as a member of a firm in Auckland until he began practice as a barrister sole in 1976. Mr Cavanagh is well-known for his work in local government and planning law and also has a wide general civil law practice.

Mr John Oswald Upton of Wellington. Mr Upton is aged 50 and was admitted to the bar in 1964. He has been a barrister sole since 1986. Mr Upton has conducted a wide general litigation practice with emphasis in insurance law. He has also been a member of the Crown Prosecutor's Panel in Wellington for a number of years. He has also appeared in senior Courts in Australia and often in the Pacific Islands.

Mr Michael Robert Camp of Wellington. Mr Camp was admitted to the bar in 1965 and has practised as a barrister since February 1990. He has had a wide general civil law practice and has appeared in a number of well-known defamation actions.

Mr Anthony Alan Lusk of Auckland has practised as a barrister sole since 1989, having been admitted to the bar in 1967. He is aged 47. Mr Lusk is an acknowledged specialist in the area of insurance law.

Mr Julian Grosvenor Miles of Auckland. Mr Miles is aged 48 and was admitted to the bar in 1967. He has practised as a barrister sole since May 1990. Previously a partner in a large Auckland law firm, he has conducted a wide range of civil litigation with some emphasis on the law of intellectual property and defamation.

Dr William Gillow Gibbes Austen Young of Christchurch is the youngest of the new appointments as Queen's Counsel. He is aged 38 and has practised as a barrister sole since April 1988. He has a wide practice in both the civil and criminal jurisdictions. □

Attorney-General

Interview with Hon Paul East Attorney-General of New Zealand and Leader of the House of Representatives

I thought the first question Minister would be about your family background, starting before the beginning as it were with your parents and grandparents. For instance when did your family first come to New Zealand?

Well on my father's side my family came in the middle of the last century and settled in the Christchurch area. On my mother's side of the family they came at about the same time to Auckland. In fact one of them was one of the first European children born in Auckland. So they have been here for quite a while on my mother's side of the family.

I see, is that your grandparents or earlier on each side of the family you are talking about?

No. No. No. That is my great-great-great-grandparents – four or five generations back.

What were the family backgrounds?

Well my father was a lawyer before me and he practised in Rotorua although sadly he died almost 20 years ago, in fact not long after I qualified as a lawyer. I had only been in practice for a short period before he died. His father was a newpaper editor and they lived in a number of cities, in Christchurch, in Taranaki and in Whangarei. I think the last newspaper that he was editor of was in fact the *Northern Advocate* in Whangarei. Then his father before him was an Anglican Minister in Christchurch. On my mother's side, my mother's father was an engineer who lived a good deal of his time in America and South America as well as New Zealand; and his father before him had a similar sort of background in engineering and living in other parts of the world.

It sounds as though you had quite an adventurous family history on both sides.

Well, yes except by the time I was born I only had one grandparent alive so I didn't really get to know them in a personal sense.

Well, where were you born?

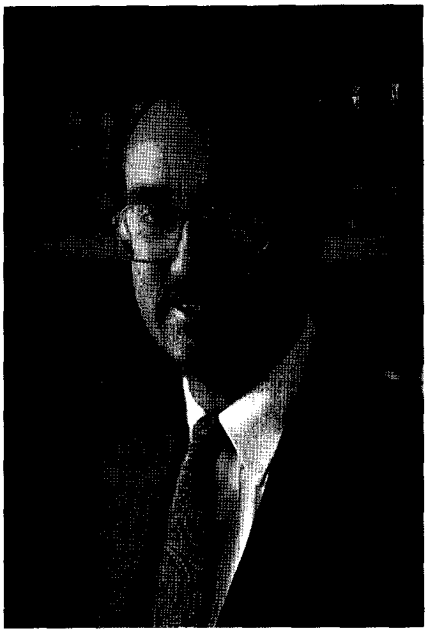
I was born in Opotiki, in 1946 and my father had qualified in law in Auckland and he came down to join a practice in Opotiki in the 1920s, – late 1920's I would think it would be. Then he moved to Rotorua shortly after I was born, he joined a legal firm there, and practised there in Rotorua until his death in 1972.

Where did you go to school?

Well I went to the local schools in Rotorua until secondary school and then I was sent away to boarding school. My two brothers before me had been sent to Kings College in Auckland, and I was a boarder at that school until I went on to University in Auckland as well and studied law there. I started in 1965.

Jack Northey would have been on the Law Faculty then.

Jack Northey was the Dean certainly, and a very powerful figure in the Law School and on the university campus.



Brian Coote was a professor who I remember very well also because he was a very intellectual figure. He was then a man of some reputation given his expertise in the contract law area, and the thesis that he had just written when he was in England which would have been referred to favourably in one or two English cases.

What further education did you have?

Well after I finished at the Law School in Auckland, I like most people who when they have finished their qualifications they plan to travel, and I thought I would combine study with travel so I went to University in the United States for a year and did a Masters Degree there, which co-incidentally is where I met my wife. That was at the University of Virginia in Charlottesville. I think at that time

I was probably about the second or third New Zealander to attend that University, but since then there have been a considerable number. In fact I think now it is probably one of the most popular of the North American Universities for New Zealanders to study at.

Was Geoffrey Palmer there at one stage?

Geoffrey Palmer came to lecture a little after I had completed my degree. Just after I left I think he finished his study at Michigan or Chicago, I am not sure about that. David Baragwanath went there. I am trying to think of who else, anyway John Priestley and Bruce Robertson the Judge was there I think the year after I was there.

What years are these we are talking about?

We are talking about 1971/1972.

You say you met your wife there. Were you married while you were in America?

We were married just as I was finishing my degree there. She had studied at the same University. She had a Bachelor's Degree in Journalism and she had just finished a Master's Degree in Anthropology.

Is she American?

Yes, she is an American.

When you returned to New Zealand did you go into practice with your father?

Yes. Well, prior to going to America I had worked in Auckland and I studied part-time for the last three years of my degree. That was the normal thing at that stage, although I was I think one of the last of the students at the time I went to university before law moved into a full time course. I had practised with Morpeth Gould & Co where I had had the good fortune to be the clerk to Mr Justice Barker. I found that a rewarding and challenging experience and then some time after I qualified I went to work with Jim McLay to help him. He had just at that stage purchased, or just at that stage taken over, if that is the expression, Peter Williams' practice, so I worked with Jim who is a friend of mine from school days, when Peter went out as a Barrister sole. Then from there I went to North America and then I really came back, just shortly after my father had died, to Rotorua. I was not really thinking it would necessarily be permanent. I just came home, for a period at least, because my mother was living in Rotorua by herself; but as events transpired I have never quite got around to leaving again, and I am still here almost 20 years later.

It has been your home base?

It has been home base. It was always home base. It was where I was brought up and it is where we all consider home to be.

In terms of time I suppose you have spent actually more days in Wellington.

Probably in recent years that would be the case.

When you were in practice what was the nature of the practice?

I practised in the Courts on a wide variety of matters because in a place like Rotorua there was not the ability to specialise in one particular area so I practised in the Courts over a wide area.

In the area that used to be called the Magistrates' Court?

Yes indeed. In fact I was in front of the Magistrates' Court in Auckland when there were some pretty fierce Magistrates who one appeared in front of in fear and trepidation.

Was Freddie McCarthy, as the only name I recall, there then?

I think he would be considered to be one of the kinder ones. I won't mention any other names.

So about how long did you work in law before you went into politics?

Well I started in Rotorua towards the end of 1972. I became a partner in the firm about a year later and I practised really up until I came into politics in 1978 and in fact for a period after that on a reasonably limited part time basis. I actually started in politics at a local level in 1974 when I became Deputy-Mayor of Rotorua. That was really because in those days in the City Council business it was on a part time basis, the meetings were in the evening and I found that to be an interesting way of spending my time.

Well, you started in local body politics as so many have, and were you at that time already a member of the National Party?

Yes. My family has always been involved in the National Party. My father actually was a Dominion Vice-President of the National Party in the 1950s, so my sister and brothers and I can remember working carrying scrutineer forms around at election campaigns at a fairly early age.

The next question is why did you go into politics, was it just the family?

Well that is a very good question, and it's one that I find very hard to answer. I suppose there was an element of frustration that led me into politics both locally and in national politics. Seeing things that were being done that you didn't agree with and would like to see being done in a different way.

When you entered politics you would have been a backbencher for the usual inaugural period?

I was a backbencher for six years from 1978 to 1984. A good deal of that time is really spent learning the system. There is an awful lot to learn if you are new to politics and the parliamentary process. The second term as a backbencher I suppose the most interesting assignment the one I found the most challenging and enjoyed the most, was chairing the Select Committee on the Official Information legislation. That was a major project which probably took some 18 months from the time we started looking at the legislation to the time it was finally passed into law. It was a very thorough job and

I think the Act as a result has proved to be a success and a workable piece of legislation which everybody is pleased to see is on our statute books.

On the relative importance of being Chairman of a Select Committee; in the Parliamentary system do you feel it really is of some importance in terms of shaping legislation, of exercising some influence?

Yes, I think it is. In opposition you have very little opportunity really to change legislation to any great degree – although that is in fact changing and that is a good thing. In the time that I have been here I think the Select Committee process has changed quite markedly. I think it started during the period when I was a government backbencher. Select Committees now have a much greater ability to amend or change legislation to make it more workable and in fact to react to the public's submissions that are made on legislation and to improve it. Now that has been a developing trend probably over the last 10 to 12 years. So that means that all members of Parliament, through the Select Committee process, can play a valuable role in improving legislation. Indeed also in improving the system of government because of course one of the Select Committee roles, which is a little neglected and I think many of us would like to see more emphasis on this role, is to examine Government Departments and agencies of the State to make sure they are doing their job properly, and effectively spending the taxpayers' money, and not abusing the powers and authorities that they have.

The Select Committee procedure is one of course that is most commonly thought of in terms of members of the public pressure groups, interest groups call them what you will, having the chance to come along and say their piece. Sometimes the impression is given that this is really more for the media in the hope of general influence rather than hopes of effecting a specific change. But to what extent are they listened to?

They are listened to and I think there has been a change. I think that it would be fair to say maybe 10 or 12 years ago that a government brought legislation into Parliament, it went to a Select Committee and very little was changed. Now we have quite substantial changes being made in the Select Committee process. There is not the same political loss of face now for a Government to back down or to amend legislation quite substantially during the Select Committee process.

Did you have any other particularly interesting experiences when you were a backbencher?

I am sure I did, but I think the Official Information legislation for the period the National Party was in Government was the most memorable.

Well what about being in opposition? Is that really as frustrating as many people think?

By comparison to holding the reins of Government it is a very relaxing period of one's life; and of course you are in the position where you are not making political decisions that are likely to cause anguish or disquiet in the community. So that in itself makes it a less demanding job than being in Government. I think though there is an opportunity to play a useful role in opposition depending on the responsibilities that you have. You can do that through the Select Committee process, or by bringing up important issues of the day and trying to focus public opinion on them.

How much time and effort as an MP do you actually have to put into constituency problems? I mean not just seeing that you maintain a political base but also dealing with, well, voter questions. First of all do you have to put a certain amount of time and effort into your political base so that local people haven't forgotten you?

If you neglect your own electorate then you really are starting to sow the seeds of your political downfall, and there have been many examples of that over the years. It is important even if people have relatively large majorities. It is very important that they keep in close contact with their electorate. In our constitutional system it is an important part of the job of a parliamentarian, whether they are a Cabinet Minister or a backbench member of Parliament, that they represent the interests of their constituents and ensure that they are properly served by the Government and that issues of concern to the electorate are addressed by the Government and Parliament. Almost all the Members of Parliament would have clinics in their constituencies on a regular basis where they meet people who have problems that they wish to bring to the attention of their MP.

So you don't even get your week-ends off?

No, generally those clinics are held on a Saturday and take most of the day.

Now since the 1990 election you have become Leader of the House and Attorney-General. Those two offices would appear on the face of it to have little in common so perhaps we could talk about them separately. First of all what about Leader of the House. Could you tell us what the job is in practice?

Well, the job of Leader of the House is to ensure that the Government's legislative programme is passed by Parliament. In doing that you have to make sure that Parliament sits on a regular basis so that the legislation can be considered, and that it can fulfil its other roles of scrutinising the government expenditure. So that involves a close relationship or link between the Cabinet and the rest of Caucus, and it involves giving priority to legislation so that what the Government considers to be the more important matters are addressed at an early stage. Then there are some activities that have a timetable which by law requires them to be passed by a certain date, more particularly the Budget, and there are standing orders that of course require the Address-in-Reply debate to take priority over other matters. Things like that. So there is something of a balancing act in terms of ensuring that there is a steady flow of work for Parliament

to address and that important matters are given priority.

I suppose in a real sense therefore your job entails you in direct contact, in establishing priorities, with all the members of Cabinet.

That's right because at the moment I have before me papers from all the Ministers asking for 180 bills to be passed in this session of Parliament which is going to be an impossibility. So then one has to sit down and set priority for those measures.

They would all like them to be done tomorrow?

Indeed yes. Setting priorities also involves working with the Parliamentary Counsels' office, for which I am responsible, to ensure that they have the ability to draft the legislation.

And then there is the role of Attorney-General, who of course is nominally and I don't mean that in a dismissive sense, nominally the leader of the profession. How do you see that?

I think for any lawyer that is an immensely rewarding role to have and I have thoroughly enjoyed the few months that I have had been in this position and I am looking forward to the work that lies ahead. For any lawyer as I say that has been brought up in the law it is a thrill to have that responsibility as Attorney-General.

As Attorney-General is there any call on your part to ever appear in Court?

That's to be seen. It is unusual for it to happen in New Zealand. One of the reasons that I would be a little diffident about that is that under our adversarial system of justice for every winner in a Court case there is a loser or there generally is.

The Crown doesn't always win!

The Crown certainly doesn't always win and nor should it. But one of the areas where the Attorney-General does have a traditional role is as the protector of charities so perhaps there might be an issue that came up there in the future which would allow an appearance although I cannot say that I am actively seeking that. Of course in the United Kingdom it is the convention that the Attorney-General prosecutes all poisoning cases and we haven't had any of those in New Zealand for many years. I am not sure whether that has anything to do with the advent of cremation as an option, but I couldn't see myself being involved in that area, no.

You mentioned the Attorney-General in the United Kingdom and that underlines a difference in the office. It has the same title but we do not have anybody here with the status of the Lord Chancellor do we? Our Attorney-General is the nearest thing it would be to a Law Officer who sits in Cabinet although not in our case of course also a member of the judiciary.

Yes, that is right. The division in Britain is very different from here with the Lord Chancellor as the actual Cabinet Minister and the Attorney-General not a Cabinet Minister.

One of the other matters that is of great interest to people is the relationship of the functions of the Attorney-General and Solicitor-General. I think there is often a misunderstanding. Could you just comment from the experience you have had so far.

I think there is in fact a misunderstanding. I have already had approaches from members of the public asking me to commence prosecutions in certain areas – the campaign for nuclear disarmament is a case in point – whereas in fact the legislation specifically allows for the duties and responsibilities of the Attorney-General to be delegated to the Solicitor-General. That is quite properly the course of action to be taken, particularly when there is any political overtone to a decision that might have to be made. So you are right there is some confusion in the minds of the public about that role. I think it is the way it should be. The Attorney-General is there as the principal legal adviser to the Government of the day using the resources of course of the Solicitor-General and the Crown Law Office, but acting as a link between that office and the Cabinet and Government Ministers. But it would be wrong for the political appointee such as the Attorney-General to be actively involved in making decisions on who should be prosecuted and who shouldn't be prosecuted and such matters.

One of the other main functions of the Attorney-General is in the appointment of the Judiciary, and since you have been in office you have had occasion already to appoint a number of Judges.

Two High Court and one Court of Appeal appointment.

Is that a responsibility that is personal to the office?

Yes. It is. In fact the convention is that it is the Attorney-General who makes the final decision on appointments to the Court of Appeal and to the High Court. The appointment of Queen's Counsel is made in conjunction with the Chief Justice, but the High Court and Court of Appeal appointment is a decision for the Attorney-General alone, although of course it is proper and indeed I have made a point of consulting widely before making those decisions. The convention is that the appointment of the Chief Justice is made by the Prime Minister. Judiciary appointments are not in any way government appointments, and it should be made clear that I see the role of appointing Judges that the Attorney-General fulfils, as being something distinct from government decision-making. In fact these matters are not discussed by the Cabinet, or by me with my ministerial colleagues. As a matter of courtesy I have notified them of the appointments I have made before they are publicly announced, but that is as far as the involvement has been.

And when you say that you consult widely obviously the Judiciary, Chief Justice and the Law Society.

The Chief Justice, the President of the Court of Appeal and the other

members of the Judiciary, the Law Society, and the Bar Association.

The appointment of High Court Judges and Court of Appeal Judges is different from the convention in respect of District Court Judges as I understand it.

Yes, for District Court Judges the appointment of those is the responsibility of the Minister of Justice.

One of the questions which will become of greater interest if there is a considerable increase in the jurisdiction of the District Court consequent on the Court restructuring, is whether that is in fact an appropriate situation to continue. I am not asking you to crystal-ball gaze but has that been considered to your knowledge?

No, but I think that is something that we should address. Perhaps there is a role for the Attorney-General and the Minister of Justice to discuss and consult for District Court Judges judicial appointment because obviously the amount of consultation the Attorney-General has done and does, would be of use to the Minister of Justice. I think there is some sense in doing that. We shall have to look at that.

Well that is looking into the future but it does lead on to the next question about Court restructuring. It has been not unusual in the past for the Attorney-General and the Minister of Justice to be the same person. As far as Court restructuring is concerned whose primary responsibility will that be?

The Minister of Justice has the responsibility for the legislation which will change the structure of the Courts although the Attorney-General has a role, and that's my job, to make representations on behalf of the Judiciary, to make sure that their concerns are taken into account.

Any indications at this stage of when something might be done? The Leader of the House presumably has some control over the legislation.

Yes, I don't anticipate — I certainly hope that the Bill will be passed this year.

That's the Bill that is already there?

Yes, and I don't — without pre-empting — I had better not pre-empt what might happen, as the Bill is not in my hands.

So we should just leave it on the basis that eventually the responsibility for the content of the Bill is with the Minister of Justice. Two other practical matters are the question of wigs and gowns, and of course the issue of Appeals to the Privy Council is a matter of continuing moment. First, do you have any views about the wearing of wigs and gowns?

The issue of wigs and gowns because that has become a matter of topical interest particularly given that one senior Auckland practitioner, together with others, has lodged a petition before Parliament calling for the wigs and gowns and other items of distinctive clothing to be dispensed with in the Courts of New Zealand. I have concerns about doing away with wigs and gowns. It is not the least that once that decision is made you will never bring them back again. I think in major civil trials, and in jury trials of a serious nature, it is appropriate for people to wear wigs and gowns. But at the end of the day I think it is a decision for the Courts and the profession to make. It is not for the Government to impose a decision one way or another. I think it is going to be an issue that there is going to be some debate about during the course of this year because there are a lot of people talking about it. What I have expressed is my own view. At the end of the day it may well hold no more force than the views of any other practitioner. But for what it is worth I think that if we dispense with them then we will never see them back again, and we might well regret the day. So in serious trials, whether civil or criminal nature, I think wigs and gowns should be retained.

What is your present view on the right of appeals to the Privy Council?

I might well be considered to be something of a traditionalist or a conservative in these matters, but I believe that the Privy Council has served New Zealand well. There have been one or two examples where most of the country has disagreed strongly with a decision and the most recent example of that would be the Samoan overstayers case, but putting that to one side I think the Privy Council has served New Zealand well, and I think at least in the medium term it is an institution that we should retain as our final Court of Appeal. The reason I say that is in a country of 3.4 million people we really have to ensure that we have a final Court of Appeal that is objective, dispassionate and removed from our — when I say removed I mean detached from — the Court structure beneath it. That is difficult to do in a country of our size. When people say that we should look to Australia for some sort of joint Australasian Court I see great difficulty in that given particularly the federal system of government in Australia.

But surely if the objection to the Privy Council is being non-resident it seems absurd to replace it by another non-resident Court.

Yes, the same thing applies to Australia. So we are in the situation that by virtue of our population it is hard to establish another — and I think we all agree there should, and I certainly hold the view that there should be — a third tier, a second right of appeal for the most serious cases that can come before our Courts. So it is difficult with our population size. Yet we are larger than some of the island nations of a few hundred thousand who naturally look to an overseas institution such as the Privy Council to provide their final right of appeal or even to New Zealand. So we are in that in between position but I still think that we have been served very well by the Privy Council and I don't want to see the right of appeal removed at this stage.

Do you want to comment on the alleged war criminals issue?

Well I simply say about that, that

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Books

News Media Law in New Zealand

By J F Burrows

Oxford University Press, 1990 (3rd edn). ISBN 0.19.558208-X Price $49.95

Reviewed by John Stevenson, Barrister and Solicitor of Wellington

Congratulations to Professor Burrows. In *News Media Law* in New Zealand he has achieved his difficult objective of writing a book which must be of appeal to the media and to lawyers who practise in that area.

He has presented a wealth of invaluable material in a refreshingly readable and interesting manner.

The book skilfully combines a high quality of academic research and knowledge with practical examples, many of which have been compiled from media experience in New Zealand.

As a lawyer who has now been practising in this area for some thirty years, I benefited from the "refresher" of reading the book. I came across several aspects of the law which I did not know and my memory was prompted on many others. I think the fourth edition will become a companion of the practising lawyer. Undoubtedly, its clear language and practical examples will be plagiarised in many future legal opinions.

Likewise, I perceive the book as being compulsory reading for all editors and journalists – especially those who may wish to publish material running close to the wind. Already on a number of occasions, editors or journalists have quoted to me contents of the book in a manner which shows that they have clearly grasped and understood its contents.

Fear of the law can curtail publication. I believe, the law is often less restrictive than perceived by the media. Whilst Professor Burrows at times waves a yellow caution flag, which is very wise, he provides the key to the knowledge of the law which should remove fear and enhance the ability of the media to publish.

At the risk of repetition, in my view, the standard of the research and its presentation at both the conceptual and practical level is excellent. The inclusion of the large number of New Zealand cases and examples makes the publication particularly applicable and attractive to the New Zealand reader.

Being a reviewer and hoping to express a "vitriolic" criticism as "fair comment", I sought for some fault or error. No such luck and the vitriol will have to be reserved for something else.

Media Law in New Zealand is an important contribution to both the law and the media. I have no hesitation in recommending in the strongest terms that all those involved with the media or the law read this book at the earliest opportunity. □

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as a lawyer I have serious misgivings about holding criminal trials in New Zealand for war crimes that occurred over 50 years ago on the other side of the globe. I think in those circumstances it would be extraordinarily difficult to hold a fair trial. There would be enormous publicity and media interest which in itself would create the risk of prejudice. The memories of those involved must be, after that period of time, suspect; and issues such as identification I think would create great difficulty. As well as that we would have to pass retrospective legislation of a criminal nature to make offences that took place a long time ago in another country offences within the New Zealand jurisdiction; and as a lawyer as I say I have grave misgivings about that course of action. I think however we do have a responsibility, having been presented with evidence or having been presented with information from the Simon Weisenthal Centre that there may in fact be persons involved in war crimes living in New Zealand, we have an obligation to make enquiries to see if that is so. My own view, as the preferred option, would be that if the countries in which these war crimes occurred, and it could be established that we did have some war criminals and the war crimes took place in overseas jurisdictions, that we would do all that we could to facilitate the extradition of those war criminals to those countries. But I say again that I think it would be the least desirable option to actually hold criminal trials in New Zealand.

Anything else about your office of Attorney-General you would like to comment on?

I would simply like to say that I think that we are extraordinarily lucky in New Zealand, that we are so well served by the judiciary in our Court structure, that we have Courts that have always been fiercely independent and we must be the envy of many other countries. I see in my own small way as the Attorney-General a role in doing all I can to ensure the independence of the judiciary and to ensure that the high standards that we have are maintained. I think that is the challenge that I have as Attorney-General and the one that I look forward to the most. □

Intent in law and medicine

By Mr G R Gillett MSc, MB, ChB (Auck), DPhil (Oxon), FRACS, Senior Lecturer Department of Surgery, and Senior Lecturer in Medical Ethics, University of Otago

This article is based on a paper given by Mr Gillett as the 1989 Kennedy Elliott Memorial Lecture to the Wellington Medico-Legal Society. The author considers the differences of approach to medical ethics based on intention as being the critical factor, compared to consequences being regarded as the crucial issue, in the moral assessment of medical situations. A number of hypothetical cases are looked at for purposes of illustration, and reference is made to the situation at National Women's Hospital that led eventually to the well-known Cartwright Report. He also considers what he calls the vexed question of euthanasia. Mr Gillett's conclusion on the general ethical question is that good medicine, when viewed as a moral activity, is based on the intentions of the human heart and the thoughts of the practitioner.

Intent is a central concept in legal theory and in medical ethics. No one seriously debates its importance in questions of criminal law but it is otherwise in medical ethics. There is a sizeable body of opinion that limits the moral assessment of medical situations to the outcomes or consequences that flow from what is done. Yet others seem to regard doctors as almost uniformly exhibiting malign intent with the presumption that they should be treated on that basis by their "victims" and by society in general! But I believe that medicine can only thrive on a foundation of good intent to act in accordance with professional standards of excellence. If this is done patients ought to be treated with respect and enabled to exercise their rights with respect to medical care. I will explore the rationale for the role of intent in general legal theory in such a way as to suggest its central importance in medical ethics. This has implications for questions of clinical responsibility, the current climate of medical practice and the vexed question of euthanasia.

Mr A is retired and looks after his ailing wife. Each day at 4 pm he gives her her afternoon medications which include an injection of insulin. One day he gives her her medication and goes off to prune the roses. On returning, he finds her dead. Distraught he hurries to the kitchen and suddenly realises that he has given her ten times her normal dose of rapid acting insulin. A hearing finds that Mrs A died of the injection but no charges are pursued.

Mr B lives three houses away from Mr A. He follows the events surrounding Mrs A's death with close interest. Four months later he administers a large dose of digoxin to Mrs B who dies as a result. He is somewhat surprised to find himself charged with and convicted of murder (or culpable homicide).

However justified the decisions in these cases, it is clear that the crucial issue on which they have been distinguished is that of intent. Mr A and Mr B did very similar things but Mr A was deemed innocent becuse he was not thought to intend to kill Mrs A whereas Mr B was judged to have such an intent.

Dr C approaches Mr D with a heavy dose of opiate pain relief and says "Mr D, I think you know that we have discussed the risks of this medication and I have told you that at the dose we are now using there is a chance that it could interfere with your breathing and you might die. Are you happy for us still to use it?" Mr D replies "I understand perfectly doctor and all I am concerned about is keeping this pain under control the way you have been until now." Dr C injects the drugs she has brought and, forty minutes later, is called to certify Mr D's death.

Dr E approaches Mrs F and says "Here we are with your injections Mrs F, don't worry they will take the pain away". Mrs F mumbles something about feeling unhappy with morphine. She dies after a respiratory arrest some forty minutes later.

Dr G approaches Mr H and says "well, Mr H, we have discussed the fact that you want to put an end to your life and I have brought the drugs along to do that for you. Do you still feel the same?" Mr H responds "Yes, doctor" and she proceeds to give him a lethal injection of barbiturate and curare.

We have, traditionally, taken the stand that there is a vast difference in the actions of Dr C and Dr G, just as there was between those of Mr A and Mr B but we must ask whether we are right to take this stand. The attitude evinced clearly turns on the notion of intent as an important factor in medical decisions. I believe that the case of Dr E and Mrs F reveals other problems surrounding the doctor's intent similar to those the Cartwright Report has brought to our attention.[2]

But in order to address the issues we need to be clear about the nature of intent.

Intent and assessment

Many philosophers view intent or the intention with which an act is committed as a kind of inner state or event which causally produces an action. The same view is evident in legal debates about the existence or otherwise of the requisite act of will in a disputed event where the "evidence lies buried in another man's consciousness into which no human being can enter".[3] But, quite apart from its philosophical difficulties, this view fails to explain why we place such ethical importance on intent,[4] after all, indigestion, a lump in the throat and electrical disturbances in the brain are all inner states and events but none of them has a role similar to that of intent in moral praise and blame and therefore in the intuitive constraints on punishment.

The intuition that intent is at least as important as consequences in assessing the morality of an action is well expressed by Elizabeth Anscombe: "If someone really thinks, in advance, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration – I do not want to argue with him; he shows a corrupt mind".[5] Anscombe underscores the fact that an adequate moral justification for punishment must take account of *desert*, and desert is clearly linked to intent rather than outcome as we noted in the cases of Mr A and Mr B. A perspicuous analysis of intent should reveal this link.

Intent is, in fact, inherently tied to our moral assessment of a person; our judgment that Mr B intended to kill Mrs B takes us to the core of his character and reasoning in a way that other facts about him do not. An intention to act thus and so is the conclusion of a process of reasoning (however brief) in which the character of an agent disposes him to favour certain reasons and purposes over others. The fact that an agent's evaluations of and reasoning about a situation are intrinsic to the intentions he forms implies that actions are quite distinct from mere responses.[6] On the basis of such weighting of reasons he forms a conception which guides and directs his behaviour (as long as he remains committed to it). This conception and its prosecution is the essence of intent and for this reason, even when it is formed with less than full deliberation, it reveals profound truths about the individual concerned. Indeed if we are asked what sort of a person somebody is we can respond by indicating the ways in which he typically reasons about certain situations or the intentions with which he typically acts. For instance, we convey a great deal about George by saying "George is the sort of person who, if he saw an old lady having difficulty crossing the road, would look to see if there was a suitable audience before he decided to help her." George's reasoning about what to do clearly reflects his own wish to create certain impressions to his own credit rather than any genuine sense of charity. Our vignette implies that an apparently worthy intention on George's part will often mask a deeper intent which is far less admirable. This "takes us to the heart" of his character in just the way suggested above. Intent therefore emerges from and evinces the character of an agent in a way that is highly relevant to our moral assessments of that agent. The link between character and reasoning is further explained when we pursue the relation between reason and intention.

The ethical need for reasons

A reason to act thus and so must be endorsed by an agent in order to affect behaviour.[7] However compelling the reason may seem to be, an agent can ignore or devalue a reason in a way that sharply contrasts with an efficient cause. If, for example a person's action is caused by something other than her own reasoning then we regard her behaviour in a completely different way from what we otherwise would.

> H is a 26-year-old male with a background of offences heard by the juvenile court but has not had a conviction since he was 18. He has recently begun beating his de facto wife and his most recent attack has led to her admission to hospital. He has refused medical or psychiatric help and she has been induced to lay charges of battery sufficient to cause grievous bodily harm. In the process of investigation it emerges that these episodes of violence come on quite unpredictably and without relation to preceding circumstances. H begins to make aggressive and sometimes abusive remarks and then his behaviour worsens to the point where he beats her up. His aggression subsides as inexplicably as it begins at which point he characteristically goes to sleep. H proves to have epilepsy and his aggressive episodes disappear once he is started on anti-epileptic medication.

Notice that H's behaviour is here caused by "inner events" in the form of electrical activity from the brain but that inner events of this kind are clearly not what we want when we are discussing intent. We intuitively realise that H plays no role in the origin of this behaviour except that he is the vehicle through which certain aberrant brain activity expresses itself. But what is it about reason that entails that H does have a significant role to play? Because an agent must endorse a reason for it to affect her behaviour, reasoned activity is differently constituted from merely responsive activity;

> The more an action is described as a mere response, the more inclined one would be to use the word "cause"; while the more it is described as a response to something having a significance that is dwelt on by the agent, or as a response that is surrounded by thoughts and questions, the more inclined one would be to use the word "reason" (S Hampshire "Some difficulties in Knowing" in *Philosophy as it is*, p 39).

When we think about reason in this way, it becomes clear that it is not the preserve of an elite; the merest schoolchild, slavishly imitating the teacher in an attempt to master arithmetic can reject the claim of reason: "But Jenny, two and two always makes four", "I don't believe it!". It is clear that nothing can compel Jenny to respond with "four" until she accepts or agrees to comply with the structure of reasoning that constitutes mathematics. When she does so she will become a reasonable person

with respect to this area of human functioning and, in doing so, be changed as an agent.

Therefore intent has a special place in our understanding of persons in that intentions stand at the conclusion of trains of reasoning (however brief) in which what has significance to an agent guides or directs her behaviour in ways that depend on her character and the commitments she makes. The intentions she forms spring from her allegiances, those things she holds dear and takes to be constitutive of self. Intentions therefore reveal a great deal about a person. One commentator put it thus:

> Out of the heart of a person proceed the evil thoughts and fornication, theft, murder, adultery, covetousness, wickedness, deceit, sensuality, envy, slander, pride and foolishness. (The Gospel of Mark, Ch 4, v 4)

These considerations make it clear that intentions are unhelpfully likened to "inner events" in general because they are only important in virtue of these wider links to the psychology of the individual concerned. Wittgenstein remarks:

> Why do I want to tell him about an intention too, as well as telling him what I did? — . . . because I want to tell him something about myself, which goes beyond what happened at that time. (in *Philosophical Investigations*, p 659).

Marks of intent

We need to distil one or two further "marks" of intent from this brief theoretical discussion before we turn to more practical issues.

First, intentions are conscious: they involve "a distinct state of awareness".[8] To weigh circumstances in the light of their significance and then maintain a reasoned commitment to a course of action which maximises outcome in terms of one's own values and desires is, *inter alia*, to take conscious note of what is around one. This is because the successful prosecution of most actions requires adaptation to context and contingencies in the environment and this, of course, implies consciousness of what is going on. That is not to say that intentions do not reflect deep-seated motives and poorly understood dispositions to act and react in certain ways but merely to point to a feature of acting with intent that distinguishes it from automatic or uncontrollable behaviour.

Second, intentions are reflected upon in the light of certain norms. A thinker forming an intention can always ask "But ought I to act that way?" This distinguishes intentions from the ordinary run of inner events not only because of the special character of reason/reflection but also because they are reasoned about with respect to an evaluative framework (which may either be prudential or moral in its content). These reflective and conscious aspects of action can be illuminated by defects of intention.

An intention can fail because the knowledge on the basis of which it is formed is defective. If K intends to sell you a functioning car battery but instead gives you a dud because somebody stacked them wrongly then he cannot be said to have intended to cheat you. he did not know (nor should he have suspected) that the battery he gave you was wrong. The parentheses introduce a further element to ignorance beyond the brute fact of not knowing this or that. Where there are actions of suitable moment involved we insist that certain knowledge be gained before the agent embarks upon them. I am required to check my mirror before I pull away from the kerb because if I cause an accident by so doing it is not sufficient to say "But I did not know anyone was coming"; I must, to exculpate myself, prove that I could not have found out because the relevant fact was concealed from normal efforts to gather knowledge on the score. Thus we might hold a person guilty because she was careless or reckless in the way that she did something. Even though she might truthfully claim that the knowledge showing the harm that would be caused was not in her possession we would then judge that she *should* have appraised herself of it before she acted in the hazardous way that she did.

An intention can be defective because the reasoning that would normally produce it is deficient in some way. If a woman concludes that her mother is possessed by a demon and that a sharp wooden stake driven into her chest at midnight will cure her of this ailment then, arguably, we would have to look hard at whether she intended to kill her mother. Her evident insanity could plausibly be held to disrupt her ability to form a reasoned intent to act in the way that earns our justified censure.

An intention can be overridden by an occurrent impulse. Consider the following case.

> A young man on remand but with a violent record is in a bar. He has resolved not to get involved in any trouble but he is grabbed by the arm and instinctively aims a damaging punch at his assailant's throat. His assailant dies from a fractured larynx.

Here it would be hard to argue that he intended to kill. In Anscombe's terms this act is surrounded by thoughts and questions which tell *against* it. What he did is therefore more likely to be responsible than intentional; if he had acted with intent he would probably have acted differently.

We can identify a further failure of intent where primitive or immature motives interfere with "all things considered best judgments" about what one should do.[9] Often moods, reactions and character traits which run quite counter to a person's mature considered choices and intentions will intrude upon his behaviour. For instance, a young man who has never learned to deal with his own frustrations or inadequacies may evince a wounded self-conception to the point that he tends to strike out whenever he feels challenged or insecure. This may lead to a pattern of domestic violence about which he feels genuine remorse but which he cannot escape. It is perpetuated by a series of unsatisfactory and over-dependent relationships each of which crumbles because of his violent response to any inability to cope with situations. Here the lack of conscious or reflective self-understanding subverts his ability to conduct himself with considered intent in a way quite unlike the anti-social tendencies of a more studied criminal.

In each of these types of case we discern a defect of the ability to act

with a clear intent; "a mentally abnormal defendant, who has difficulty in controlling his anti-social impulses or appreciating the moral significance of his actions, is already less culpable in the law's evaluation"![10] Such defects help to define the role of intent in our understanding of behaviour. It emerges that we can ascribe intent where an agent is able to take cognisance of the facts relevant to a certain action, to reason about these facts and then to act in accordance with his thoughts about what it is best to do in the light of them. Because the reasoning and thoughts involved are, in a very real sense, at the behest of or under the control of the agent we are tempted to adopt the view that intent indicates that the agent produced an "internal push" or "act of the will" to cause the action. However, this assimilates the agent's role as thinker to the role of an impersonal causal event without which some set of occurrences would not have happened. I have argued that this is not an adequate analysis because it does not reveal the internal links between reasoning intent, character and moral praise or blame.

Deserving moral praise or blame

The concept of desert, as I have noted, captures the intuitive link between intent and moral praise or blame. We believe that a person deserves the maximum penalty for homicide if she kills another person with malign intent or malice aforethought. We are now in a position to investigate this a little further.

It is clear that the intrinsic link between an agent's character and the processes of reasoning which lead to her intentions justifies us in considering that not only the act but also the agent is reprehensible when she acts with malign intent. Thus there is a *prima facie* case for moral blame when an agent intentionally performs an evil act. However it is possible that there are cases where the agent knows quite well what she is doing but does not understand its moral properties. For instance, if a person from a culture in which informal borrowing was a regular feature of life were to act on this basis in a New Zealand suburban community, it may well be regarded as theft.

It could be claimed, in her defence, that this is an inappropriate attitude given her background. To sustain that argument we would, of course, need to show that the borrower had no awareness that what she was doing was wrong (there was, for instance, no attempt at concealment) and made no attempt to prevent reciprocal activity of a like kind by others. Once appraised of the problem we would then expect the "offender" to make a genuine attempt to fit in with the new mores or work toward their resolution (although there might be an understandable initial hostility at the "unjust" accusation). The general point is clear: a plea of *moral* ignorance is only plausible if the fundamental dimensions of a person's relations with others evince the coherence that one would expect of a different set of moral commitments from those invoked in an accusation.

A more problematic case is the claim of *temporary* moral incapacity or ignorance. In fact we would be on fairly safe ground in saying that moral commitments are so deeply interwoven with a person's relationships and personality that it would require a major disruption of mental economy to disturb them. In effect the anomaly here is like that which would be evinced if, when reminded that one hated Strauss and yet was enjoying his music, one said "Oh yes, I had forgotten". Aesthetic judgments are somewhat more deeply embedded than the sort of thing that one might just "forget".

These features of intent and intentional action are of direct relevance where medicine and the law are in contact. I shall examine three such areas, viz, diminished responsibility, legal attitudes to clinical responsibility and euthanasia.

Diminished responsibility

One analysis of diminished responsibility due to some affliction adopts the model that the disease caused the action or caused the agent to act in certain ways. Both are inadequate formulations. We do say (and know what is meant by) "It was the drink talking, not him" but we cannot let this intuitive understanding substitute for clear thought about what is really going on. Drink does not talk but is consumed by a person who then says things he would otherwise not say. It is less clear with something like temporal lobe epilepsy where we are tempted to think that the disease is like a capricious or malign spirit within the agent who "takes control" of her body so that it behaves in certain ways that she would not.

This picture of physically distorted activity serves to emphasise the relative impotence of the afflicted person in these cases but it does not "carry over" very well into other cases. For instance, the Hungerford mass murderer was an inadequate character, socially inept and unable to form satisfying working or personal relationships. His sole satisfying activity appeared to be his membership in a local gun club and he owned an imposing array of modern deadly weapons. One day he went on a brief but tragic excursion in which he slaughtered several innocent people and then killed himself. It is unlikely that he was psychotic and most likely that, in an act of desperation, he hit out at a world which he found unaccepting. Here there is no ready demon to identify as the pseudo-intentional source of his anti-social behaviour. Yet we are aware that he is not responsible for his behaviour in the same way as a professional killer or terrorist who, with malice aforethought, may shoot and kill an equal number of people in the service of some gain or ideology.

What we recognise in all cases, even when we slip into the easy metaphor of a disease or state "causing" an act, is that the process of data collection, reasoning and balanced decision-making about an agent's options, is disturbed, that, in effect, something has "substantially impaired his mental responsibility for his acts". (*R v Byrne* (1960) 3 All ER 1 at 4). But we, as doctors, must learn to be precise about just what defects are plausible in certain conditions and therefore give not only "expert" but informed and well-reasoned opinions to the Courts.

> M is a young woman charged with the culpable homicide of her mother and sister. It emerges that one afternoon after they had come home from night shift work and were asleep M armed herself with a kitchen knife and stabbed both of them. She then drove to a local river bridge and the knife has been missing ever since.

> Having been to the river M drove to a friend's house two streets from her home and was seen wiping something off her hands. After having a cup of tea with her friend she drove home and called the police to say that she had found her mother and sister dead.

Let us say that this train of events is established beyond reasonable doubt but that M claims that she has no memory of the events and that she must have suffered some kind of trance (M had been known to have strange absences as a child). It is argued that M was "substantially impaired" in mental responsibility because the actions were done automatically and thus that the crucial "intent to kill" is missing in this case. Applying the "inner cause" model to this problem leaves one with no recourse but to venture a relatively unsupported opinion as to whether M was in an altered state of awareness during this course of events. The present analysis does somewhat better.

We identify the requisite intent if and only if M pursues a reasoned course of action in which she follows some guiding conception in the face of contingencies which suggest that she is conscious of her environment. If her action is carried through in such a way as to show mental qualities of this kind then it is beyond reasonable doubt that she acted with intent. If she also evinces the fact that she is aware of the moral qualities of her behaviour then we can be sure that not only does she know exactly what is going on but that she knows that she has done wrong. It is clear that this, in fact, was the case; it is quite implausible to claim that the responsive, immediate-object directed activity associated with automatic states such as a psychomotor disturbance could explain this course of events. Her behaviour showed that even during her alleged automatic state she could intelligently negotiate her environment and, in the light of information from that environment she could pursue a goal-directed pattern of actions that fulfilled a guiding conception (albeit of a pathological kind).

By contrast, an automatism is, *ex hypothesi*, relatively stereotyped and therefore directed on things toward which, to use Anscombe's contrast, one might act responsively rather than reflectively. Such a "trance-like state" can "clear" at any point and has an intrusive quality with respect to ongoing mental activity. It occurs and then passes off usually followed by a period of bewilderment which persists for some time after the events. M did not show these aberrant features. There was a smooth transition from her questionable actions to a rational pattern of compensation structured in such a way as to evince an understanding of the implications of her acts and a strategem to mitigate those implications. For those with an eye on recent case law, similar considerations would apply to "sleep walking".

All this does not go one whit toward proving that M is psychiatrically normal – she may suffer any of the other defects of intent that can arise in a distorted psyche but it is clear that she did not kill her mother and sister during any kind of "automatic state". She is therefore guilty of killing with intent, whatever other mitigating factors may need to be considered in assessing her responsibility.

Partnership of doctor and patient

We can now turn to the *prima facie* defects of intent in the recent behaviour of doctors at National Women's Hospital (NWH). These have to be understood in the light of the promises made by a doctor on entering medical practice. He promises, *inter alia*, to take care of his patients in accordance with good standards of medicine, to keep them from harm and to treat them with respect as persons. He also promises to have a special regard for his medical colleagues to the extent of treating them as brothers (and, I presume, sisters). It is evident that these promises may conflict. When they do, as is commonly the case with systems of duties, there is no settled procedure for deciding between them.

It would be fair to say that, until very recently, the expert status of the doctor and his need to formulate an effective plan of medical management have combined to put him in a dominant role in which the patient has been seen as "following Doctor's orders". Given that medical decisions are often complex and difficult to think through, this is quite understandable. But, under certain circumstances, the formation of habits which lead one to single-mindedly pursue what one sees as the best plan of management can lead to unfortunate consequences. It is not difficult to imagine the critical circumstances. A senior person with an authoritarian bent working in a hierarchical power structure can allow his view of what might be in the best interests of his patients to override other considerations such as changing medical opinion or the patient's own wishes.

The irony is that such an individual, who is least likely to participate in the spirit of collegial relationships – where one learns and shares, giving and receiving advice and help in co-equal interactions with other colleagues – is likely to be protected by those very relationships from having to face his or her mistakes. These factors set the stage for potentially harmful anomalies in patient care. An individual who devises and pursues treatment plans that are rigidly structured in his own mind and refuses to entertain contrary opinions or advice despite the unclarity of our medical knowledge and the real risks to patients is liable to force his patients into a complaint role. Just as he finds it hard to accept criticism or challenge from his colleagues so the intellectual insecurity of his position (which even if it is denied will be niggling away subconsciously) might make him intolerant of questioning or hesitation on the part of his patients. It is quite possible that such a colloquy of circumstances led to patients suffering significant harms in the NWH situation.

What would mitigate the fault if this were the case would be that the doctors are generally taken to be acting with good intent: they generally try to do what is best for their patients. Traditionally that has excused injuries which, in any other context, would be treated as culpable homicide or grievous bodily harm. Indeed one significant feature of the oath that a doctor takes is that it marks him or her as a person whose life is conducted within an ethos of informed care and treatment inherited from Hippocrates and therefore as a person to whom such mitigating intent ought, in general, to be attributed.

This tradition is now irrevocably

changed in an important respect: the patient has been given a much more "equal" role in the partnership. Cartwright has only endorsed a shift occurring throughout the western world in that it is increasingly being recognised that medical care must be a partnership in which the doctor interacts with his patient as an expert adviser and caregiver not as a managing director. We have come to recognise and respect the patient's *autonomy* (to use the current jargon). This involves treating the patient as a rational individual with his or her own values and concerns which are a valid part of the management of an illness.[11]

In the light of this change we can identify an anachronism amounting to a moral defect in the style of practice which appears to have been adopted by some doctors at NWH and is, no doubt to be found elsewhere in NZ medicine. Some doctors assumed a dominant "paternalistic" role, presiding over a number of dependent patients and their own junior functionaries. When this happens, the patients are treated as the doctor thinks best with insufficient consideration being paid to their wishes. This precludes realistic involvement by the patient in the decisions being made. The lack of meaningful consent to the research on novel treatment for cervical cancer was symptomatic of this underlying problem.[12] The ethical worries follow not only from contemporary codes and precepts but from some very basic moral intuitions.

Aristotle has it that human beings are rational social creatures. As such we interact with each other and therefore each of us becomes aware of and responds to two things about other people. First, we recognise that they are persons like ourselves with their own thoughts about what is happening to them and second, we recognise that they have needs similar to our own especially when they are suffering. This awareness not only of the patient's needs but also of her ability to take an intelligent role in decisions about how they should be met seemed to be missing in at least some of the cases treated at NWH; Cartwright remarks: "The investigator should have sought the patient's consent" and concludes that the ethical principles concerned "were breached from the outset". (*Report of the cervical cancer enquiry*, p 136-7). Thus there was a failure not only to abide by an accepted norm of contemporary medical practice but also to respect one of the basic features of human interactions. Such a failure is rightly castigated by those who claim that the profession is arrogant and pigheaded. It amounts to a kind of insensitivity to others which deserves to draw the censure of moral commentators.

Other points of view

The defect of intent aggravating this adherence to traditional medical attitudes is, however, somewhat akin to the defect shown by a deprived or spoilt child who has not developed mature sensitive and balanced attitudes to others and therefore responds in a sociopathic way to personal challenge. Doctors are, of course, much too well educated to fall under any conventional description of the sociopathic personality type but one often detects similar personality features. There is a kind of narcissism evident in the way that many doctors are unable to see things from other than their own points of view. Some of us also organise our lives in a way that pays scant regard for the cares and concerns of others. We often get quite miffed when others, particularly our juniors, threaten to eclipse, even in small measure, our own brilliance. The traditional ward round in which the senior surgeon is followed by a retinue of deferent inferiors is a wonderful illustration of these facts. They are particularly evident in our discomfited and downright annoyance when others ask *prima facie* reasonable questions which require us to justify our opinions. In these situations the insecurity evinced by bluster and rank-pulling or the dismissive medical "put-down" designed to humiliate the hapless junior all too obviously give the lie to the aura of self-assurance and composure that many senior doctors emanate. One can even find doctors who are prone to temper tantrums and bouts of aggressive ill-humour which keep others wary, off-balance and unable to take an intelligent role in medical situations. This accentuates the gross imbalance of power already extant in the medical institution.

The distortion of normal relationships and the immaturity and personality disorder rife among us together produce a pathological social context. Some doctors learn to overcome their inadequacies and others do not. The latter can plausibly be accused of malpractice and, in the current climate, are increasingly likely to be. Such accusations have all the justice and/or injustice attendant on accusing the casualties of our social system for their interpersonal crimes on a more mundane stage. But although their conduct is, in one sense, understandable, it is also intolerable. We must and do act to constrain those individuals whose character, reasoning and attitudes lead to defective intentions and evil deeds. We are learning that we must do the same with those whose defects of character and intent impair their medical practice.

Doctor E caused the death of his patient in circumstances which strongly suggest a lack of intelligent choice or assent on her part to what was done. We are told that at the heart of the NWH affair there were also medical acts committed with an intent to benefit but without the intent to treat the patient as a person in her own right; Cartwright claimed that there was "a basic lack of understanding of the ethical importance of providing information to patients, be it about the nature of her condition and its management or inclusion in a clinical trial". (*Report of the cervical cancer enquiry*, p 171). To act thus is now unacceptable and the climate is such that the intent to benefit by medical treatment can no longer be considered to make good the ethical shortfall.

Euthanasia

The last issue to emerge from my Pandora's box is that of euthanasia.

Doctor G committed what we would call "active voluntary euthanasia" – an intervention which terminated the patient's life at the patient's request. In Holland it is done most commonly with an injection of barbiturate and curare.[13] This is permitted where the patient requests it, the doctor believes the patient's condition to be helpless, another (designated) doctor concurs with the decision and the patient is considered competent to make a reasoned choice in the matter.[14] I believe that a missing ingredient from many discussions of this practice is the matter of intent.[15]

We must first make a clear distinction between motive and intent. The motive of the Dutch "euthanasist" (or "telostrician")[16] is to relieve suffering and/or distress and to afford the patient a gentle death. With this motive I am in hearty agreement. What those who support euthanasia then suggest is that we should serve this motive by endorsing the intent to kill as part of our medical ethos. This I dispute.

The ethos of care which embeds medical practice enables us to employ a range of techniques all of which, more or less explicitly, aim at enhancing the patient's quality of life. When faced with any crisis or catastrophe, a doctor draws on her skills to act so as to preserve life and human function as far as possible. *Inter alia* she acts to relieve distress but her overall intent is to salvage a recognisably human life where it is threatened by a medical condition. There are a number of situations where this purpose demands resources of a more personal than technical nature – where we must consciously lay the technology aside and address the patient as a person without intending to do things to him or her. This is commonly the case in the socio-psycho-pathology of everyday life and it applies *a fortiori* to death and dying.

Medical care

A dying patient is in great need of companionship and affirmation as a person in what is often a fearful and dehumanising ordeal. The doctor who is content to just give a painkilling drug rather than engaging with the personal needs written on her patient's face therefore fails to honour a promise to care for that patient in an informed way. Medical care requires us to diagnose real needs in accordance with good standards of medical practice. In this area those standards have been set by folk such as Dame Cicely Saunders and Elizabeth Kubler-Ross who have identified the importance of a kind of humility and openness in the complex situations which arise in caring for dying patients. This suggests two substantive conclusions about the intent to kill a dying patient.

First, such an intent runs counter to the proper humility and restraint that should govern medical intervention where there is no clear right answer and the patient's needs may be expressed obliquely. What the dying patient wants cannot be unproblematically read from his remarks and thus to interpose a medical technique such as active euthanasia between the doctor and the patient at this point where sensitivity and lack of "intervention" themselves constitute desiderata for practice is, in my opinion, a mistake. It is the universal experience of those in hospice and terminal care medicine that the needs of the dying patient can usually be met in such a way that a good and gentle death will come in its own time and without being ushered onto the stage "untimely" and as a result of medical contrivance.

Quite aside from the particularities of the dying patient, I think there is a great temptation in modern medicine to develop powerful technologies and efficient interventions which obscure the fact that our patients are increasingly turning to us as persons. When faced with a problem that may seem insoluble it will often emerge that the real issue concerns communication and the doctor-patient relationship. (I would say that the ethical problems in modern medicine are, in fact, 90% to do with such issues.) Closer attention to the humane art that is medicine rather than the technical discipline it threatens to become in a cut-and-dried, cost-effective world would almost certainly have avoided some of the problems that developed at National Women's Hospital.

Conclusion

When an appreciation of medicine as an interpersonal partnership between the doctor and the patient becomes as deeply ingrained in a doctor's character as the urge to use medical techniques to combat disease, medicine will change. This tendency is present in medicine but often it is blunted, discouraged and even criticised by those who regard medicine as a place where empires can be built and "power plays" made regardless of the effect on patients![17] If we succeed in modelling and teaching the concern and respect for patients that is implicit within the promises one takes on entering medicine then such activity will become obsolete. I sometimes despair that medical characters can be formed in the image of the ideals we profess but we can only act in the hope that they will. Once this basis for medical practice is written into the hearts of doctors and not merely into the codes that regulate them then the actions and intentions of doctors, given sound training in medical techniques, will be above reproach.

Good medicine, like every other morally relevant activity of human beings springs from the thoughts and intentions of the human heart. And here, I am afraid, the law has only a secondary role because the constraints we put in place to curb injustice can never substitute for that mode of being which informs the conduct and intentions of a just person. □

1 Ms Bunkle commonly uses the term "victim" when referring to patients and almost without exception regards doctors as part of a conspiracy to enact gratuitious harms on a long suffering public.

2 *The report of the cervical cancer enquiry*, Auckland (NZ): Government Printer, 1988.

3 Wootton, B, "Diminished respon-sibility: a layman's view" *Law Quarterly Review*, 76 p 224.

4 See eg G N A Vesey "Volition" *Philosophy*, (1961) XXXVI 138.

5 Anscombe, G E M "Modern Moral Philosophy" in *Ethics, religion and politics*, Oxford: Blackwell, 1981, p 40.

6 Anscombe, G E M "Intention" *Proceedings of the Aristotelian society*, LVII, 1956-7.

7 Hampshire, S, "Some difficulties in knowing" in *Philosophy as it is*, (ed T Honderich & M Burnyeat) Harmondsworth: Penguin 1979.

8 Brookbanks, W, "Intoxication and recklessness" in *Movements and markers in criminal policy*, (1984), p 23.

9 Donald Davidson uses this phrase in discussing weakness of the will (*Essays on actions and events*, Oxford: OUP 1980, p 21ff.

10 Brookbanks, W "Diminished responsibility: balm or bane?" in *Movements and markers* . . ., op cit.

11 I have discussed this in "Information and consent" *New Zealand Medical Journal* (1988) v 101 p 792-5 and "Informed consent and moral integrity" *Journal of medical ethics*, (1989) 15.3.

12 The recent Health Department guidelines have put the same constraints on both.

13 P V Admiraal, "Active voluntary Euthanasia" London: Voluntary euthanasia society (1986).

14 H J J Leenan, "Euthanasia, assistance to suicide and the law: developments in the Netherlands" *Health policy*, (1987) 8 p 197-206.

15 In fact there are multiple problems which I have discussed in "Euthanasia, letting die and the pause" *Journal of medical ethics*, (1988) 14.2 p 61-8 and which are also covered in *The euthanasia report*, London: BMA, 1988.

16 R Crisp "A good death; who best to bring it?" *Bioethics*, (1987) 1.1 p 74-80.

17 I am afraid that medicine on the management model may aggravate this aberration.

Judicial Portraits

On Friday 22 March portraits of the first two Chief Justices, Sir William Martin and Sir George Arney, were unveiled at a small function at the High Court in Wellington by the Attorney-General the Hon Mr Paul East and by the Minister of Justice the Hon Mr Douglas Graham. The portraits had been painted by the well-known Canterbury artist Mr William Sutton. The speakers at the function were the Chief Justice the Rt Hon Sir Thomas Eichelbaum, the Attorney-General, and Mr Michael Camp, Vice-President of the New Zealand Law Society on behalf of the President Mr Graham Cowley. The speeches that follow have been lightly edited for publication by omitting such matters as the formal openings.

Rt Hon Sir Thomas Eichelbaum, Chief Justice

First I welcome you and thank you all for coming to this small ceremony to unveil the portraits of the first two Chief Justices of New Zealand, Sir William Martin and Sir George Arney.

You may [later] wish to make your way [to] the number one Courtroom, through the doors here on my right, and view the collection of portraits [of some former Chief Justices already] there, or refresh your memory of them, as the case may be.

No doubt you have all looked at them before, at least in passing. Those of us who sit here of course have more opportunity to study them closely – sometimes to relieve the tedium, sometimes for inspiration in difficult moments. In that event, some Judges may prefer to look at particular portraits rather than others, either because of the known expertise of that Chief Justice in the subject matter at hand, or because of the perception the sitting Judge may have as to that Chief Justice's acumen in general. Or it may be that the particular subject matter calls for a soft heart, or alternatively firm hand. That brings to mind that only a day or two ago I heard the aphorism about a former English Lord Chief Justice who was described as a man with an iron fist within an iron glove.

You may not all have appreciated, at least until you were invited to today's function, that while the collection of portraits included each and every one of the last eight Chief Justices of this country, it was missing both of the first two.

Now the next thing I say will astonish many of you, but it is not always the case that whenever the judiciary has a good idea and passes it on to the Justice Department, it is received with acclamation and promptly actioned. But when it was suggested to the Department and the then Minister and Attorney that they might commission the painting of portraits of the first two Chief Justices in order to complete the collection, they instantly agreed and today's ceremony is the result.

So before proceeding further, on behalf of the judiciary I would like to express my appreciation to the Government and the Department for their support of this proposal. It goes without saying that the result is to enhance immeasurably the previous incomplete collection, and to complete a set which will constitute a valuable historical record as well as contributing to the preservation of the traditions of the legal system in New Zealand.

Before I call on the Attorney-General there are two important points about the collection not yet mentioned.

Those of you familiar with judicial history will know that that great Wellington firm, Bell Gully, has the remarkable record of claiming three of the ten former Chief Justices, Sir Michael Myers, Sir Humphrey O'Leary and Sir Richard Wild. I would like to say now how pleased we are that Lady Wild and John Wild are with us today.

At this stage I mention a person central to to day's proceedings, Mr William Sutton, the Canterbury artist, eminent among contemporary portrait artists in this country, who painted both the portraits about to be unveiled. It is a special pleasure for us that he is able to be present today. Mr Sutton has previously painted Sir Richard Wild and Sir Ronald Davison, his portrait of the former, in particular, being widely regarded as a striking depiction of the subject's characteristics. So, just to round this off, while Bell Gully may claim three, Bill Sutton now is able to claim four.

Mr Sutton has been to a great deal of trouble, working not only from photographs, but also by study of writings about the two Chief Justices so as to form that image of the subject which I understand portrait artists regard as essential to their work.

The second important person, or body of persons, needing to be mentioned is the New Zealand Law Society. I will however, return to the subject of the Society after the Attorney has spoken. When he has done so, I will ask the representative of the New Zealand Law Society to add a few words and finally, I will ask the Attorney and the Minister of Justice to unveil the portraits.

Hon Mr Paul East, Attorney-General

Thank you for the opportunity of participating in this ceremony to unveil the portraits of the first two Chief Justices of New Zealand, Sir William Martin and Sir George Arney.

It is an important ceremony because it is important that we respect the history and traditions of the law.

While I have yet to view the pictures I know the difficulty that the artist Mr William Sutton has laboured under.

Earlier in the day I read an article in the July 1967 edition of the *New Zealand Law Journal*. This is not to suggest that I am 23 years late in keeping up with legal reading, but that I wanted to obtain some information about the history and background of the portraits in the Wellington High Court.

It was in 1967 that the portrait of the Rt Honourable Sir Harold Barrowclough was unveiled. At that time the then Chief Justice Sir Richard Wild expressed disappointment that the first two New Zealand Chief Justices were missing from the collection. All that was left to recognise their contribution were some ancient photographs and some rather flimsy records.

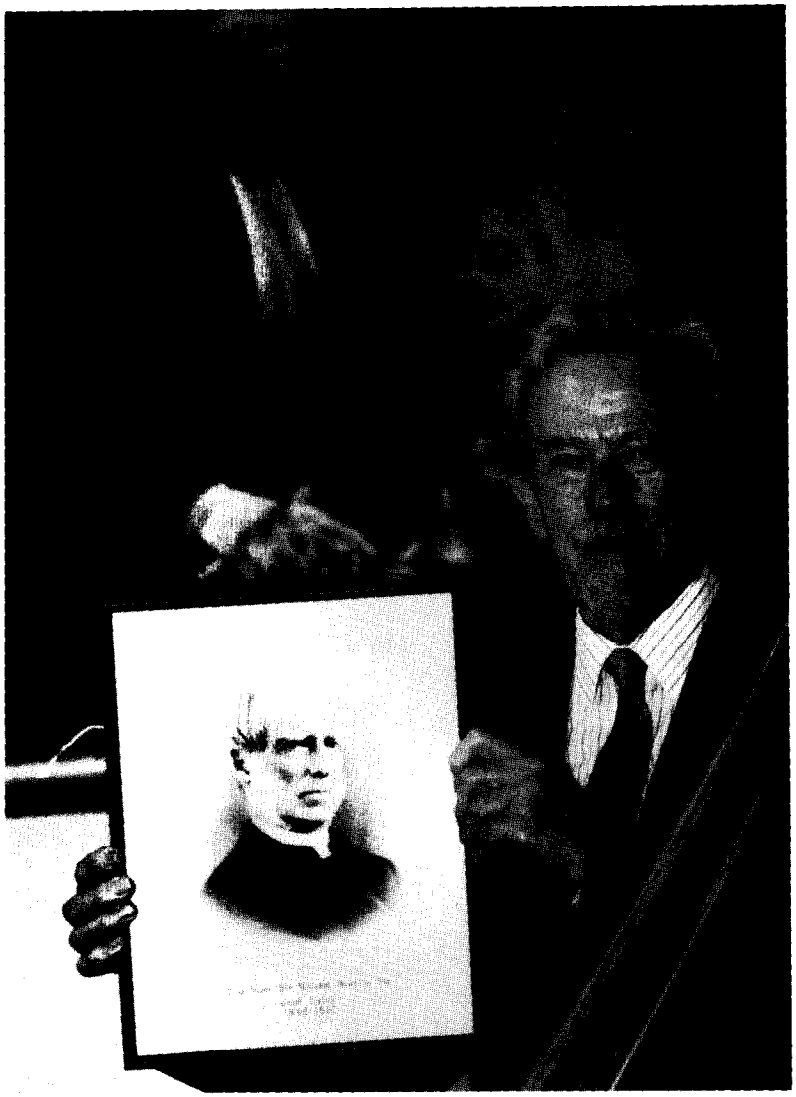
It is a considerable achievement that from this small base of information we are now able to unveil these two portraits.

I can't help but think that as we unveil these portraits, which are very much a part of the tradition and atmosphere of law, it is in sharp conflict with one of the very first petitions received by the new Parliament where one Donald Francis Dugdale, barrister and solicitor of Auckland is calling upon Parliament to dispense with the use of wigs, gowns and other distinctive items of clothing in the High Court. This is always a matter of debate but I suspect likely to be even more so in the immediate future.

Care must be undertaken that change does not take place just for the sake of change and that the reasons for; and the advantages, of such traditions are carefully studied before decisions are made from which there can be no return.

The first portrait to be unveiled is that of Chief Justice William Martin. He served as Chief Justice from 1841 to 1857 and his name is still recalled with affection by the kaumatua of Maoridom.

I note that he took office at the age of only 34. The third case he sat on was the famour *Maketu* case concerning a Maori charged with murder. Martin's rulings were translated and repeated widely among the Maori population, and his comments in that and subsequent cases played an extremely important part in helping Maori people adjust to the concepts of English law.



Dominion Sunday Times

Artist, William Sutton, holding photograph with portrait of the first Chief Justice in the background

Martin was also a very earnest advocate of Maori interests, even placing his status as a Judge at risk by publicly opposing some early English orders which would have enabled the Crown to seize any unused Maori land. He was alarmed at many of the unscrupulous tactics employed at the time to acquire Maori land and strongly argued for a fairer approach.

Martin was deeply religious, an accomplished linguist and was very well read. Upon his retirement in 1857 due to ill health he spent several years assisting the education of young Maori. He also published a number of pamphlets in which he argued that the Crown should strictly and fairly adhere to the Treaty of Waitangi when dealing with the Maori people.

George Alfred Arney served as Chief Justice from 1857 to 1875, having been appointed straight from the English bar. (A practice no longer available to the Government). He made his mark as a skilled administrator and a popular and meticulous judge. Unlike Martin, whose approach to his duties tended to be quite academic and theoretical, Arney won wide respect for his skills on a practical level.

He was friendly and good humoured, and was always polite and helpful towards counsel who presented argument before him. He was known to be especially congenial if faced with young counsel, battling with nerves as well as the complexities of their case. (Still with relatively fresh memories of such anxiety, I would say it is an attitude to be commended.)

His judgments were long and fastidiously thorough, while his exhaustive summings up to juries received a little good-natured criticism for the way they "dwelt with mathematical precision on

every little detail which arose in or out of a protracted and tedious trial". (*Colonial Law Journal*, 1875).

His thorough approach to the law is reflected in the fact that across his whole tenure only one of his judgments was ever overturned on appeal, and then only by a majority decision. His easy-going manner, free from any hint of superiority, endeared him to everyone, both inside and outside the legal profession, and it was amidst universal regret that he announced his retirement in 1875.

These then are two Chief Justices who certainly deserve to be remembered by these portraits.

I commend the Justice Department and my predecessor for commissioning these two portraits. I see it as playing an important part in ensuring respect for the law.

Chief Justice, Rt Hon Sir Thomas Eichelbaum (continues):

Turning now to the New Zealand Law Society, I should tell you first that a record of the collection up to and including the portrait of Sir Harold Barrowclough may be found in the *New Zealand Law Journal*. For those of you who like counsel to be more precise, the full reference is [1967] NZLJ 300. From the history there set out it is apparent that the portrait of Sir Harold Barrowclough was the first to be made available through the generosity of the New Zealand Law Society. That is to say, the Society commissioned the painting, and handed it over on, I suppose, an indefinite loan. That commenced a tradition which the Law Society has followed down to the present time. So it is particularly appropriate that the profession should be represented here, as it is by a number of leading counsel, and that there should be an address on behalf of the profession. Accordingly I now call on the Vice-President of the New Zealand Law Society, Mr Michael Camp.

Mr Michael Camp, Vice-President, New Zealand Law Society

I am pleased to speak on behalf of New Zealand Law Society in the absence of its President on this occasion.

From the New Zealand Law Society files I note that once the present Chief Justice had taken office on 6 February 1989 the Government wrote to the New Zealand Law Society by 22 March 1989 saying "at the request of the Chief Justice, the Minister of Justice has asked if it will be possible to commission these portraits".

It has been possible.

I thank the Chief Justice for the initiative and Government for shouldering the cost.

Heritage and history are important. I have thought the photos, in the side corridor of the Court, of the Judges of this Court, give a real sense of continuity, certainty and purpose that reinforces the role of the High Court as being at the centre of this country's system of justice.

The present convention that has seen the portraits of the last three Chief Justices and the present one, painted at the initiative and cost of New Zealand Law Society, could be seen as a reasonable expression of user pays today, but I view it as part of the profession's commitment to history, and a gesture of respect and gratitude to the holders of that office.

The New Zealand Law Society is equally grateful to Government for taking that view in relation to the earliest holders of this office and for completing the set, and on behalf of the Law Society I thank Government for shouldering the burden.

The Chief Justice then invited the Attorney-General and the Minister to unveil the two portraits which was done to acclamation. □

Recent Admissions

Barristers and Solicitors

Balfour H D B	Auckland	3 December 1990
Bassett J M	Auckland	3 December 1990
Battersby M J	Auckland	3 December 1990
Bedford V R A	Auckland	3 December 1990
Berry J C	Auckland	3 December 1990
Bonnar G P	Auckland	3 December 1990
Bush N A G	Auckland	3 December 1990
Carter N J	Auckland	3 December 1990
Chamberlain W D	Auckland	3 December 1990
Cobb R W	Auckland	3 December 1990
Cox G A	Auckland	3 December 1990
Crump D W	Auckland	3 December 1990
Doak P M	Auckland	3 December 1990
Downing S	Auckland	3 December 1990
Dwyer W J	Auckland	3 December 1990
Elkind J B	Auckland	3 December 1990
Flood C M	Auckland	3 December 1990
Graham K J	Auckland	3 December 1990
Harkness A M	Auckland	3 December 1990
Hobson T L	Auckland	3 December 1990
Hosking G R A	Auckland	3 December 1990
Jagusch S R	Auckland	3 December 1990
Kirton K S	Auckland	3 December 1990
Laracy D A	Auckland	3 December 1990
Leupolo F T	Auckland	3 December 1990
McCarthy P A	Auckland	3 December 1990
McClintock R B	Auckland	3 December 1990
MacDonald A M	Auckland	3 December 1990
MacDonald T J	Auckland	3 December 1990
McFadden M D	Auckland	3 December 1990
McKenzie D F G	Auckland	3 December 1990
MacKenzie S J	Auckland	3 December 1990
Malu T N	Auckland	3 December 1990
Meek M J	Auckland	3 December 1990
Millar J K	Auckland	3 December 1990
Mingaye K I	Auckland	3 December 1990
Morais M M	Auckland	3 December 1990
Morgan-Coakle E A	Auckland	3 December 1990
Murphy C L	Auckland	3 December 1990
Nagel M K	Auckland	3 December 1990
Ng C L S	Auckland	3 December 1990
Organ D J	Auckland	3 December 1990

The professions: An overdue readjustment?

By Ashley Balls, of Auckland, Management Consultant

The author has recently undertaken a study of the professions of accountancy and law in the United States, United Kingdom, Europe and Australasia. He has come to the conclusion that the changes that are occurring elsewhere, largely out of necessity, will also be reflected in New Zealand.

Mr Ashley F Balls was formerly a part-owner and director of an international firm of management consultants based in the United Kingdom. The consultancy specialised in services for the legal profession. He has published "The Young Solicitor's Guide" and other works on the legal profession for clients. He has been a lecturer to post-graduate law students and young solicitors' groups throughout Great Britain.

Are all the repercussions of October 1987 over? Perhaps not. Observations of what is happening to the professions overseas may make any future adjustments here less painful.

Real pressure has yet to be felt by the accounting and legal professions. The prospect of a leading firm becoming bankrupt should not be discounted if US experience is any guide. The US accountancy firm of Laventhol & Horwath (the 7th largest) filed for Chapter 11 bankruptcy in December 1990. Ernst & Young, has been running advertisements proclaiming that it is in a "very strong financial position". What else would a client expect of its auditor? Then there are the lawsuits: Standard Chartered, the international financial group has taken proceedings against Price Waterhouse for US$800m following the purchase of an unsuccessful bank in Arizona.

Some would argue that the accountancy profession worldwide is reaping what it sowed in the '80s – merger mania and the desire to sell other services (tax and management consultancy, insolvency, corporate finance etc) which has increased dependence on non-recurring business. These services have been sold by loss leading the traditional area of expertise on which accountancy was built: auditing. The pressures created by loss leading core business may have caused a lowering of standards, allowing for the modern fad of revaluing intangible assets like brand names, "off balance sheet" loans, etc. As a result annual accounts are increasingly difficult to interpret, particularly for the layman who, as shareholder, pays the auditor!

New Zealand is looking at reporting standards. New regulations and a new Companies Act are being drafted. England has recently established a Financial Reporting Council. The profession must be more accountable to the shareholder and less able to pander to the whims of company management. Solutions include audit rotation (5 yearly as in the USA) and preventing auditors from "selling" non audit services to audit clients, a revolutionary concept.

The legal profession too may be facing a period of adjustment. Severe financial pressures are being felt. 1990 saw the disappearance of a national firm, Messrs Brandon Brookfield. Merger and acquisition business (M&A) has fallen one third in the past year alone. Top City of London firms too are feeling the pinch. In 1989 the firm at the top of the league table handled bids to the value of £31.5 billion ($100.8 billion). Last year the top firm handled only £5.8 billion ($18.5 billion). The effect on fee income must be catastrophic. Lean times for staffers too, especially with law schools turning out more lawyers than ever before.

Clients are now asking for quotes before work is undertaken, (a completely new aspect to legal practice), creating greater competition and driving down profit margins.

The bull market drove a recruitment boom, having a dramatic effect on salaries and partner profits. In England assistant solicitors' salaries are now routinely $NZ64,000–$225,000 and more senior partners in top firms frequently draw $1.6 million plus annually.

Cushioned by large profit margins (25 plus percent) many firms took on new premises. Some bought freeholds or very long leases, frustrating the promotional prospects of potential partners who could no longer afford to "buy in". Many of these expensive purchases took place in the run-up to the property crash. Although top English firms are able to rely on the protection of a plethora of "blue chip" clients, stories abound of partners in smaller firms deferring their drawings altogether. Will it happen here, where, a comparatively small business community (under

150 listed companies) is served by a comparatively large number of big firms? Resorting to residential conveyancing (a current vogue) is not the answer.

The introduction of new management skills may be the answer. This will require each firm to identify its strengths and market them. Some firms are well advanced in this, having taken on marketing directors and other non-law professionals. In some of the larger national firms the marketing department's budget alone remains uncut for the current year. So as not to create a regime where goals become difficult to attain, imposition of tight fee targets and budgets on assistant solicitors must be managed with great care. To make staff responsible for business development is, in effect, to operate a franchise. It is important that the environment is not so altered by management pressures that valuable key staff, potential partners, leave taking clients with them.

Some sacred cows may have to be challenged or slaughtered. Partnership structure and unlimited liability, hitherto cornerstones of legal partnerships, may well be unsustainable in the future. In the recent Telecom sale, New Zealand witnessed a transaction of several billion dollars managed by law partnerships who are only able to buy around $250 million worth of professional indemnity insurance. The cost of insurance is rising dramatically and is starting to rival rent and salary expenditure in scale.

Committee management appears an easy solution for large partnerships but is slow working as partners must remain as fee earners. The concept of a managing partner with no fee earning responsibility whatsoever is as yet little tried here but appears to have met with great success elsewhere. The delegation of all management authority to one partner as a full time function must be considered a practical option.

There is a need for a more open style of management, which may even include publication of financial information, already relatively freely available in Europe and the United States through such organisations as the Centre for Inter-Firm Comparison in London. They undertake regular surveys, with the full co-operation of the profession.

Is incorporation the key to the future? Are multi-disciplinary partnerships a solution? Both are proscribed by law in almost all countries where law partnerships operate. The latter has been tried by other professions, namely banking and accounting and appears largely to have failed. The experience of the accountancy profession extending its auditing function to more esoteric areas has not been entirely successful. Neither have banks been successful in moving into stockbroking; witness the large scale redundancies presently taking place in the United States and England (eg commercial banks laying off 15% of domestic staff).

Sound professional management and a back to basics approach may offer stronger long term solutions than the current vogue for tinkering. The purchase of external management skills, such as financial management and marketing is not the end of the line, just the beginning. The revolution has barely begun. □

Correspondence

Dear Sir

Mr Dugdale has tossed the Law Commission's proposal for a new statute into the rubbish tin ([1991] NZLJ 76) without addressing seriously the most important feature of the proposal. That is its style. It recasts the law to avoid "prolixity and tautology". The result in my opinion is far superior to the existing statute. If adopted, it is a major step to making legislation "as understandable and accessible as practicable" (part of the terms of reference).

Even if the "Be" in "Be it enacted" is good idiomatic English; even if there is a case for defining the South Island so that we can be sure it includes Stewart Island; even if Mr Dugdale is right about marginal notes, these criticisms do not go to the heart of the proposal.

Of more interest is his proposition that operative parts of statutes should contain only rules, never principles. It presumes that law operates by rules (albeit informed by principles). Very often this is so, but by no means always. Our law is not just a set of rules. The legal outcomes of many issues are guided by principles rather than by rules. There is no reason at all why principles should not be stated in statute law. Indeed, one of the notable features of New Zealand statute law over the past decade has been the statement of principles in operative parts of the statute to inform the application of rules. Further, there are a number of instances where principles are designed to operate without the support of rules. The Commission gives examples (para 282).

J G Fogarty, QC

Pity the poor lawyer

Solicitors throughout the country choked over their cornflakes last week on reading that lawyers should get out of their Rolls-Royces and on to their bikes. Subsequent letters to *The Times* from lawyers surviving on overdraft and driving elderly automobiles have failed to elicit public sympathy.

The spectre of solicitors on the dole queue was seen by Law Society President Clarke a decade ago; now it is for real. Some city firms over-extended, moved into costly new premises and staffed up for work that failed to materialise. But it is not just City assistant solicitors who are being made redundant: in market towns some firms which have expanded rapidly in the last three years are now laying off staff. This is partly due to over-ambitious planning, but the recession and increased competition have caught many firms unawares.

Solicitors Journal
8 February 1991

US Law Firms: Tougher times leading to more marketing

By Pamela Young, Managing Director of Cording Young Limited, a management, marketing and communications consultancy to the professions and services.

The maturing of legal markets and the slowing of the United States' economy has prompted many North American law firms to take marketing seriously. Similar pressures and possibilities are facing New Zealand firms.

Marketing for survival

The need for legal services marketing was amply demonstrated at a conference I attended in San Francisco in October, 1990. The conference, titled "Marketing for Survival in the 1990s", was organised by the National Law Firm Marketing Association (NALFMA) and co-sponsored by the American Bar Association.

NALFMA began in the late 1970s as an informal network of law firm marketing professionals. It was incorporated in 1986 and today comprises about 750 members. The Association's purpose is to provide support and education for its members and also to educate the legal community about the role for marketing.

The four-day conference was attended mainly by marketing administrators, although there were a number of law firm partners present. Several marketing people I talked to confided that it had taken a lot of persuasion to get any of their firms' partners to attend. Evidently, some American firms are still struggling to come to terms with the necessity of marketing, and to perceive it as an essential component of practice management and development.

To partners concerned by their firms' shrinking client numbers and revenues, marketing has been accepted (though not always welcomed) as another necessary administrative function. However, this restrictive view exhibits a basic misunderstanding of "marketing" as merely consisting of tactical devices such as newsletters, advertising and public relations. Failure to grasp the strategic importance of marketing has resulted in marketing roles in many law firms being performed by people who lack senior marketing qualifications and experience in commercial business environments. The composition of the conference's agenda and audience tended to confirm this.

Topics covered at the conference were very varied. Speakers came from many perspectives; some were themselves lawyers, others were academics or consultants, and a few were marketing directors with law firms. The conference was pitched at a very practical level, and would have had most value for non-trained marketers with a need for good, basic "how-to" advice. Lawyers who attended would also have gathered very worthwhile insights into the various facets and benefits of marketing.

Broadly, the conference menu offered bites of Marketing Research, Marketing Techniques, Niche Marketing, Marketing Training, Services Development, Service Quality, Public Relations, Image Building, and Technology. The sauce required to blend all these ingredients together was an emphasis on strategy. By this, I mean strategic planning at the level of management, and the development of long-term marketing plans based on ongoing research and analysis. The conference, in my opinion, did not really deal with these subjects adequately.

Evolution of professional marketing

A good many US law firms have been doing some form of marketing for several years. In 1977, a landmark Supreme Court decision eased the restrictions on attorney advertising and created a new environment. Progressively, law firms recognised the need for formal business planning and help from outside professionals to develop and implement marketing and communications programmes.

However, controversy still flourishes about the "tastefulness" of visible marketing activities, such as advertising and public relations. This is particularly so with large law firms serving the corporate market. Interestingly, NALFMA reports, a top US law firm recently conducted a survey on a range of marketing issues and received the general response that clients did not understand why lawyers thought advertising was "such a big deal". The majority of respondents did not view tasteful advertising as unprofessional, and they did think advertising could be a useful way to learn about law firm services.

The cautious attitude to marketing so typical of law firms reflects the evolution of another service industry – banking. Before the mid-1950s, banks had no understanding or regard for marketing. They were supplying needed services and clients had to put up with austere and rigid

treatment. When, however, banks began experiencing increased competition in the late 1950s, a few innovators adopted advertising and sales promotion techniques, to great advantage. They won more clients. The other banks had no choice but to follow suit.

The next phase was not simply to attract clients, but to keep them loyal. The intimidating atmosphere of banks was transformed. Bars were taken off tellers' windows and friendliness became the norm. Inevitably, the competition caught up. Leading banks had to find a fresh means of differentiation, and at this point their marketing efforts moved into new realms. Changes in facade were matched by changes in the service mix. Continuous innovation and expansion of banking services has now been the rule for a decade.

Recently, banks have moved towards a more strategic approach to marketing. Rather than attempting to be all things to all people, some have repositioned to gain the high ground in niche markets. In this sense, positioning is aimed to achieve real, not just cosmetic, differences from the competition. This strategic stage of marketing is perhaps the least conspicuous, but there is no doubt that it gets to the heart of the matter. The key to successful banking today is market analysis, planning and control, to measure the potential of various markets and to anticipate trends, and threats.

The strategic approach

The lessons are obvious for the legal profession in the United States (and New Zealand). Faced with an oversupply of lawyers, competition from other professions, and stagnating economies, a thorough re-evaluation of traditional practice methods is urgent. There is no need for law firms to repeat, step by painful step, banking's gradual discovery of strategic marketing. As latecomers to the concepts of modern management and marketing, lawyers should take the short cut and commit their resources to analysis and planning, where they will be used most effectively. As a result, activities such as services development, advertising, publicity and image-building will be much better attuned to real market needs and possibilities.

The conference's opening speaker, William Mindak, Professor of Marketing at Tulane Univesity, New Orleans, offered a provocative view of how urgent it is for the legal profession to embrace modern management and marketing principles.

His thesis hinges on the fact that the legal market is mature. In fact in the United States, it is saturated, with a projected one million lawyers in circulation by the early 1990s. Economic and competitive pressures have their positive repercussions, however. They oblige mature industries to look further than merely taking market share from rivals. They need to recycle and reposition their products and services, often in radical new ways.

In the case of the legal profession, Professor Mindak suggested that by diversifying and specialising, overall market growth could still be achieved. He also encouraged firms to aim to do more than just remedy people's problems. More fees, he pointed out, could be easily generated by offering clients ongoing counselling in matters such as investment, taxation, real estate, and so on.

Another speaker, Ward Bower, of the Pennsylvanian consulting firm Altman & Weil, took a sobering look at the threats facing lawyers if they fail to diversify and to market their profession more aggressively.

In times gone by, he pointed out, lawyers had a quasi-monopoly of the services they supplied to private and commercial clients. Today, the traditional domain of lawyers is being clearly invaded by accounting firms (tax and business law), consulting firms (labour and environment law), and financial institutions (estate planning and probate law). Law firms have been slow to react to this menace. The root of the problem is because the legal profession has been unable to differentiate itself meaningfully from these other service providers. The remedy, according to Bower, cannot be left to the marketing efforts of individual firms alone. It will only be achieved if the profession as a whole seeks to improve public awareness of the value of lawyers.

This flexible vision of why and how the profession needs marketing is gaining ground with US law firms, as the conference demonstrated. Its agenda covered new services, and non-legal services, and also the related issues of mergers, geographical expansion and international affiliations.

Non-legal services

James Jones, Managing Partner of the Washington DC firm Arnold & Porter, spoke on the blending of legal and non-legal services. Bringing multi-disciplinary teams together to provide comprehensive services to clients is a growing trend in the United States. The process began two decades ago, with the emergence of paralegals and investigators.

Mr Jones described the extent of this phenomenon today. He spoke of recent surveys which show that law firms are active in investment banking, energy and environmental consulting, management services, human resources consulting, advertising, labour relations, office support systems, real estate development, international trade, health care and educational consulting, economic research and legislative services.

Law firms do not restrict their activities in these fields to handling only the legal aspects of the service. Some have hired non-legal professionals to complement their specialist consulting groups. Other firms have established separate subsidiaries to offer non-legal services, or have formed affiliations with such service providers.

In almost all cases, these associations of lawyers and non-lawyers have arisen for the same basic reason – to serve clients' needs in the most efficient and cost-effective way. Despite arguments that such associations threaten legal "professionalism", the proliferation of ancillary services provided by US law firms indicates that the market will have its way.

Mergers are increasingly common among US law firms. One firm I talked with had been through three mergers in three years! Another firm had just become the largest in California, and the seventh largest nationally, as a consequence of a merger. Evidently, these mergers are triggered by the need to consolidate resources in a tough environment. US law firms are experiencing falling margins; demand for their services is dropping as the economy slows, and fees are losing fat as

firms compete more strenuously for business.

These conditions are also contributing to the international moves being made by a number of the largest North American law firms. Branches, or affiliated offices of US firms are being established in Western Europe and Asia, with interest also being shown in Eastern Europe. There is talk that this global trend could produce a small number of powerful, multinational law firms comparable to the "Big Eight" (as they have been known) accounting firms.

Legal services marketing in practice

While I was in San Francisco, I took the opportunity to visit three of California's leading law firms and learn about their marketing programmes.

These firms differed from others I encountered, in that they had professional marketing people placed relatively high in the organisational hierarchy. (Many firms elevate an administrative employee to handle "marketing" activities. Because these people lack marketing training and experience in commercial business, they are usually ineffectual at a strategic level).

The marketing director for one firm, which had 130 partners, was an MBA graduate and had 10 years experience marketing large US and international professional service firms. She had only been with the legal firm for a year, but clearly had the partnership's endorsement of her function. She reported to the firm's executive director, a non-partner. Her other point of contact with management was with the marketing committee, made up of partners from the different practice sections.

Already, in the space of one year, she had built a team of five staff. These people each had different roles; database manager, journalist/copywriter, desktop publisher, production assistant and marketing assistant.

The marketing director and her assistant were directly responsible for pure marketing, marketing research (including competitor analysis), strategic planning and programme development.

Under the marketing director's impetus, the firm's database systems, including mailing lists, had been totally rebuilt. To help set up the system, temporary clerical staff had been recruited. This project was supervised by the database manager.

The three publicity people on the team looked after media communications and publicity, desktop publishing for newsletters and direct mail, and producing presentation materials for the partners.

The marketing function also included providing training to partners and the staff in marketing skills. In addition to these internal services, the firm used external market research services and other consultancies to help with special projects.

The research agency helped the marketing director conduct focus groups. (These are small groups of people, usually clients, who are brought together to discuss the firm's services. From their opinions and suggestions, fresh standards and service directions are developed).

Another firm I spoke to was one of the largest in California, with 190 partners. They were moving quite slowly towards marketing but had made a significant step with the recent appointment of a marketing officer. This person did not, however, have management status. Previously, the only marketing done by the firm was some publicity, co-ordinated by a relatively low-status employee.

The firm did use a public relations consultancy, which it paid a considerable monthly retainer. The consultancy's brief was to obtain media exposure for the firm and to help organise occasional events.

The new marketing officer was at the initial stages of implementing a proper marketing strategy. This involved helping define and package services, assessing the firm's service delivery systems and initiating market research of the focus-group kind. It was also her job to look after advertising, sales and publicity and to set up a marketing training programme.

Prior to this, a public relations firm had been hired to help partners devise mini-marketing plans. It was the marketing officer's intention to place a greater emphasis on integrated marketing planning for the whole firm. This was necessary to raise the market's awareness of the firm's service range, and to improve its image. Apparently, the firm was perceived as "huge, expensive, conservative, Republican, and collegial". Marketing was expected to change that!

Both of these women told me that they found it hard to keep track of business developments taking place at the level of individual partners and specialty sections. This lack of feedback to the marketing department hampered their efforts to co-ordinate prospecting and step up the onselling of services.

Their experiences are certainly not unusual within the legal profession. In any profession, the individual behavioural habits of partners have always been a challenge to the development of a single firm culture. For legal firms to accept marketing, in the proper sense of the term, they need to experience it positively. If given the chance, strategic marketing will result in increased business and fresh horizons for the practice.

Perhaps it is unfortunate that the October 1987 crash, and the ensuing shakeout in commerce, has put pressure on the legal profession to adopt marketing as a survival tactic, whether they like it or not. Had there been less compulsion, firms might have taken a more positive, long-term view of marketing, seeing its strategic potential to bring in better quality clients and to enter new markets, instead of rushing into tactical activities like advertising, direct mail and seminar functions. With the more progressive US firms, the strategic approach is only really beginning to catch on.

Balancing progressive and conservative forces

Judging from the topics at the NALFMA conference, and from my discussions with many of the delegates and the firms I visited, American lawyers are ahead of their New Zealand counterparts in accepting and practising marketing. This is hardly surprising, considering that modern marketing techniques were developed first in the United States. Perhaps what did surprise me was to discover that US firms were not more progressive. For an explanation, I could advance the theory that in professional groups such as lawyers, it is possible to identify two distinct types of member; the "futurist", or the enthusiast, who thrives on change

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Correspondence

Dear Sir,

At [1991] NZLJ 43 Mr Don Mathias wrote an article entitled "Guilt by inference". The thesis of this article was, it is submitted, flawed in the following fundamental respects:

i. Inference is treated as an exceptional requirement whereas in fact it is the norm.
ii. It assumed categorical distinctions between facts and inferences, between primary and other facts and between primary and secondary inferences which cannot be sustained;
iii. It assumed that the judgment of the majority of the High Court of Australia in *Chamberlain* (1984) 153 CLR 521 is a correct statement both of New Zealand law and of logic when, it is respectfully submitted, it is neither.

Inference is normal, not exceptional

This is related to the point that will be made below that there is no clear distinction between fact and inference. Almost all cases require some degree of inference. Failure to grasp this simply represents failure to think through the thought processes in detail.

In particular *mens rea* is usually and not exceptionally inferred from the *actus reus*. In fact this is so obviously the case that many, including Professor Glanville Williams, have called for an evidential burden to be placed on the defence in respect of *mens rea* issues. This would simply mean that the Judge would not have to direct the jury in every case that they must be satisfied that the act was done intentionally when they have not heard anything to lead them to believe that it was not.

Mr Mathias's definitions and categories

Facts in issue: the definition of "fact in issue" as a fact "which must be established by the prosecution to prove its case" refers to "material facts" ie the facts the substantive law requires proved to make a particular charge stick eg, in the case of murder, death. But the reference to some facts not being in issue in a particular case appears to assume that "fact in issue" means "any contested fact". The latter will include inferences, which leaves room for confusion when the expression "fact in issue" is used later in the article.

Subordinate facts are defined to mean facts which go to the admissibility or weight of evidence. These are what in the Law Society paper *Preparing to Win* are referred to as "indirectly relevant facts". Mr Mathias refers to "subordinate facts" being the basis for an inference about a fact in issue. If "fact in issue" means "material fact" this would mean that the "subordinate fact" had become a "primary fact". Presumably therefore "fact in issue" here means "primary fact". To make matters worse a "subordinate fact" can, of course, be "in issue" ie contested.

Primary fact is a fact proved by a witness or by some other form of direct evidence. Confusingly, it is said that a primary fact may also be called an "evidentiary fact" whereas our understanding of the common use of that term was that it was an inference drawn from evidence which itself proved a "material fact". It is attempted to distinguish primary facts from *inferences*, which themselves can be primary or secondary.

The difficulty in making this distinction is illustrated by *Chamberlain* itself. The "primary fact" to which Brennan J was referring was the presence or otherwise of fetal haemoglobin in

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continued from p 129

and adaptation, and the "golden ager", who feel more comfortable conserving things the way they have always been.

The challenge to law firms is to find a dynamic balance between these two forces. That way, firms will progress in the right direction, at controllable speed, while keeping their professional standards and service characteristics intact.

The situation in New Zealand, as I have experienced it with both large and small firms, is that there is an evolving awareness of marketing, although confusion still exists about its essentially strategic purpose. The smallness of law firms in this country, compared with those in North America, means that not all the lessons and perspectives of the conference are relevant to us here. However, the emphasis on marketing for survival, on finding out what clients need, and enhancing or developing new services to meet those needs, is a fundamental principle of marketing which firms of any size must adopt to compete.

The other essential lesson concerns the use of marketing to differentiate one law practice from the next. Too many New Zealand firms are adopting a "me too" approach to marketing, copying at a tactical level each other's services, and the methods of publicising these with advertising, newsletters, seminars and so forth. Because clients are being increasingly solicited by such material, tactical marketing is unlikely to have a sustained impact if it is not supported by strategic differentiation. This implies researching and implementing tangibly different services and methods of service delivery, and, if necessary, being more selective in targeting specific markets.

This strategic approach promises spin-offs beyond the individual firms and their clients. It should result in a revitalised profession, with a broader skills base and practice scope, and a much improved capacity of adaptation. □

the stains under the dashboard. But this was a conclusion drawn from observing scientific tests and based upon assumptions about those tests, ie an inference.

Furthermore any piece of evidence can be resolved down to a "primary fact" about which we may be reasonably certain, if only the fact that a witness has asserted something in Court. There is no clear distinction between fact and inference and any theory that rests upon such a distinction cannot be sustained.

Nor is there any distinction between primary and secondary inferences. The length of a chain of inference between an observed fact and an unobservable fact will depend more upon the person analysing the process than on any intrinsic qualities. Thus, commenting on *Auckland City Council v Brailey* (1987) 2 CRNZ 397, Mr Mathias mentions evidence from which it can be inferred that the accused could not have changed seats and that the accused got out of the driver's door of the car. This inference and this fact together lead to the inference that the accused was the driver. There is surely an intermediate inference that the accused was sitting in the driver's seat. It is this inference, coupled with a generalisation that the person sitting in the driver's seat of a moving vehicle is almost always the driver that leads to the inference that the accused was driving. Exceptions to the generalisation may be imagined and the chain might be extended by still more pedantic analysis.

Chamberlain

Flaws in the reasoning of the majority in *Chamberlain* have been exposed above. Fortunately it does not represent the law in New Zealand, being quite inconsistent with the Court of Appeal in *Thomas* [1972] NZLR 34. The Court unanimously and specifically rejected a defence submission that facts from which the Crown sought to draw inferences must be proved beyond reasonable doubt. The Court said (at p 38) that "it is to the totality of that narrative to which the formula 'beyond reasonable doubt' applies". In particular a material fact may be proved by the convergence of a number of inferences based upon facts, about each of which there is room for doubt.

Nor does *Chamberlain* represent a correct logical statement as Mr Mathias believes. The dissent of Deane J is unanswerable, as is the devastating critique delivered by Roden J in *R v Shepherd* (No 3) (1988) 39 A Crim R 266. For fuller comment on this we refer readers to our article "Inferring Beyond Reasonable Doubt" shortly to be published in *Oxford Journal of Legal Studies*.

Yours faithfully,

B W N Robertson,
Lecturer in Law,
G A Vignaux,
Professor of Operations Research,
Victoria University of Wellington

Dr Mathias responds:

Dear Sir,

Thank you for the opportunity to comment on your correspondents' letter. I am grateful to them for troubling to comment on my article, and any abruptness in my remarks is due to your [editorial] suggestion that I comment "briefly". I did not mean to suggest that I regard inference as an exceptional process; in the second sentence of my article I observe that the prosecution "frequently" rely on inferences. In practice it would be rare for a contested case not to involve inferences.

Your correspondents' comments on my definitions and categories is merely an attempt to substitute their terminology for mine, and their misunderstanding of mine is revealed in their reference to the evidence in Chamberlain *where they describe the fact that fetal haemoglobin was in the stains as the "primary fact" whereas I would call it the "fact in issue"; further, I would call the results of the scientific tests the "primary facts" and the reliability of those results would be based on "subordinate facts". The usefulness of your correspondents' analysis is undermined by the doubtfulness of their conclusion that "there is no clear distinction between fact and inference".*

I do not agree that they have exposed any flaws in the majority reasoning in Chamberlain, *nor that that case is inconsistent with* Thomas. *They do not correctly state the defence submission rejected in* Thomas: *it was that facts from which the Crown sought to draw inferences must be proved beyond reasonable doubt* without reference to other evidence *[1972] NZLR 34, at 40 line 28). I am in agreement with the rejection of that submission, as can be seen from my discussion of* Makin *and* Thomas *and my discussion of the cords metaphor shows that I do not insist that the jurors all agree on the facts they find to be proved in support of the inference of guilt.*

In Shepherd *Roden J is at cross-purposes with* Chamberlain. *In an effort to show that an inference of guilt beyond reasonable doubt may be based on facts themselves not proved beyond reasonable doubt, Roden J uses the following illustration. Where the fact in issue (my terminology) is whether D tossed a coin and got heads on a particular day, the primary facts (my terminology) are that he tossed it once (fact in issue not proved), or — alternative facts — twenty times (fact in issue proved). Roden J says that each toss of the coin is like a fact proved on (something approximating to) the balance of probabilities, and that therefore proof beyond reasonable doubt arises from a combination of facts each proved to a much lesser standard. This is clearly false. Once a juror accepts beyond reasonable doubt that a toss of the coin occurred, that can be used as the basis for the inference that it came up heads, but on its own that would not prove heads beyond reasonable doubt; as the number of tosses proved beyond reasonable doubt to have occurred increases, so does the standard of proof that heads occurred: eventually the juror will be subjectively satisfied beyond reasonable doubt that one of the tosses was heads. I would not join your correspondents in calling Roden J's critique of* Chamberlain *"devastating".*

D B Mathias

Waiver and legal professional privilege: *Derby v Weldon*

By Steven Zindel, a Nelson practitioner

This article recounts the experience of the author when working on a very substantial case in England in 1989 and 1990. The article considers the problem in respect of legal professional privilege regarding documents which may have been unintentionally disclosed and whether that waives the right to claim the privilege. He is of the view that protection will ordinarily be given if there has been a mistake made but that in large and complex transactions the protection afforded is still inadequate.

The ever more complex litigation being waged in New Zealand is nevertheless dwarfed by the size and scale of the mega-cases to be found in England and the United States. Whilst working in London in 1989 and 1990 I was involved in commercial fraud proceedings for a New York-based client. These proceedings were known colloquially among Chancery staff at the High Court there as "the interlocutory". The case is *Derby & Co Ltd and Others v Weldon, Jay and Others* Ch 87 D3804 and it has received its name as a result of the three and a half years of fiercely contested interlocutory proceedings that culminated in a trial which began in October 1990 and has only recently been settled. The case has been reported nine times and among other things is a landmark case for the Court's power to issue a worldwide *Mareva* injunction freezing assets pending trial ([1989] 1 All ER 1002 (CA)).

The aspect of the case which was most important to me as "Head Cleric" of a 30-40 "paralegal" team was the conduct of the plaintiffs' discovery. The proceedings had been issued by the American merchant bank Salomon Inc and its associated companies against two former English directors (and their associated companies, trusts and other entities) of a commodities trading company (Cocoa Merchants Ltd – "CML") which Salomon had taken over in 1981. The allegations made were many and included breach of contract of employment, misrepresentation, breach of trust etc as a result of the collapse of CML and alleged benefit obtained from the directors and their related entities.

The plaintiffs inherited from that company and had themselves roomfuls of documents covering not only the four years of deteriorating trading with which CML had been involved, but also many documents on the aftermath and the investigations which had been carried out. As the year went by these investigations became increasingly sophisticated as more evidence was unearthed. A key to the defence was the execution by the plaintiffs of a release agreement in 1984 which the plaintiffs alleged was executed at a time when the magnitude of the wrong-doing on the part of the defendants was not fully known. Legal advice obtained during the course of 1984 by the plaintiffs both through their own in-house legal advisers and externally was regarded as highly sensitive as evidencing the intentions of the plaintiffs in executing the agreement.

The documents containing legal advice and detailing the investigations conducted when legal proceedings of one sort or another in a variety of forums and jurisdictions were contemplated, were frequently hard to detect. The magnitude of the task involved in fishing out such documents arguably covered by legal professional privilege from the 5,000 files of approximately 300 pages each, regarded as relevant, from an even larger paper mountain was horrendous.

The earlier job that was done of listing the over 1,000,000 relevant documents was necessarily brief at times and no verification of the lists of documents was ever made. This was a fertile ground for attack from the defendants who alleged that the lists were not in conformity with the rules provided in the White Book (in New Zealand see Rule 298(4) of the High Court Rules which in the opinion of Master Williams QC in *Wang NZ Ltd v A-G* (CP 561/89, Wellington Registry : 13 TCL 12,6) merely codifies the decision of the Court of Appeal in *Hunyady v A-G* [1968] NZLR 1172.)

It was no surprise that when I started as the most junior of a 30 or so strong team of full-time lawyers on the case, that many privileged documents had already been inadvertently disclosed to the defendants in the course of the discovery.

I was employed to deal with the mechanics of inspection by the then eleven defendants and their advisers and experts and to be one of the four solicitors and counsel eventually involved in compiling the trial bundles for the action. These trial bundles came to form over 200 lever arch files of documents (which incidentally needed to be copied some 20 times for trial). The paralegals whom I was supervising were generally all graduates but only a small percentage of these were legally trained. They were expected

to perform the copying and sorting of the documents both for the defendants and for our clients' further research and for the purposes of compilation of the tial bundles.

Much of the damage concerning privileged documents being released to the defendants in the course of the on-going inspection exercise had already been done, although it was some six months into my time there before that fact was fully appreciated. Increasingly one of my roles became to minimise the future damage caused by the release of privileged material, by trying to read everything that was copied for the up to 20 representatives of the defendants, or which made its way into the trial bundles. The prospect for clerical error and sheer "white-out" conditions as a result of the surfeit of paper involved in the litigation was enormous and identifying arguably privileged documents was not always an easy matter. Problems continued to plague us.

Three judgments in the proceedings which are unreported in the main English reports dealt with the issue of legal professional privilege and generally they were in favour of the plaintiffs' claim that they did not intend to waive privilege simply by giving copies of privileged documents to representatives of the defendants. The judgments are those of the chief interlocutory Judge appointed for the case, Mr Justice Vinelott on 9 April 1990 and 2 November 1990, and also the decision of the Court of Appeal on 27 July 1990 which has been reported in *The Times* on 29 August 1990. The cases are of considerable practical relevance.

These decisions support the strand of the law which holds that the equitable jurisdiction to restrain breaches of legal professional privilege should override the general legal evidential rule that once discovery is made and inspection by the other side complete, then the party inspecting the documents may use such information and obtain appropriate copies of the documents. However, the exercise of the equitable jurisdiction is by no means automatic. The authorities are somewhat conflicting as to when the discretion will be exercised. It is possible that the *Derby v Weldon* litigation will now have introduced some finality to the debate.

The *Derby v Weldon* cases are authority for the following propositions:

1 No need to show confidentiality: no need to enter into a balancing exercise

Documents for which legal professional privilege are claimed do not also need the added quality of being confidential to be protected. Judgments in the past which have used the language of confidentiality eg *Ashburton v Pape* [1913] 2 Ch 469 and *Goddard v Nationwide Building Society* [1986] 3 All ER 264 were distinguished by Mr Justice Vinelott in his 9 April 1990 decision as depending not solely on the relationship of confidence alleged for relief to be granted and for confidential/privileged information wrongfully obtained to be returned and/or not used at trial. Also, there is no corresponding need for the Court to enter into any kind of balancing exercise between the conflicting public policy considerations of completeness of evidence before the Court and that of legal professional privilege (endorsed by the Court of Appeal in its decision of 27 July 1990). See also *Eagis Blaze* (1986) LLR 204 and *Goddard v Nationwide Building Society* supra. His Honour expressly disapproved of the decision in *Webster v James Chapman & Co* [1989] 3 WLR 939, in that regard.

2 Once looked at or copied, able to be used?

In fact, simply because a privileged document has been looked at by a party making inspection, that does not mean that privilege may be taken to be waived, with the information in that document allowed to be used and a copy able to be obtained. Vinelott J in his 9 April 1990 decision implicitly disapproved of the decision of Mr Justice Hoffmann in re *Briamore Manufacturing Ltd (in liquidation)* [1986] 1 WLR 1429 as proceeding upon an unwise concession by counsel for the liquidator. Also, merely because a document has been copied does not mean that it can be produced as secondary evidence of the contents of the original: *Ashburton v Pape* supra and *English and American Insurance Company Ltd v Herbert Smith* (1986) FSR 232; cf *Calcraft v Guest* [1898] 1 QB 759.

3 Waiver does not depend on conduct

Despite *dicta* in *Ashburton v Pape* supra, the protection afforded to legal professional privilege does not depend on the conduct of the third party into whose possession the record of the confidential communication has come : *Goddard v Nationwide Building Society* supra; *English and American Insurance Co Ltd v Herbert Smith & Co* supra.

4 The need to seek protection early

The party which desires protection must seek it before the other party has adduced the privileged information in evidence or otherwise relied on it at trial : *Goddard* supra; *Herbert Smith* supra (the granting of leave to amend a list of documents under Order 24, Rule 17 prior to inspection will ordinarily be routine in England : *Guinness Peat Properties v Fitzroy Robinson Partnership* [1987] 2 All ER 716 but in New Zealand under Rule 304, no leave is required).

5 Conduct is important in so far as fraud or obvious mistake is concerned

It is relevant, whether the party seeking to take advantage of the disclosure of privileged information does so having procured inspection by fraud, or who having made inspection realises that he has been permitted to see a document or documents only by reason of an obvious mistake. In such circumstances, the Court has the power (and generally ought to) intervene for the protection of the mistaken party : *Guinness Peat* supra. Lord Justice Slade in that case emphasized that these circumstances were not intended to be exhaustive and Vinelott J in his 9 April decision amplified these circumstances to state that the Court would not only intervene where

there was knowledge by the party making discovery of the mistake but also where the Court could infer a party's knowledge, as when a particular document was obviously privileged and there was an absence of enquiry. So too ". . . if the circumstances otherwise found the inference that the solicitor to a party to whom disclosure was made must have suspected that the document was disclosed by mistake and refrained from making enquiry in case his suspicions were confirmed."

Vinelott J explained the rationale for the strict obligation which he placed on solicitors acting on inspection to ensure that mistakes in discovery were not taken advantage of, in the following terms:

> The Courts expect a high standard of probity and care on the part of its officers in the conduct of litigation, and a solicitor must be taken to be aware of the importance of legal professional privilege and in the words of the Vice-Chancellor [Sir Nicolas Browne-Wilkinson in *Herbert Smith* supra at p 239] of the mischances that are likely to occur in the course of discovery in a complex case. These principles must be borne in mind even in the heat of contested litigation.

6 Once inspection has been made, it is harder to claim protection

Mr Justice Vinelott did feel constrained by what Lord Justice Slade had said in *Guinness Peat* supra, to hold that an implied waiver of privilege could still occur where there was inspection of the document or documents concerned, even if that inspection had not resulted in any more, such as if the document or documents had not been adduced in evidence in Court or shown to a prospective witness.

The basis for this rule was explained that the person making inspection would suffer a detriment by reading a privileged document and learning something which could not be put out of his mind, and which would therefore inhibit the conduct of the action. Such a detriment would allow the other party to be bound by his legal advisers as agents who were acting within the scope of their client's ostensible authority in disclosing privileged information, even if they were acting without his actual authority. The logical paradox which this presented to His Honour was that the detriment could still be suffered if it ought to have been obvious in reading the document that privilege could have been claimed and if the document had probably been disclosed by mistake. When was it going to be apparent that the document was privileged? In the middle of the document? At the end? After reading the second document? And how was the party inspecting not to suffer prejudice in those circumstances?

On the facts, a number of documents released by the plaintiffs to the defendants were agreed to have had yellow "post-it" stickers (either in a certain position on the document, or with "P" or "Priv" or "Privileged" on them) affixed to the document and this was enough for Vinelott J to conclude that the defendants' solicitors ought to have been put on notice when inspecting, that privilege was claimed for one document in particular which definitely had a sticker. At the very least, he ruled that the defendants' solicitors should not have inspected or taken any copy of the document concerned without first inquiring whether it had been inadvertently disclosed.

The Court of Appeal was prepared to go further on the basis of the evidence to prevent even documents which are not obviously privileged on their face from being used. The defendants' solicitors had candidly admitted that they knew some documents were privileged, they had even sought the advice of leading counsel on the question and had subequently disregarded his advice that they should contact the plaintiffs' solicitors over whether they had intended to disclose the documents in issue.

In the words of Lord Justice Dillon:

> It is plain that the system for excluding privileged documents which had been applied by the plaintiffs' solicitors had broken down and the first and second defendants had appreciated this.

The Court phrased things in terms of the law of rectification of contracts (see *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555.)

As the defendants were aware that many privileged documents had been inadvertently disclosed and had sought to take advantage of that mistake, they were not entitled to assume that privilege had been waived in relation to any document in respect of which privilege was later asserted, including documents which were not on their face privileged.

Lord Justice Butler-Sloss went so far as to censure mildly the firm of solicitors taking advantage of the mistake. It was said that ". . . they were at risk in continuing to retain these documents."

In the context of the compilation of the trial bundles, however, Vinelott J in his 2 November decision drew on his reading of the evidence of the plaintiffs' solicitors that although the initial trial bundles were put together by inexperienced staff and paralegals, the bundles themselves were reviewed by experienced solicitors and counsel to ensure that privileged documents were excluded. Privilege was held not to have been waived for documents introduced by the defendants, which had been copied from those which had slipped through at the discovery stage. But to Vinelott J there was no such justification for the selections made by the plaintiffs to be protected from waiver of privilege. In His Honour's view, there was no reason why the defendants should be taken to have known that mistakes had occurred in the preparation of plaintiffs' selections for the trial bundles. Consequently, they were entitled to assume that the documents included by the plaintiffs were documents which the plaintiffs proposed to rely on whether privileged or not.

This ruling was made notwithstanding the fact that some documents introduced by the plaintiffs into the trial bundles were obviously privileged and that it had been held by His Honour previously that it would be wrong in any case to assume that a party intent on claiming privilege would pick and choose which privileged documents would be disclosed. Also, in the context of the approximately 60,000 pages of information in the trial bundles, His Honour imposed a

high standard indeed on the solicitors responsible for screening the trial bundles. In my respectful view, it was expecting too much of solicitors under intense time pressure and facing a multiplicity of complex issues, not to make some mistakes. Fortunately, as it happened, no more than a modest handful of documents appear to have slipped through and many, if not all of those, were not overtly helpful to the defendants.

7 Legal advice by company advisers

There is a hint in the decision of Mr Justice Vinelott on 9 April 1990 that legal professional privilege may be weaker for in-house legal advisers than for solicitors, particularly where such advisers perform a number of functions. His Honour stated on the facts before him that an explanation of the activities of the plaintiff companies was needed before it could be held that documents submitted to in-house legal advisers fell properly within the scope of legal professional privilege.

8 Waiver through reference to legal material subsequently

From Vinelott J's 2 November 1990 decision, a waiver of privilege does not occur simply when the effect of legal advice is referred to in interlocutory proceedings (as for example in a summary judgment application where a frequently used sentence of a plaintiff in an affidavit in support is "I have been advised by my solicitors that the defendant has no defence to this action.") But a waiver of privilege can be taken to have occurred when the substance or content of legal advice is referred to: *Mabubeni Corporation v Aristedes* 6 November 1986 (unreported, English Court of Appeal).

From the decision of the High Court of Australia in *A-G for Northern Territory v Maurice* (1986) 161 CLR 475 the test for whether waiver should be implied or imputed in the absence of an intentional waiver of privilege, is whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that the material associated with it was privileged from production. In New Zealand, Mr Justice McGechan in *Commerce Commission v Fletcher Challenge Ltd (No 4)* (1989) 2 PRNZ 15 held on the facts of the case before him that fairness did not require such an imputation of waiver where a witness for the defendant had referred to certain legal opinions in answer to questions during trial, but where the plaintiff had not itself discovered legal opinons obtained by it. Mr Justice Wylie in *Equiticorp Group Industries Ltd v Hawkins* (1990) 2 PRNZ 19 held that where a report which was prepared by a solicitor to determine a cause of action was extensively referred to in an affidavit in opposition to an application for security for costs, waiver of privilege could be implied, for otherwise it would be unfair and misleading to allow disclosure of a substantial part of the document while continuing to assert that the communication itself was privileged.

9 Severable parts of a document

It is a question for the Judge whether if privilege can be taken to be waived in relation to part of a document, fairness requires that the other party should be entitled to adduce the whole of the document to ensure that the Court is not misled by seeing part of it out of context. In the English Court of Appeal decision in *Great Atlantic Insurance Company v Home Insurance Company* [1981] 2 All ER 485, the Court held on the facts of that case that the whole document was privileged and that disclosure by the solicitor for the party making discovery of two paragraphs was waiver of privilege of all. Whether it is possible to sever component parts of a particular document, depends upon whether each part deals with a distinct subject. (A decision quoted in the *Great Atlantic,* supra, case was that of *Churton v Frewen* (1865) 2 Drew and Sm 390 where it was held that a privileged document containing largely unprivileged material could not be inspected, even for those parts referring to the unprivileged material, and this decision was used as a justification for Mr Justice Chilwell in *Mudgway v NZ Insurance Company Limited* [1988] 2 NZLR 283 holding that waiver of privilege for a particular document does not amount to waiver of privilege to other documents which are referred to in that document.)

10 Where the party claiming waiver of privilege was himself made the addressee or copyee of privileged information

If an officer or employee of a company is given privileged information, the privilege will normally be taken as having been waived against that person, if there is subsequently litigation between the company and the person, when the advice given or instructions received are material to an issue raised in litigation. In *Derby v Weldon*, one of the directors of the company, CML, which had been taken over by the plaintiffs received much prima facie privileged information whilst he was with CML, in the employ of the plaintiffs and before the extent of his alleged wrong doing became known. He was thus able to use information which had been given to him when the plaintiff companies were not aware that subsequently they might be proceeding against him for the £100,000,000 eventually claimed.

11 The form of an order

Whilst it is all well and good to win an application that privileged documents were disclosed in error and to have copies of documents returned, it is important to ensure that the information contained in those documents is not used in some more indirect way, such as through cross-examination. It is desirable to obtain a written undertaking or order sealed to the effect that not only will copies of privileged documents in the other side's possession, custody or power be delivered up, but also all notes (and copies) of the information contained in or derived from any of the documents (with the other party having the right to obliterate any editorial comment made that is secondary to such information). Also the party which has carried out the inspection should be made to undertake not personally or through its agents to make any use of the information contained in or derived from the documents for the purposes of pleading, evidence, preparing for trial, cross-examination or otherwise overtly

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The case against oaths

By D F Dugdale of Auckland

In 1990 Dame Barbara Goodman and nine others presented a petition to Parliament the prayer of which read "That legislation be enacted replacing so much of the Oaths and Declarations Act 1957 as provides for the administering of oaths and the making of affirmations by provision for a single non-religious but appropriately solemn form of undertaking". The nine supporting petitioners were the Rev David Clark of St Luke's Presbyterian Church, Remuera, D F Dugdale, S Elias QC, Hon A M Finlay QC, Sir Edmund Hillary, Sir Robert Jones, C M Nicholson QC, B H Slane and P B Temm QC.

The Justice and Law Reform Committee heard submissions on the petition on 8 August 1990. The Committee was told that on 17 May 1990 the General Assembly of the Presbyterian Church had resolved to request the government to abolish the practice of swearing oaths on the Bible at occasions of public and judicial testimony. The Justice Department recalled in submissions that it had as long ago as 1978 urged on the Royal Commission on the Courts the view that:

> It is not too much to assert that not infrequently the administration of the oath is a gabbled farce, almost unintelligible to the uninitiated and answered with little comprehension of the consequences . . . it would be far better to require a witness simply to promise to tell the truth with a clear statement of the consequences should he make a false statement.

On 16 August 1990 the chairman of the select committee reported the petition back to the House of Representatives with the recommendation that it be referred to the government for favourable consideration and that report was accepted by the House.

As the matter is of some interest to members of the legal profession the contents of Dame Barbara Goodman's written submissions are set out below.

Submissions of Dame Barbara Goodman
in support of Petition No 1990/249

1 The law requires the swearing of oaths by witnesses, jurors and other persons involved in judicial proceedings, by the holders of certain offices, principally important offices of state and as a condition of eligibility to pursue certain callings, in particular legal practice, membership of the police and schoolteaching.

2 The normal manner in which an oath is taken is that prescribed by the Oaths and Declarations Act 1957, s 3 (a) and (b) namely by repeating or assenting to a form of words that includes some such expression as "by Almighty God" or "So help me God" while holding in the hand a copy of the Bible (or a New Testament or an Old Testament).

3 It is a matter of historical fact that as Christianity spread throughout the Mediterranean Christian congregations took over many of the rites and practices of the religions that were displaced. Easter is the modern form of an ancient fertility festival. The sacrament of eucharist had its pre-Christian forerunners. Perhaps the most concrete demonstration of this process was the Christian takeover of the very places of worship of the supplanted creeds. The baptistry at Split began life as a temple to Jove. To this day there can be observed the columns of a Greek temple embedded in the walls of the cathedral at Syracuse in Sicily. One primitive ritual taken over by Christianity was that of oath-taking, the belief that (through fear of divine intervention) promises had greater weight when made while touching a sacred object. Although in the forms prescribed by the Oaths and Declarations Act 1957 the sacred object to be touched is a Judaeo-Christian document, the Bible or one of its constituent

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continued from p 135

howsoever. In New Zealand, we have the permissive Rule 304 to authorise amendment of discovery lists, but in the circumstances it would be a safe course for the party having inadvertently made disclosure to record the consent of the inspecting party to the amendment of the list of documents and for the removal of the offending documents from the discovery.

Conclusion

It is my respectful conclusion that the law allowing protection from waiver of privilege is now reasonably settled. The protection will ordinarily be given where there has been a mistake and a taking advantage of that mistake. However, the duties which are placed on professional advisers on all sides is high. It is too high for those solicitors who screen many documents for privilege in the context of a large discovery. The mere presence of a solicitor at some stage in the screening process ought not to preclude a party from later asserting that a mistake has been made and that there ought not to be any imputed or implied waiver of privilege in the circumstances. It is likely that we will have to await another decision from the more developed jurisdiction in England before we see any sign that the Courts will adopt a more realistic attitude. □

parts, we should not let this blind us to the fact that the oath is in origin a piece of pagan superstition the survival of which in the closing decade of the twentieth century is a symptom not of enlightenment but of atavism. It is doubtful whether witnesses in the year 1990 who are minded not to tell the truth are deterred by fear of heavenly retribution.

4 English law used once with harsh logic to provide that persons of no religious belief were incompetent to hold any office when an oath was required (the history of Charles Bradlaugh an atheist excluded from the House of Commons only to be defiantly re-elected by his constituents is well known) or to give evidence. "An oath" said an English Court in 1786, "is a religious assertion, by which a person renounces the mercy and impeaches the vengeance of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice" (*R v White* 1 Leach 430, 431). So in the case of *Reg v T H Barclay* (1873) 2 NZCA 252 the New Zealand Court of Appeal found itself wrestling with the problem of whether it should admit the evidence of an Anglican who believing that God had power to reward or punish had doubts as to whether He *will* punish. Following the Bradlaugh affair the law (which had earlier been modified to make provisions for Quakers and Moravians) was in England varied by a statute of 1888 which made provision for affirmations, and this statute is the ancestor of the provision for affirmations contained in the New Zealand Oaths and Declarations Act 1957, s 4.

5 What your petitioners propose is that the logical next step in the reform of the law in this area should now be taken, and that the forms of oath and affirmation should be replaced by a single non-religious (but appropriately solemn) form of undertaking.

6 We believe that there are three reasons in particular for such a change. First as the law now stands the person who does not wish to swear an oath (whether because of

(i) commitment to a belief other than Judaeo-Christian or
(ii) because his Judaeo-Christian beliefs forbid the employment of holy writ and the invocation of the name of the Deity in such a context or
(iii) because of staunch unbelief)

must draw attention to his creed, and do so (much more often than not) in public and in some such formidable atmosphere as that of a Court of law. Yet every citizen is entitled (if he or she so wishes) to preserve his or her religious beliefs as something private. Freedom of religious belief must surely extend to and include the right to keep one's religious beliefs (or unbeliefs) to oneself. Disclosure by a witness (for example) of his or her religious belief or unbelief can lead to prejudice (albeit subconscious prejudice).

7 Secondly it is offensive to many sincere religious believers that the name of the Deity and the sacred book of their religion should be casually employed by persons who are indifferent to religion and to the religious significance of oaths. It is a taking in vain of God's name.

8 Thirdly there are those who (whether or not themselves the holders of religious beliefs) recognise the origin of the oath in pagan superstition and regard it as totally out of place as part of the procedures of (for example) a modern parliament or a modern court of law.

9 We acknowledge the need in replacing oaths and affirmations for solemnity and formality. We accept that witnesses and others who now take oaths must have impressed on them the importance of their promises, and that there must be a formal method of demarking the boundaries within which if a man knowingly lies he commits perjury. We believe that it is possible to provide for such matters by such a single non-religious but appropriately solemn form of undertaking as we advocate.

10 What we propose is by no means without precedent. Where in less formal situations it is desired to extract a statement the maker of which can be punished for perjury if he lies there is employed the statutory declaration. Its form is set out in the First Schedule to the Oaths and Declarations Act 1957. The declarant "solemnly and sincerely declares" and concludes "And I make this solemn declaration conscientiously believing the same to be true". This formula is an effective example of the single non-religious but appropriately solemn form of undertaking that we recommend. □

Libel as seen by a journalist

Those of us who seek to publish uncomfortable facts about our fellow human beings are constantly being plagued by the law of libel. That it is a law which most of us detest and fear should not, however, blind us to the fact that we could not do without it altogether. If no one had any redress for libel no one would ever believe a word we wrote. I cannot count the number of letters I get from people who have read my column in the *Mirror* and say, 'We simply couldn't believe your article about X and wonder if you could tell us whether he is suing you' – or something of the sort. When I worked for *Private Eye*, this reaction was even more common. *Private Eye*, one of the very few genuinely free publications in the country, is always falling foul of the law of libel, but if there were no law of libel at all, no one would believe a word in *Private Eye*, and as a result some of the great scandals of modern times would not have been exposed.

If we need a libel law, then, why do we hate it so? One reason is that the only people who are certain to benefit from the British libel law are the lawyers. I have never been in a libel action without at some time in the proceedings feeling a sense of solidarity with the man who is suing me against the great army of lawyers whose pockets will be full whatever the result.

Paul Foot

London Review of Books
7 March 1991

The Treaty of Waitangi: *"Do I dare, Disturb the universe?"*

By Nick Gerritsen, a practitioner of Christchurch

It is the author's view that the Treaty of Waitangi concerns values and morality and is therefore more than merely a legal document subject to legal interpretation. However, he suggests that the developing size and complexity of the debate about the Treaty is daunting. He suggests that the issue is now of such a nature that it needs to be resolved by Parliament.

And so they said . . . it's a matter of good faith, let the spirit free . . . and so it was . . . and the land of New Zealand was overcome and haunted by the noblest of spirits .

So, "let us go then, you and I . . ." (The Love Song of J Alfred Prufrock, T S Eliot).

The debate over the Treaty of Waitangi ("the Treaty") necessitates an appreciation of all facets of our society of which values, politics, the law, and new avenues of thought, are but a few. Throughout the intricacy and emotion one must also keep in mind the everyday reality of the debate. It is vitally important to consider how ordinary New Zealanders are affected and how relevant the Treaty is to their everyday lives.

The reality is that a large percentage of New Zealanders cannot afford the luxury of gazing skyward and pondering higher issues. They do though, have views.

If one considers the debate holistically can it be said that concrete progress is being made? Instead of drawing society together in pursuit of harmony, the knives are being drawn. The Treaty is now often used as a justification for acting beyond the ordinary norms of society.

Values

It is a matter not just of justice, but of values. Rational justice is said to be the basis of any sound decision. (*National Bank of Greece and Athens S A v Metliss* [1957] 3 All ER 608) and the driving force behind justice itself is provided by values (R W M Dias, *Jurisprudence*, 1985, p 194) as they link the law and society together "in the widest sense". (ibid, p 219).

But what comes first, the values or the just decision? Plato and Aristotle believed in the educative function of law. Aristotle said that "legislators make citizens good by forming their habits" (Dias, *Jurisprudence*, p 51) – that moral ideas are shaped by legal enforcement and that values are pre-empted educatively. Some "shared morality is essential to the existence of any society". (ibid, p 112) The question is who creates this morality in the first place. Do humans, as sheep, just merely follow?

The Treaty

The Treaty of Waitangi concerns values and morality, more than mere legal interpretation. The question which comes to mind with respect to this issue is who is leading this value based "resolution"?

The majority of New Zealanders are largely too busy surviving to worry directly about the justice of the Treaty of Waitangi. Views are very mixed. In a survey conducted by the *New Zealand Herald* – National Research Bureau in July 1988 "62% of respondents were not satisfied with the Treaty, 34% believing that it should be re-negotiated, and 28% in favour of its abolition. A further 25% supported the Treaty, with 4% saying that it should have the force of law". (*Waitangi*, 1989, ed I H Kawharu p 281). Will it ever be possible to adduce a common view of the Treaty? – so much for a shared morality.

Despite its practical implications for society the Treaty has been adorned with sentiment and, as such, fulfils the dream of many an academic. Perhaps the rats who have amended the original over the years had the right idea, or does this fact merely exemplify serious historical neglect.

Throughout the debate the practical effect of such "Treatytalk" has been forgotten. Everyone is speaking at once, the politicians, the Judges, Maori representatives, European representatives, academics, church leaders . . . . All that arises out of this consummate conversation is a collection of rather inadequate garbled signals.

The Treaty and values

The totality of New Zealand's values is divisible by the current population. Everyone is entitled to hold their own views. There is though, a large degree of common misconception within society with regard to the Treaty, such as the view that the word "partnership" inherently involves a fifty percent sharing. Few people are aware of the restrained meaning that has been placed on this word within this context. Partnership "does not mean that Maori New Zealanders are entitled to fifty percent of all the seats in Parliament; nor to fifty percent of all the tax revenue, . . . And it certainly does not mean that Maori New Zealand is entitled under the Treaty to half of all Crown property in the country". Further, the word "partnership" connotes inherently some form of equality, and must be clearly stated as in the *Te Weehi* decision that ". . . inequality between persons may indicate an overall justice rather than an injustice". (*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 at 693.) Lest one forget.

. . . and politics

Social perception is at odds with the approach and interpretation of the law. Who is pre-empting who? This is an issue that all New Zealanders need to be very familiar with if the view of the law is to reflect social values. Politicians are aware of the importance of the Treaty, but also of the dichotomy of views which presently exist. As David Lange said, as Prime Minister, there are "nuts and bolts issues" which can be "identified and quantified" and yet questions which affect all New Zealanders more personally such as "is your quarter acre section safe?" (Chateau Seminar – *Council Brief* 163, July 1989). To such a question it is suggested a politician would reply "totally safe," and a lawyer "good question".

Effective government in modern times means the effective management of limited resources in the best interests of the community. The pivotal question is whether the Treaty of Waitangi should account for a different approach to sharing, and who is to decide? This introduces a subjective element and is at odds with comments such as those of Geoffrey Palmer who, as Prime Minister, said that "clarity and certainty are the foundation stones of our law". (Speech to Wellington District Law Society, December 1989). The Treaty has become the main means of effecting asset redistribution or at least attempting it. Mr Palmer himself noted that the "Maori people are looking for a way out of a whole range of social problems". (ibid) This may be true but any redistribution of assets only goes part of the way to resolving the Maori problem. The real "trick" will be to convert the benefit of this new wealth to the greater good of the Maori community and New Zealand society as a whole.

Resolution?

The current mechanism for resolution ticks over as the hand of some gigantic clock. As time passes, expectations and fears heighten, perceptions sway from the nuts and bolts reality of the Treaty and social values are altered.

The crux of the practical implications of the Treaty is how far New Zealanders will have to go to accept it, or perhaps more pertinently, how far the Government will have to go before the population fully accepts that "*Treatyism*" is a valid aspect of the New Zealand way of life. Will Treaty of Waitangi clauses establish enforceable obligations on the part of Councils and other institutions to become experts in semantics or perhaps scholars of philosophy so as to "*get into the spirit*"? There must come a point where this all becomes superfluous to everyday life. New Zealanders will pick up a basic understanding of the Treaty but it is suggested that any eternal resolution must necessarily involve more than this.[2] The Treaty is all about rights. It is not something which will disappear save all New Zealanders permanently shutting their eyes to it. Paul McHugh has said that "I do not think it beyond the wit of lawyers and Judges to deal with it, or to develop a clear understanding of the Treaty's implications, by the usual process of building a body of common law around it". (in *Lawtalk* 324, April 1990, pp 28-29.) This compares with David Lange's view that the adversarial system of justice is such that the "Courts will never settle and never come close to settling the complex issues of race relations". (Chateau Seminar – *Council Brief* 163, July 1989)

If we are to rely on lawyers' wit (which seems preordained), the issue then becomes how far this innate ability can be used to generate and ensure future justice. Social values, evolving from the Treaty, are developing at a tangent to technical legal interpretation. Some compatibility between the two must be achieved, but who is to make the first move? Can a Court suddenly pre-empt a change in social values or does one wait for a minority group within society itself to generate a change? Where does the responsibility of the Government lie?

New avenues

The most recently resurrected academic ploy is the concept of Aboriginal title. This doctrine continues to gain respectability. It has been described as a "fiduciary-like obligation binding the Crown",[3] and has led to subterranean questions such as those presently faced in Canada, for example; how safe is a Torrens title? (Trainor J in *Hund v Halcan Log Services*).

How many New Zealanders are aware of the *Te Weehi* case which recognises "that an unextinguished non-territorial Aboriginal title may survive over Crown land".[4] Or do we keep these titbits hidden amongst all the other little secrets underneath our gowns.

If the doctrine of Aboriginal title continues to creep into Treaty jurisprudence then so will defences of ignorance as the basis of "unknowledge" of the Treaty of Waitangi. There may exist a positive duty to adhere to the principles of the Treaty but it is a very different issue when it comes to the question of enforcement. How and through what mechanism can you achieve this?

Rights

To guarantee lasting security a moral balance must be achieved. It has been said that

> to promote and maintain a successful scheme of justice requires the promotion of a sense of obligation, requiring amongst other things, a curb on the appetite for rights, especially when this leads to abuse of liberties. (Dias, *Jurisprudence*, p 67)

The fundamental basis is that any "scheme of justice is likely to turn sour if nurtured on ideas of rights alone". (ibid.) Yet the issue of rights forms the core of the arguments, passionate and heartfelt, that are promoted by both sides.

Does this explain the fact that, as the Treaty issue grinds on, one is beginning to hear faint whispers that it should have been filed in the too hard basket? The suggestion that interim settlements may be a "valid option for the future"[5] devalues current efforts and locks society into a confined debate about a document whose words and interpretation have been held to be not as important as the spirit which rises therefrom. The hourglass has already run for 150 years and any suggestion of an interim settlement is akin to turning the glass over to start afresh.

Who makes the first move? — sovereignty

The perpetual question of sovereignty is subsumed within the intoxicating spiritual debate. The

Courts have taken a supervisory position, that is, "a responsibility to supervise Government policy at a high level". (Sir Robin Cooke, [1987] NZLJ 244) The extent of the supervision is the moot point, particularly when it is the view of some people that the Treaty issue "is of a kind which only Parliament can ultimately resolve". (Geoffrey Palmer, Discussion Paper to Wellington District Law Society, December 1989) As an analogy, it is as if the Treaty debate was a tennis match. It is the first set; the Maori Council had the first serve, and the politicians are deciding whether they should go for the volley or slam it. The Courts are the net – stopping some balls but sending others off at a tangent, in a direction unbeknown. So while the Courts, Government and Maori tribal representatives are playing their game, our "plebian" society is left, with bated breath, in a state of tacit uncertainty. The Treaty issue is opaque and it is not the done thing "to call it as you see it".

The Yesterdayness of Todayness

The Treaty has brought about a time of fine words and extremism. It is appealing to think that it is an issue which would go down quite well one afternoon

Before the taking of a toast and tea

under a weeping cherry tree, in a New Zealand country garden. There is a time, though;

Time for you and time for me,
And time yet for a hundred indecisions
And for a hundred visions and revisions

With regard to the Treaty one knows this only too well. Perhaps time is not yet precious enough? (extracts from *The Love Song of J Alfred Prufrock*, T S Eliot).

It has been said
that majoritarianism has had such an overwhelming influence on policy development that the resurrection of partnership 150 years later, will require a bold departure from accepted views of the state, including its presumption to represent the Maori partner on all accounts. (*Waitangi*, I H Kawharu, p 295)

This sounds rather space-age in comparison with the every day reality of the new found "*Treatyness*". It suggests that the majority has to start all over again in a pseudo-democratic manner.

One is left daunted by the developing size and complexity of the Treaty debate.

There is much misconception, and the reality is that the Treaty is perceived to give rise to a number of "rights"; to deep water fisheries, to whitebait in Canterbury Rivers, to F M radio frequencies, to forests, to a separate Maori justice system . . . and as a practitioner one reads reported cases such as *Reihana v Ruthven* (unreported, High Court, Invercargill, February 1990, AP 9/89, Tipping J) in which the Treaty is used in support of a Family Court custody claim.

Where will it end? Will it end? Some now hold that achieving interim settlements is good progress. The truth may be that some involved in the Treaty debate are making too much money out of it. They cannot "afford" to let it be resolved.

If one was to venture to call it as one sees it, New Zealand is in a mess. A heavy obligation lies on the Government (Parliament) to deal with the issue "now". Any attempt to place it on the "back-burner" will only give rise to greater constitutional issues as the Courts attempt to grapple with the Treaty without adequate guidance. And throughout all this the average New Zealander whoever he/she may be has to pursue an ordinary life.

To the dilemma facing all New Zealanders over the Treaty of Waitangi, the words of T S Eliot sing out, simply;

Do I dare
Disturb the universe? □

1 Alex Frame, "A State Servant Looks at the Treaty", [1990] 14 NZULR No: 1, p 89.
2 Michael Batchelor, "Consider the Treaty", *Lawlink* 5 (2) June 1990.
3 P G McHugh, "The Legal Basis for Maori Claims Against the Crown" (1988) 18 VUWLR p 15.
4 Ibid, p 17.
5 "A Challenge to the Profession – become involved", *Lawtalk* 324 April 1990 30-36.

Recent Admissions

Barristers and Solicitors

Barber N M	Wellington	2 November 1990	Lash N J	Wellington	2 November 1990
Bennet D E	Wellington	2 November 1990	Latton R J	Wellington	2 November 1990
Bing I	Wellington	2 November 1990	Lear H D	Wellington	2 November 1990
Blathwayt J S	Wellington	2 November 1990	Lindsay S J	Wellington	2 November 1990
Bridges D J	Wellington	2 November 1990	Lipschitz M W	Wellington	2 November 1990
Calvert I R	Wellington	2 November 1990	Lloyd C M	Wellington	2 November 1990
Chandler J K	Wellington	2 November 1990	Papa L N	Auckland	3 December 1990
Forsell J L D	Wellington	2 November 1990	Peploe G J	Auckland	3 December 1990
Greenslade D W	Wellington	2 November 1990	Quirke N M	Auckland	3 December 1990
Greer B M	Wellington	2 November 1990	Rameil C	Auckland	3 December 1990
Harray P J	Wellington	2 November 1990	Robinson L M A	Auckland	3 December 1990
Inder C J	Wellington	2 November 1990	Robinson M J	Auckland	3 December 1990
Kneebone S H	Wellington	2 November 1990	Rush G A	Auckland	3 December 1990
Lang E K	Wellington	2 November 1990	Satherley G J	Auckland	3 December 1990
Lasenby R L B	Wellington	2 November 1990	Sharp M J	Auckland	3 December 1990

Tax Turnaround

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

One of the luxuries which Australia has given up, in contrast to New Zealand, is allowing litigants to appeal to the Privy Council. For some years now the High Court of Australia has been the third tier for all seasons. The seven Justices are kept very busy.

The main Court building is in Canberra, although occasionally the Court sits elsewhere. I have heard it said that this almost total sitting in Canberra is leading more and more to the Court being removed from the cut and thrust of the real legal world.

After all, Canberra is the compromise site for Australia's capital. It has grown up on what was once desolate wasteland at a sort of mid point between Sydney and Melbourne. There the central bureaucracy and government run round and round in ever decreasing concentric circles in an endeavour to rule this broad land. The result is not always a happy one.

The National Office and the Commissioner of the Australian Taxation Office are also to be found in Canberra. Some would say they too are out of touch with the ordinary Aussie. Be that as it may, the Commissioner seems to be in tune with the High Court, since he has enjoyed a fair amount of success there in 1990.

This is in contradistinction with the Court in the era of Sir Garfield Barwick, when he filled the seat of the Chief Justice. I clearly remember being constantly amazed at the tax decisions in favour of taxpayers at that time. All kinds of what I though were artificial tax voidance schemes received judicial blessing. In New Zealand they would never have been countenanced.

These earlier cases are now falling by the wayside, especially with the replacement of the old s 260 by the provisions of Part IVA of the Income Tax Assessment Act since 27 May 1981. *John's case* (89 ATC 4101), for example, finally overruled *Curran's case* (74 ATC 4296), which had spawned many a scheme. Almost all the High Court tax cases of 1990 favoured the Commissioner with the notable exception of *Thiel* (90 ATC 4717) with its international, rather than domestic, application (see my article in 34 *Current Taxation* 118).

One case on which I should like to dwell is *Cooling* (90 ATC 4472). In fact it was never heard by a full bench of the High Court, having fallen at the hurdle of the hearing seeking leave to appeal. Having heard and quizzed counsel for the taxpayer, the Court found it unnecessary even to call upon counsel for the Commissioner for argument. The application was dismissed.

At first instance Spender J found in favour of the taxpayer on all grounds without too much bother, but was unanimously overturned by the three Judges of the Full Federal Court. Without doubt the High Court thought those Judges got it right.

The case was very much a creature of its time. It concerned lease inducements.

Coincident with my settling in Queensland, but there is no linkage I'm sure, the property market started to boom. At its apex were multi-storey office buildings and shipping complexes (or resorts, to use the more fashionable expression). Of course, it soon became obvious new space far exceeded demand. So something had to be done to fill the new space.

Developers on-sold their developments to investors. The price was crystallised by capitalisation of the rent. This meant tenants had to be in occupation at the big rent to justify the valuation. In order to attract the tenant in the first place, there had to be a sufficient inducement or incentive to act as a palliative in the face of the commercial rent.

A range of incentives were developed. Rent free periods (effected usually by an exchange of cheques), free fit-outs, cars, boats, antiques, paintings, luxury holidays and in the end, the ultimate inducement of cash.

Mr Trevor Boucher, the Commissioner, in making one of his high profile addresses, on 18 August 1989 said his view was that such inducements (at least when in cash — s 21A catches the cashable ones) were taxable "either as ordinary income or under the capital gains provisions". He set out to prove it in *Cooling*, which he thought very winnable.

In that case a Brisbane firm of solicitors were induced to have their service company take premises on a 10 year lease in a new AMP building at a commercial rent. The inducement was cash of $162,000 to be divided among the partners. Mr Cooling received $21,060. Mr Boucher asked for his share too.

Income according to ordinary concepts is a wonderful chameleon. It changes with the environment of the times. In Australia in the *Myer case* (87 ATC 4363) there was a one-off receipt held by the High Court to be taxable as arising from a commercial transaction entered into in the ordinary course of business. What a springboard for the Commissioner!

But at first instance Spender J made no bones about what *Myer* did not decide:

> *Myer* is not authority for the view that every receipt of a business is "income". If it were, no sensible

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Mens rea — *Millar, Morgan, Metuariki* — and mistakes: a finale?

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

In her note "Mens Rea and Unreasonable Mistakes – a Reply" [1990] NZLJ 202, Elisabeth Garrett has raised some further interesting issues alluded to though not fully addressed, in our earlier discussions through the pages of the *New Zealand Law Journal*. One such matter is the distinction (if any) between elements of offences and defences; another is the problem of proof of mens rea; a third is the distinction between offences of basic mens rea and offences of ulterior intent; a fourth – the distinction between the persuasive burden of proof, the evidential and the "tactical" burden, and finally the relationship between these distinctions.

I Elements of offences and defences

In *DPP v Morgan* [1976] AC 182, at 214F there was unanimity at least that the prohibited act was nonconsensual intercourse and the mens rea was an intention to commit it (knowing that the woman was not consenting) both being elements of the offence which the prosecution has the burden of proving. From this proposition it seemed to Lord Hailsham LC that there was "no room for a 'defence' of honest belief or mistake. Either the prosecution proves the requisite intent or it does not" (above). But this dictum begs two questions. First is it really possible to distinguish between elements of offences and defences? Secondly, what amounts to proof of mens rea by the prosecution?

As to the first, Lord Edmund-Davies says that to speak of a "defence of mistake" is to use lax language. (*DPP v Morgan*, supra, 229 G). Terminologically it is more correct to call it a "challenge that the necessary mens rea exists" as His Lordship suggests. However, it is debatable whether there is a distinction other than of terminology between defences and elements of offences. Glanville Williams[1] amongst other eminent academics thinks not, following Professor Stone who first questioned the distinction in logic in 1944.[2] G P Fletcher[3] on the other hand, upholds the distinction conceptually. It is not necessary to do more than draw attention to this interesting debate for the purpose of this note.

II Problem of proof of mens rea

Turning to the second question Lord Hailsham's dictum raises, what does amount to proof of mens rea in a crime where the mental element is not specifically defined? Rarely if ever is there direct evidence of an accused's

continued from p 141

> distinction between income and capital could be maintained.

He went on to hold for the taxpayer on all grounds, including those under the capital gains provisions.

It was altogether a different story in the Full Federal Court on appeal. The main judgment was delivered by Hill J, a fairly recent appointment, who had had a large tax practice at the bar.

The nub of what he had to say is contained in these passages:

> Where a taxpayer operates from leased premises, the move from one premises to another and the leasing of the premises occupied are acts of the taxpayer in the course of its business activity just as much as the trading activities that give rise more directly to the taxpayer's assessable income. Once this is accepted, the evidence established that in Queensland in 1985 it was an ordinary incident of leasing premises in a new city building, at least where the premises occupied were of substantial size, to receive incentive payments of the kind in question. Why then should a profit received during the course of business where the making of such a profit was an ordinary incident of part of the business activity of the firm not be seen to be income in ordinary concepts?
>
> In my view the transaction entered into by the firm was a commercial transaction; it formed part of the business activity of the firm and a not insignificant purpose of it was the obtaining of a commercial profit by way of the incentive payment. This result accords with common sense.

And the High Court said "Amen" to that. Perhaps I should sail away fast to Bermuda aboard my yacht weighed down with bullion! □

state of mind unless by a confession. Expert evidence of the state of mind of a normal person is not admissible but is a question for the trier of fact to decide by reference to the totality of the evidence before the Court. The majority in *Morgan* avoided the issue of proof of the accused's subjective belief that the woman was not consenting. However, both minority Judges adverted to this problem, and Lord Edmund-Davies said:

> In the absence of contrary evidence the accused may be presumed to have appreciated the significance of circumstances which must have come to his notice (at 226, C).

Without such a presumption it would be impossible to prove the mens rea of many crimes especially where an accused did not give evidence. I use the word "presumption" interchangeably with the word "inference" to mean a conclusion drawn from the evidence.

III The distinction between crimes of basic mens rea and ulterior intent now becomes relevant

Crimes of basic mens rea are those crimes "whose definition expresses (or more often implies) a mens rea which does not go beyond the actus reus".[4] In crimes of ulterior intent there is a further mental element to be proved apart from the intention to commit the actus reus. It is certainly arguable that in all crimes of basic mens rea proof of the actus reus can be prima facie evidence from which the trier of fact may (though not must) infer proof of mens rea. There could be other evidence of the accused's state of mind but this is unlikely unless the accused raises the issue himself.

There is high judicial and academic authority that the Common Law crime of rape was a basic mens rea crime[5], so that in the absence of evidence to the contrary proof of sexual intercourse without consent would entitle the trier of fact to draw the inference that the accused knew the woman was consenting.

Crimes of basic mens rea include most, if not all, crimes and offences in Cooke P's "*Strawbridge* without-reasonable-grounds" category of mens rea offences discussed in *Millar* [1986] 1 NZLR 660, 665, 667. Those offences I labelled category 1B in "Mens Rea and Unreasonable Mistakes" [1990] NZLJ 130. In this category the doing of the forbidden act imports an intention to do that act where the evidence does not raise the issue of absence of mens rea. Such, for example, would be *Metuariki* [1986] 1 NZLR 488 (proof of possession of the magic mushrooms implied knowledge that they were a forbidden drug) and *Millar* (proof of driving whilst disqualified implied knowledge of the disqualification). Whilst there is a subtle difference between these and the *Morgan* type of offence it seems "so narrow as to be not worth preserving", per Cooke P and Richardson J in *Millar*.

IV Distinction between the persuasive burden of proof and the evidential and tactical burdens

In all mens rea offences (Cooke P's category 1, supra) the persuasive burden of proof remains on the prosecution (unless of course an exception to *Woolmington* [1935] AC 462, is involved). With crimes of basic mens rea, however, if the Crown has adduced evidence to the effect that, for example, driving took place and the defendant was disqualified, as a matter of practicality the accused who wishes to contest a prima facie inference of mens rea will have to give evidence of his belief that he was not in fact disqualified. This is perhaps not an evidential burden as such, as Glanville Williams has pointed out.[6] C R Williams has called it the "tactical" burden or the onus of leading evidence to suggest, for example, lack of mens rea.[7] He says:

> Similarly in rape if an accused's "defence" [my quotation marks] is that he believed the victim was not consenting he will bear the tactical though not the evidential onus of leading evidence to support this "defence".

If the accused challenges the prima facie proof of mens rea the prosecution has the onus of negating lack of mens rea beyond reasonable doubt. The Judge is obliged to leave the issue to a jury in a jury trial; he has no filtering power as he has when there is an evidential onus on the defendant (as in general defences such as automatism). The evidence raised by the accused is likely to take the form of a mistaken belief in facts which, if true, would negate mens rea, which is where the so-called "defence" of mistake of fact comes in.

V Conclusion

In "Unreasonable Mistakes and Mens Rea" I was concerned with that part of the decision in *Morgan* where the majority decided that it was logically impossible to require a mistaken belief of fact to be reasonable. *Metuariki* (supra) applied this aspect of the *Morgan* decision in New Zealand and *Millar* (supra) confirmed that a mistake of fact need not be reasonable. It seems it was not until *Beckford* [1987] 3 All ER 425, that the Privy Council fully acknowledged the significance of *Morgan* in this respect and applied it to a situation of self-defence. In cases of self-defence I agree with Elisabeth Garrett, a defendant does have an evidential burden, which differentiates *Beckford* from *Morgan* but as Lord Griffiths said the application of *Morgan* to self-defence was a logical conclusion. (Beckford, supra, at 430.) I would further suggest as argued above that in crimes of basic mens rea like those at issue in *Metuariki* and *Millar* although the prosecution bears the persuasive onus of proving actus reus and mens rea (and the evidential burden),[8] proof of all the elements of the actus reus suffices prima facie to prove mens rea. The "tactical" burden is then on the defence to challenge this presumption or raise the issue of absence of mens rea.

Theoretical analysis such as this is necessarily somewhat artificial. In reality a more practical approach is adopted. The approach of Hillyer J recently in *Summer v Society for the Prevention of Cruelty to Animals* (High Court, Whangarei Registry, AP 2/90, 15 August 1990) is of interest.

His Honour was discussing the application of s 3(b) Animals Protection Act 1960 which he found to be a mens rea offence of the *Millar* (*Strawbridge* – without-reasonable-grounds) type where "the onus remains on the prosecution to prove that there was no justification for a failure to provide food, water or shelter". He continued:

> In the ordinary course no doubt

if the only evidence was that such essentials were not provided to animals in someone's care, that would be sufficient to prove guilt. Nevertheless, the onus in my view, as in all criminal cases in the absence of clear legislative indication to the contrary, remains on the prosecution, and there is no onus on the accused to prove his innocence.

The situation is the same as in every criminal case. The Judge or jury must look at the totality of the evidence. If the defendant does not give evidence the evidence presented on behalf of the prosecution is looked at to see whether it proves the defendant guilty beyond reasonable doubt. If there is some exculpatory evidence, that is considered along with all of the evidence . . . whether the defendant does or does not [give evidence] the question still remains on the totality of the evidence, has guilt been proved?

With respect it is submitted that this is the correct approach, following the Court of Appeal in *Millar*. □

1 G Williams "The Logic of Exceptions" [1988] CLJ 261, 276-281.
2 J Stone "Burden of Proof and the Judicial Process" [1944] 60 LQR 262, 280.
3 G P Fletcher *Rethinking Criminal Law* (Little, Brown, Boston 1978) 567-568.
4 See Lord Simon in *Morgan* [1976] AC 182, 216F, cited in Smith and Hogan's *Criminal Law*, 6 ed, Butterworths, London, 1988, 71. Smith and Hogan prefer the term "basic mens rea" to Lord Simon's term "basic intent" (to include recklessness as well as intent).
5 Above note 4 per Lord Simon [1976] AC 182 218E, cited in Smith and Hogan at 71.
6 G Williams "The Evidential Burden: Some Common Misapprehensions" [1977] *New Law Journal* 156, 158.
7 "Placing the Burden" in *Well and Truly Tried*, Essays in Honour of Sir Richard Eggleston, (eds) Campbell and Waller, Law Book Co, Sydney, 1982.
8 *Millar v MOT* [1986] 1 NZLR 660, 678 per Casey J; sed qu. per Cooke P and Richardson J at 667.

Prison and community failure

In a climate of uncertain cultural and moral norms, rehabilitation has become meaningless. How can you rehabilitate someone to a conventional norm if you don't know what that norm is?

This is not to echo the armchair penologist argument that prison is too soft. I know that a stint in Warkworth or Kingston is hardly, as Lord Ellenborough said of transportation to Australia, "a summer airing by an easy migration to a milder climate." I am also painfully aware that dogmatists are dangerously inflexible and usually insensitive people. I am for the most part glad we no longer deter crime by dandling a noose in front of someone's nose.

Such tactics usually amount to little more than dares. But I believe that the resolve behind them remains sound. The very idea of democracy is that the community can, and must, insist on a modicum of conventional behaviour within a framework of individual freedoms. Otherwise, freedom is impossible.

We have failed the prison population in this country because self-inflicted guilt has made us less insistent about community values. Partly because of institutionalized multiculturalism, but probably mostly because of garden-variety moral shilly-shallying, we have all become liberals of convenience, moral relativists. As the new truism goes, a criminal is not a criminal but a victim of socio-economic disparity.

Suddenly, although none of us is individually responsible, we are all guilty by complicity. No one wants to cast the first stone. We're all in the same boat, sinners – the original name for knee-jerk liberals.

This ambivalence is so pervasive it has become trite that a Canadian is someone whose cultural identity lies in asserting he has none. Because people of goodwill are afraid of seeming bigoted, they have, to take recent examples, been anxious to support even the most undemocratic, unreasonable and sometimes racist demands of Quebec and the country's native people. Guilt over our own widely touted shortcomings makes us quick to overlook the moral shortcomings of others.

It could well be that an offender had a lousy childhood, or is poor, or confused, or on drugs. I would guess that one way or another this sums up 80 per cent of the population. Even combined, such misfortunes do not constitute a reason to hand out absolute discharges like lollipops.

Social dysfunction requires compassion, but not misplaced absolution. Those who cannot or will not co-operate at least at the fringes of convention must be compassionately required, or helped, to find a way. Those who refuse must know for certain that they will be excluded from the larger community and its greater freedoms.

We have to become willing individually and communally to be both more giving and tougher – a little like Peter Sellers, I guess, in "Heavens Above" – tougher with deviants as well as with those who would use law and order to suppress individual rights and freedoms. With both offender and redneck, we have to stop taking the name of freedom in vain.

The next step is not stricter punishment, but the requirement that offenders graduate from prison just as they would from school. In the absence of exceptional circumstances, they could re-enter the mainstream only once they had demonstrated minimum literacy, math, and life skills – the ability to handle freedom, from balancing a chequebook and looking for a job to social drinking and sexual sensitivity.

Jeffrey Miller
The Lawyers Weekly
(Canada) 19 October 1990