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On legal and literary style

Flattery pays. Whatever we might say about the obvious insincerity of it we know, we all know, that deep down there is a solid substratum of truth in any statement that praises us. Even if the flattery is unintended and we only learn of it incidentally we get a quiet satisfaction from it that makes us feel that the flatterer is a person of perspicacity, is someone able to recognise quality when he or she sees it.

This is all by way of an acknowledgment of self-interest in this review of *The Elements of Legal Style* by Bryan A Garner, published in 1991 by Oxford University Press (USA) ISBN 0-19-505860-7. The writer wrote a laudatory review of Bryan Garner's previous book *A Dictionary of Modern Legal Usage* published at [1988] NZLJ 141. In the preface to the new work on legal style the introduction by one of Bryan Garner's colleagues at the University of Texas Law School refers to the reception of the book as having "had rave reviews all over the world, from publications as scattered as the *Harvard Law Review, The New Zealand Law Journal*, and *The Times Literary Supplement*". We might geographically deserve to be described as scattered, but certainly we are in the very best of company in that quotation.

So now to offer another "rave review". Let it be said at once that the book cannot be too highly praised. Nothing, and nobody, is indispensable, but every practising lawyer ought to have this book, (or at least know where a copy can be got at) and refer to it often. This is not just for the usefulness and value of the information and the advice given. It is a pleasure to dip into for anyone with an interest in the language, and all lawyers should have such an interest because it is the most elementary of our tools of trade.

Language for the lawyer of course is more than just a tool of trade. Style is the expression of one's personality, of the quality of the mind. *Le style c'est l'homme* as George de Buffon said in 1753. (Well, that is what he is commonly said to have said; but as H L Mencken points out in his magisterial work, *A New Dictionary of Quotations* (1942) what de Buffon actually said was "Le style est l'homme meme".)

This book on *The Elements of Legal Style* is written by an American for Americans. But the language it deals with is the English language. The author is aware of, and notes, differences in usage, even in spelling. For instance the entry "practice; practise" explains that in American English the first is both noun and verb, whereas in British English the first is the noun and the second the verb. It is a nice American distinction to think the adjective British, in this case is justifiable.

It is tempting to quote at length. So somewhat arbitrarily here are a few excerpts:

> **phase; faze.** The first is a vague word that you have already struck from your working vocabulary (see Rule 2.13). The second is a verb meaning "to disturb or disconcert".
>
> **absolve (of) (from).** One is **absolved of** financial liability and **absolved from** wrongdoing – assuming the Courts treat one kindly. [I was suspicious of this distinction, but it seems to be approved by the *Concise Oxford* (8th edition), but not by *Chambers* (1983 edition). *Collins* (1979) fudges the question by saying "usually followed by from". The *Shorter Oxford* however supports the distinction made with a quotation from Milton using "of" in precisely the way Bryan Garner does.]
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> **thankfully.** The same demon that has made **hopefully** mean "I hope" has now attacked **thankfully.** The word means "gratefully, in a manner expressing thanks", but by slipshod extension has come to be used as here:
>
> Thankfully, it didn't rain yesterday.
>
> Avoid this usage. See **hopefully.**
>
> **Compare (to) (with). Compare with,** the usual phrase, means to place side by side, noting differences and similarities between the things compared. **Compare to** means to observe or point only to similarities. [The obvious example, which Bryan Garner does not give, is Shakespeare's line, "Shall I compare thee to a summer's day?"]

And so one is inclined to go on. But this sort of sampling would leave a false impression. These extracts are taken

from one chapter. The book has seven chapters. In the first Bryan Garner questions the need for a book specifically on legal style as distinct from ordinary good style. He explains:

> True, our goals are often similar to those of other writers, but we face special problems. For example, we struggle constantly to distinguish terms of art from highfalutin jargon, and that from useful professional shorthand . . . We use ordinary English words in extraordinary senses, and extraordinary English words in senses ordinary only to us . . . In truth, though, our circumstances are not so very special. Legal writers must recognise what other inhabitants of the literary world already know: A good style powerfully improves substance. Good legal style consists mostly in figuring out the substance precisely and accurately, then stating it clearly.

Another work of some utility, but of more specialised nature, is the recently published 8th edition of Piesse *The Elements of Drafting* (ISBN 0-455-21023-3). This is published by The Law Book Company in Australia and is basically concerned with the drafting of Australian legal documents. It does however contain much of practical use and value for the New Zealand conveyancer. It emphasises the modern approach of plain English. The book lacks the zest of Bryan Garner's book being rather more pedestrian; but given its limited purpose it fulfils this quite well.

As an aside, those who enjoy language, particularly as used by the Courts and in the profession, should read the article on "Lawyer's Language" by J N Matson in the *Canterbury Law Review* (1990) vol 4, no 2, p 302. The article is very wide ranging and is a pleasure to read; although many of us would have to confess we could have done with more translation of the Latin tags than has been provided. It also has many passages that can simply be described as sound advice. An example is Mr Matson's comments on the formality of Court discourse.

> There is something to be said for the retention of the conventional "with respect" or some stereotyped equivalent, when voicing disagreement with the Judge. It need not be obsequious. The disciplined, even exaggerated, stereotyped politeness of the formal interchange between counsel and Judge can degenerate into an involved stilted and sycophantic jargon, but kept within bounds it performs a useful function, as any practising barrister will know. The stresses of litigation can be such that without the conventions of restrained and courteous language argument and counter-argument could on occasions lead to unseemly verbal brawls which are not likely to appeal to any but the most avid devotees of American television courtroom drama.

Bryan Garner's book *The Elements of Legal Style* will be invaluable to all who use it, particularly in helping the lawyer to state what he or she wants to say clearly. Justice Brandeis is quoted near the end of the book to make the point that good writing means hard work. He is quoted as saying.

> There is no such thing as good writing. There is only good rewriting.

This is true of all writing and is the necessary basis for a good style; and legal style is only a sub-branch of literary style. As Bryan Garner says at the end of this excellent book:

> Writing is an art form. However far we may take the notion of "legal science", we cannot escape the art of prose, cannot reduce our use of words to a formula. Rules are helpful, because they codify our predecessors' wisdom. But slavish adherence to the rules is little better than complete ignorance of them. Merely obeying rules will never yield literary excellence. That, ultimately, depends on judgment, intelligence, maturity, and learning — each of which you ought to cultivate with all the effort you can muster.
>
> Law, like literature, is a way of life. If we know and appreciate law, we understand our society more keenly than before. If we know and appreciate literature, we understand life more keenly than before. Successfully combining the two passions is one of the highest ideals to which a lawyer can aspire.

P J Downey

Judicial appointment : Mr Justice Jamieson

Temporary appointment to the High Court

The Attorney-General has announced that Judge V R Jamieson of the District Court at Hamilton is to sit in the High Court at Hamilton for three months from 1 July 1991.

"During this period Judge Jamieson will hold office as a temporary High Court Judge," the Hon Paul East said.

In April of this year Mr East announced that District Court Judges would from time to time be seconded to sit in the High Court for fixed periods to meet particular short-term needs of the High Court. Thereafter such Judges will return to sit in the District Court. Judge Jamieson is the second District Court Judge to be appointed under this policy.

"The Courts Amendment Bill presently before Parliament anticipates a significant restructuring of the Courts system in New Zealand.

One of its purposes will be to use the resources of the judicial system to the best advantage at each level. The decision to appoint temporary High Court Judges from the District Court bench on fixed term secondment is very much consistent with this purpose," Mr East concluded. □

Case and Comment

Constructive trusts in de facto relationships

Terry John Ireland v Lorraine June Hepburn (High Court, Palmerston North, 19 April 1991, CP 221/89 Robertson J).

The defendant was a solo mother with five children in receipt of the domestic purposes benefit. In 1985 she acquired a house in Feilding with the assistance of an old friend who paid the deposit.

In 1987 the plaintiff went to live with her. The parties disputed the nature of the relationship, the defendant depicting the plaintiff as a commercial lodger, but the Court held:

> . . . that for a period which was not less than 18 months, and probably nearer two years, Terry Ireland was the man in the house at Kimbolton Road.

Terry Ireland had no assets. He had debts which the defendant helped him with. His only income was long term accident compensation. He paid the defendant one hundred dollars a week in board. Sometime later he bought her a bedroom suite and made various small payments towards household costs. He also undertook building work around the property, completing the fence, building a bike shed and extending the bird aviary.

Robertson J said:

> Overall I find a joint contribution towards the needs of the unit financially, but not anything approaching a total pooling of financial resources. That is all there is of the evidence. There is a sharing; there is contributing but that is as far as it goes.

There was no common intention found.

In *Gillies v Keogh* [1989] 2 NZLR 327 Cooke P said that in de facto union cases the Courts should have regard to the reasonable expectations of both parties. To ascertain what that was, weight had to be given to the degree of sacrifice by the claimant, because the degree of sacrifice by one partner was a guide to the measure of any unjust enrichment of the other. Any enrichment was not unjust enrichment. Relevant also was the need to show conduct detrimental to the claimant.

In the present case sacrifice was found in the claimant's contribution of part of his ACC income and from the child care services he provided to enable the defendant to work for a short period. There was no attempt to analyse any detriment the claimant might have suffered or to find any unjust enrichment on the part of the defendant. "Sacrifice" was found simply because the plaintiff's contribution benefited the defendant. Indeed it is difficult to see to what extent the defendant could be said to have been unjustly enriched or to what degree the plaintiff suffered detriment or sacrificed anything. He paid board of one hundred dollars per week. Over and above that he contributed from time to time to serving household needs and, as he did not work, provided a presence for child care when necessary. This was the role he played in the relationship.

As Cooke P stated in *Gillies v Keogh*: (at p 334)

> Contributions to household expenses or to maintenance, repairs or additions may amount to no more than fair payment for board and lodging and the advantages of a home for the time being. More than that is commonly needed to justify an award.

The second factor the Courts will have regard to subject to a finding of sacrifice/unjust enrichment, is the value of the contributions of the claimant weighed against the value of the benefits received. (*Gillies v Keogh*, p 334)

In the present case Robertson J said:

> . . . the mortgage position had not markedly changed and certainly there was no change brought about by this man. The period of cohabitation is not great. It is 18 months to two years. There is the capital contribution of part of his ACC money and the continuing benefit of his being in the house providing resources and support beyond that which he was actually getting in a direct and elemental way.

The Judge then found that a constructive trust had been established and awarded the plaintiff $6,000 as "fair and proper compensation".

If this decision represents the law in de facto relationship cases, can we now assume that the Courts will find a constructive trust on a contributions assessment alone, even when the "contributions" are within the usual domestic range, if the plaintiff's contributions can be shown to outweigh the defendant's? If this is so, then it would appear we have now reached the point where we do not need common intention, unjust enrichment, the suffering of detriment, capital contribution to the purchase of the house, efforts to improve the property, or a "reasonable person" approach to advise that a constructive trust will be found. We simply need to look at s 18 of the Matrimonial Property Act 1976 and try to evaluate who "contributed" the most.

Jayne Francis
University of Auckland

Auckland High Court complex: First sitting

Printed below are the addresses given by the Chief Justice, Rt Hon Sir Thomas Eichelbaum and the Attorney-General, Hon Paul East at the first sitting of the High Court on the reopening of the No 1 Courtroom in the High Court complex on 4 June, 1991.

A description of the restoration of the Court buildings and the speech of the Minister of Justice, Hon Douglas Graham, made at the official opening of the complex on 31 May 1991, were published at [1991] NZLJ 184.

Address by the Chief Justice of New Zealand, the Rt Hon Sir Thomas Eichelbaum

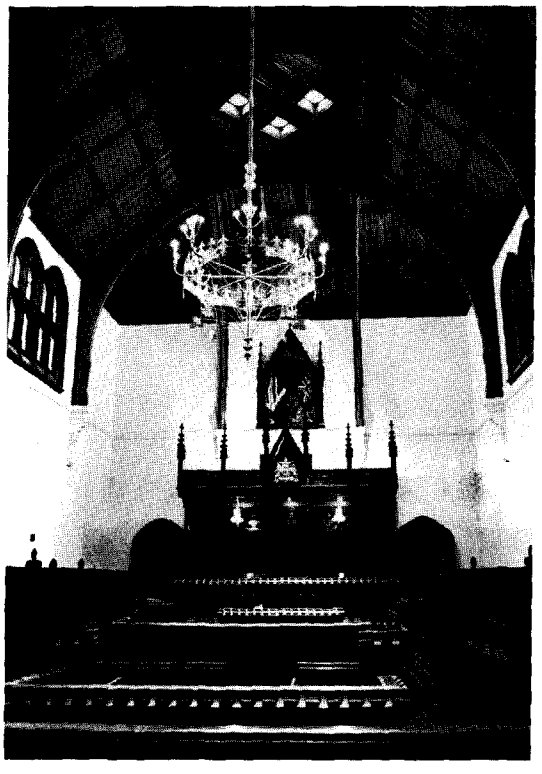
Friday's public ceremony marked the official reopening of this refurbished, restored and expanded High Court building. It is fitting that that ceremony should have had precedence: a reminder that a Courthouse is not primarily or foremost a facility for Judges and lawyers to carry out their daily work, but rather the place where the ordinary people of this country go to receive justice.

The building however has great significance for those who in the past have worked within its walls, and who will do so in the future.

It is proper therefore that they should have the opportunity to mark this occasion, the first sitting in the building in its present form, and particularly the resumption of the Court's sittings in this Courtroom, replete as it is with links and memories in the history of the law in this city.

If I may return to my initial theme for a moment, it follows that the provision of a new Courthouse is more, much more, than the furnishing of a fit place of work for advocates and the judiciary. Some would say it matters not where justice is administered, so long as it is done impartially, independently, fearlessly and well. But we all know that is not the whole truth. A surgeon cannot operate without proper equipment and assistance, and to a large extent this holds good for the judicial process also.

Further, the conditions in which justice is administered, must necessarily be seen, to a degree at least, as a reflection of the standing and importance accorded to the concept of justice within that particular country. So it is right that on this occasion we should acknowledge all who have contributed : Government, successive Ministers, the architects, the planners – including representatives of both the legal profession and the judiciary – the artists and the many workmen who have laboured so skilfully, especially in the meticulous restoration of this Courtroom and the other parts of the old building.



Number One Courtroom refurbished

The judiciary, on whose behalf I have the honour to speak today, extends its appreciation to all those concerned.

I propose to follow a precedent established by my distinguished predecessor, Sir Richard Wild, on 5 February 1968 when presiding over the special sitting of the Court to commemorate the 100th anniversary of the first sitting in this building.

I direct the Registrar to note in the permanent records of the Court the fact of the attendance of the Attorney-General, Queen's Counsel, members of the legal profession, retired members of the judiciary, and other worthy citizens of Auckland, to mark this memorable occasion.

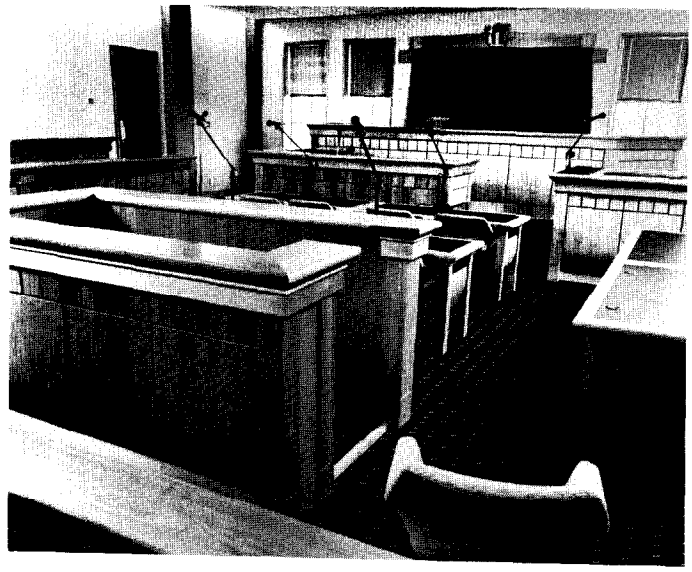
Address by the Attorney-General, Hon Paul East

May it please your Honours, it is indeed a privilege to have the opportunity to address the Court on what is in fact the first formal opening sitting that thas ever taken place in this building. When this building was first completed in 1868 the business of the Court was embarked upon without any formal opening ceremony at all. Nor was there any significant case to mark the first time the new Court building was occupied – Mr Justice Moore merely disposed of some cases in banco and insolvency. That there should be a formal opening ceremony today is perhaps fitting because this building is now in the finest condition it has ever been.

The building has a long history, that has its roots in events 150 years ago. The first sitting of the Court of Quarter Sessions in Auckland was held in the school house on 5 October 1841. Even then a wooden Courthouse was being built on what is now Queen Street but what was then the clay bank of a tidal stream. The site of the wooden building was much criticised as being very difficult to access in wet weather and eventually a small bridge was built across the stream at the foot of what is now Victoria Street. Initially the wooden building was heralded with enthusiasm as being "admirably adapted to for the accommodation not only of the Judge, gentlemen of the Bar, police officers, and witnesses, but also to afford the public an opportunity of listening to the proceedings". But the old wooden building itself did not survive the ravages of time with any degree of resilience.

By 1852 the *Southern Cross* was saying:

> It really is too bad to pen up a Judge, jury and Bar in such a wretched barn as our present Courthouse. One would almost suppose that law was playing into the hands of physic, when it consents to expose so many of Her Majesty's lieges for so many weary hours to cold, if not black, draughts, penetrating through every crevice and through more than one broken pane.
>
> We say nothing of the floor strewn with hay; that may possibly be quite appropriate in a land where the colonists are accustomed to be treated like beasts of burden. But surely, from a revenue from which so many thousands are annually squandered, a shilling or two might be cribbed to repair the glaze.



A courtroom in the new building

This of course was before the days of Treasury and Ministers of Finance carefully scrutinizing every item of expenditure. In those days there were other problems. The stream carried the refuse of a growing city down Queen Street to Commercial Bay, and advertised its presence with a smell that was particularly vocal during summer. Eventually the demands of those who had to use the building became so urgent that something had to be done quickly. A temporary building was completed in 1864 and the foundation stone for this building was laid in 1865.

But even this building did not then provide ideal accommodation. It was plagued with leaks, fleas, poor acoustics and "unwholesome stenches" almost from the beginning. The building was soon being criticised as a "huge and expensive failure". According to one newspaper account of the day "even on to the desk of the Chief Justice a stream of water was running freely". In another account the Courthouse was reported to contain "as many fleas as there are lawyers in Auckland".

Nevertheless the building has survived as an example of what could be described as "ecclesiastic gothic" architecture. Designed by Edward Rumsey in 1865 it is unique in New Zealand for its combination of red brick and sandstone construction, carved stone heads and gargoyles, carved wood and ornate windows.

By the early 1970s the exigencies of lack of space had driven many of its occupants out into rented accommodation in nearby buildings. Once a decision was made to refurbish the premises, the building was vacated completely with the resulting plethora of Courtrooms and offices congregated around Eden Terrace, to the confusion of everyone, especially of visiting counsel.

I should like to mention something specifically about the restoration of the building and the extension of it, because it represents a feat of architectural and renovation skill that would be the equal of any like undertaking anywhere. The first problem was a structural one – that of strengthening the unreinforced masonry to meet earthquake resistant standards. This has been done by a combination of diaphragms at first floor and roof

level and concrete shear walls sprayed on the face of the existing masonry walls. The shear walls were then plastered to match the original wall finish and the skirtings and mouldings were refixed. The two main towers have been secured by the insertion of a specially designed steel framework, and the parapets and chimneys have been strengthened by grouting in steel reinforcing.

The restoration of the slate roof with the addition of lead sheet flashings and redesigned gutters has made the building waterproof for the first time since it was built. Air conditioning has been incorporated with the ducts concealed in the main Courtroom as timber wall panelling. The building has been rewired and the old gas light fittings have been replicated by electrical ones. There is built in wiring for microphones, computers, electronic security, provision for video play back, and in some Courtrooms, video conferencing for the use of remote evidence. There is even an infra red headphone system for the hard of hearing.

In the main foyer the original flagstone floor was discovered beneath a layer of bitumen and the flagstones were numbered, uplifted, cleaned and relaid on mortar to the original pattern. A similar exercise was undertaken in respect of the roof above — because the main rafters were recessed into the masonry walls they had decayed after many years of leaks coming through the roof. As a consequence the entire roof was dismantled, the rafters numbered, removed, replacement timber spliced into the ends and re-erected.

Much of the timber is original that has been laboriously stripped back and coated with special varnish tinted to match the original mahogany colour — the colour is known in the trade I understand as "High Court brown". In the course of restoration evidence was found of a staircase and massive arch door having been removed from the west of the number one Courtroom. These have been replicated, right down to the "combed" paint work on the kauri door that mimics the grain of English oak.

This magnificent High Court building that we open today has had the support of successive governments since the initial planning for this redevelopment began in 1979. It is particularly appropriate to pay tributes to the Hon Jim McLay and the Rt Hon Sir Geoffrey Palmer for the interest and encouragement that they gave to the project during their terms of office.

This No 1 Courtroom has been a silent witness to some remarkable legal history. It is in this Courtroom that some of our legends of the law argued their cases.

Dicky Singer, Mick Robinson, Leonard Leary and all the great names that we as young lawyers heard so much about practised their craft in this room.

And as in earlier years it will be across this Court room that Kevin Ryan's "winged serpent of prejudice" will fly and in that jury box that twelve men and women will be advised "it is better that 100 guilty men go free than one innocent man be convicted".

There is much that we as lawyers love and respect of the law. At a time when so many have worked so hard to preserve the tradition of this building it seems ironic that a number of our profession are calling for some of our traditions to be dispensed with. In particular, I refer to a parliamentary petition suggesting that wigs, gowns and all other articles of distinctive clothing should no longer be worn by barristers appearing in this Court. First, I would observe that that is a matter that should not be determined by Parliament but rather by the judiciary and the profession. Second, I would simply warn that if a decision is made to do away with wigs and gowns then that is a decision from which there can be no return. For my own part I see wigs and gowns playing an important role in maintaining respect for the law and respect for our Courts.

At the risk of being labelled as an extreme conservative may I also take this opportunity to refer to the structure of our Courts and in particular, the role of the Privy Council. Many of you will be aware that I have already expressed the view that I think we should retain the Privy Council as our final Court of appeal at least in the foreseeable future. The Court is objective, dispassionate and detached from the Court structure beneath it. These are qualities which are difficult to achieve in a country with a population of our size.

I am sure that most of us acknowledge the benefit of a two tier appeal structure. The Privy Council allows us to retain such a structure despite our small population and provides us with a final Court of appeal that is truly independent from the Courts beneath it.

That is not to say that the Privy Council should not be aware of the social conditions within New Zealand and I am sure it must help if they have a clear appreciation of our background and history.

I am sure that both the Privy Council and our own judiciary have derived great benefit from having appellate Judges from New Zealand sitting on the Privy Council. I note that that has not occurred since 1987 and I have accordingly raised this matter with the Chief Justice and the President of the Court of Appeal. I have also taken up the case with my colleagues in Government and I am grateful to the Minister of Justice who has now put in place the necessary funding and arrangements in order that members of the Court of Appeal and the Chief Justice can sit on the Privy Council in the future.

In closing, may I pay a tribute to our judiciary. The strength, integrity and independence of our judicial system and our judiciary set an example for the rest of the world. We have been fortunate to avoid many of the problems that have befallen other jurisdictions. On behalf of the Government I thank our Judges for their hard work and dedication in the difficult task that they undertake.

When Superintendent Whitaker laid the foundation stone for this building he said:

> In whatever part of the world they may be, the first thing British colonists think of is to find a habitation for justice.

Auckland now has a habitation for justice with a tradition that extends back nearly 130 years. We can now look forward to the needs of justice being met by this building for a long time to come.

Just as in the years past this High Court dispensed justice tempered by mercy and compassion, may it continue to do so in the years ahead.

□

Judicial retirement: Hon Sir Muir Chilwell

On 24 May 1991 New Zealand's then Senior Puisne Judge, the Honourable Sir Muir Chilwell retired from the Bench. Tributes were duly paid him. David Williams Esq, QC wrote a piece for the New Zealand Bar Association Newsletter *which is reproduced, with permission, for the information of the whole of the legal profession.*

. . . It is appropriate to pay a brief but sincere tribute to this much respected and courteous gentleman of the law on behalf of the members of the New Zealand Bar Association.

Sir Muir practised as a Queen's Counsel in Auckland prior to his appointment to the Bench in October 1973. He was a leader of the Commercial Bar with particular expertise in civil procedure, property law, trusts and wills, taxation and what would now be called intellectual property. Sir Muir held the then rare distinction of being a member of the Inner Bar both of New Zealand and Victoria. He indeed argued cases before the Supreme Court of Victoria and the Full Court of Victoria.

He was President of the Auckland District Law Society in 1967. In his broader professional activities he was particularly concerned with the development of law and democracy in the Asian countries and played a leading role in the development of LAWASIA.

On the Bench Chilwell J earned admiration for his considerate and courteous style. He was at all times, even under barristerial provocation, a model of restraint. No barrister who has ever appeared before him could show a scar that this Judge willingly inflicted.

His reported judgments reflect his deep concern for fairness and justice and an acute awareness of the need to interpret statutes in accordance with contemporary public policy. Space does not allow an extensive evaluation of them, but three cases might be said to encapsulate these discernible themes. The first is *Connell v Auckland City Council* [1977] 1 NZLR 630 involving an unspectacular area of the criminal law, namely appeals from the Magistrates' Court in traffic cases. To the criminal law generally, Chilwell J brought a mind informed by experience, deepened by erudition, and sensitised by the awareness of the importance of maintaining the precious liberties which New Zealand has inherited and which he had seen were by no means secure in other countries in the Asia-Pacific region. He was no friend of over-aggressive prosecutors and even the most hardened criminal whose rights had been abused had no better guardian. In *Connell* the question was whether all judicial persons were obliged to give reasons for their decisions, unless there was specific statutory provision to the contrary. Chilwell J held there was such an obligation and in support of his judgment he said:

> . . . every litigant who loses his action, whether it be in the civil or criminal jurisdiction, is a disappointed litigant. That is inevitable and is a logical result of our judicial system. There is all the world of difference between a disappointed litigant and a disturbed litigant. In the latter category come litigants who cannot understand why the decision went against them. In this case the appellant would be justified in feeling disturbed that justice did not appear to him to have been done. It is of the utmost importance that Her Majesty's subjects should have faith in our judicial system. By far the greatest number of civil and criminal cases come before the lower Court. One should not draw distinctions between Courts but it is of fundamental importance that the lower Courts, which deal with so much work and with whom the average citizen has greater contact, should maintain respect for and faith in the judicial system.

For Chilwell J the *Connell* judgment is a short one. His judgments were often lengthy because it was not his style to meet difficulties by evading them. As Learned Hand said of Cardozo, so it may be said of Sir Muir Chilwell: "He never disguised the difficulties, as lazy judges do, who win the game by sweeping all the chess men off the table." Thus in *Minister of Foreign Affairs v Benipal* [1988] 2 NZLR 222, a major civil liberties case concerning a political refugee, he delivered judgments extending to almost 500 pages. On appeal Cooke P said:

> These judgments delivered in November and December 1985, substantially in favour of Benipal, consisted of a meticulous review of the evidence and submissions heard in the High Court and a full explanation of Chilwell J's reasons for deciding as he did. Unfortunately, as together they extend to the unprecedented length of 459 pages they are presumably for practical purposes not reportable. It is impossible to read them fully without being struck by the single minded concern to do justice that has lead to these remarkable judgments.

Finally one may refer to *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188 where, in a typically comprehensive judgment, he held that while the Treaty of Waitangi was not part of the municipal law of New Zealand in the sense that it gave rights enforceable in the Courts, it was permissible in view of the open-ended public interest criteria to be applied on an application for a water right, to take into account the cultural and traditional relationships of the Maori people with natural water. This was because "the Treaty is part of the fabric of New Zealand society" and it followed that "it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material."

In almost 20 years of judicial service Chilwell J has shown how the judicial function can be carried on at once with dignity, with commitment and with courage. The Bar salutes him and wishes him well in his retirement. □

The Treaty of Waitangi — fertile ground for judicial (and academic) myth-making

By Guy Chapman, BA (Auckland), MA (Princeton) MA (Oxon), Lincoln's Inn, an Auckland practitioner

This article was originally delivered as a law firm seminar paper. It reviews and challenges the "new orthodoxy" of recent years concerning the Treaty, both on historical and legal grounds and calls for urgent legislative remedial action to arrest the present trend of judicial decision-making in relation to alleged "principles" of the Treaty, and generally in relation thereto.

Introduction: Treaty v democracy:

New Zealand has been singularly blessed. It is weighed down by no "higher law" constitution and it is our elective and, as recent history shows, highly accountable, Parliament, which is sovereign, not our non-elective Courts.

By and large, therefore, the Courts do not become involved in larger political questions, or try to set social policy agendas, or entertain political claims, or seek to pre-empt political decision-making, tractable and elastic principles of administrative law notwithstanding.

That is certainly as it should be under our constitutional disposition.

The tendency, noticeable in jurisdictions subject to "higher law" constitutions (whether or not a particular "higher law" constitution also incorporates a "higher law" Bill of Rights), to have Courts override, hedge and circumscribe political decision-making, is one which we in New Zealand, so far, have managed, wisely, to eschew.

Our Courts, by and large, "stick to their knitting" (the adjustment of rights and claims between party and party). As Sir William Wade has put it:

> . . . to a lawyer the boundaries of the law need not be obscure, and his conscience may be easy if, by observing them, he avoids attempting to give legal answers to political questions. (H W R Wade, "The Basis of Legal Sovereignty", [1955] *Camb LJ* 172, at 197.)

We have put our trust, and our trust has not yet been shown to be misplaced, in a democratic system that is flexible, remarkably responsive (with its three year parliamentary term and its "first past the post" electoral system) and generally effective and honest.

With great wisdom, even if it be wisdom born of the unconscious, we have not incarcerated our constitution in a single document, one pronounced at a fixed moment in history, and then, as it were, thrown away the keys, or, still worse, handed them exclusively to some higher Court.

Nor has it ever been generally conceded, in our fledgling but supple democracy, that one or more groups amongst us should be recognised by all others as having special, or antecedent, rights and privileges, whether to Government expenditure, to resources such as the fish in the sea, or radio frequencies, or whatever.

Preferment of groups

For a modern democracy cannot function, happily and equably, if there is legally-sanctioned preferment of groups, or if there is the conferment of privilege and advantage, by law, according to who may have come first, who may be from this or that ethnic group, or, again, howsoever. That approach has been unhappily tried, and its product is now being hastily dismantled, in South Africa. Something similar is now being attempted, shamefully, in Fiji with, again, ultimately predictable results.

The thought that anything remotely akin could be advocated in New Zealand would, for most of our history, have been alien and risible.

Yet, over recent years, there has been a concerted move to elevate, to a status it was never intended to have, and cannot possibly support, for it is a most modest thing, a simple and ingenuous document, as a pseudo-constitutional instrument, and as one ordaining or justifying exceptional rights and privileges for some.

Around this simple document the propagators of myth, and the propagandisers, have gathered, and are even now busily at work. Of late, their effusions have been repeatedly blessed by the Courts, particularly by the Court of Appeal, and over the last few years, at least until last October, they enjoyed the favour and ear, and not least the purse, of Government.

It is not often in political life that such a determined conventicle is seen at work. In the universities, there have been mass conversions and it would now be a brave Court that would do other than genuflect.

Nor has the myth-making come cheap. The taxpayer was truly munificent in 1990. We read that the 1990 Commission, by March 1990, had already spent more than $2.3m on "promoting" the Treaty (*New Zealand Herald,* 19 Mar 1990, p 10), the Commission avowedly aiming to give the public "the facts" about "New Zealand's founding document", as the Commission fondly dubbed it. In releasing, under compulsion, details of its financial expenditure, the Commission opined knowledgeably that "attitudes" to the Treaty had changed markedly in the previous six months.

Whatever the historical and symbolic significance of the Treaty, product as it was of a laudable humanitarian impulse to secure a

measure of legitimation for the acquisition of British sovereignty over New Zealand, there is the greatest danger and folly in trying to give it, in the 1990s, a political after-life, or the status, as Chief Judge E T J Durie, would accord it, of a "Bill of Rights".

The very concept of that modest little document, more than 150 years after its date, according "rights", that is, special rights, to some, on the footing that that "some" are in a never-ending, exclusive and cosy, relationship with the Government ("the Crown"), to which all others are not admitted, must be unacceptable, quite apart from being utterly unworkable.

For that is the road to one set of rules, perquisites and advantages for one group, and another set of rules for the rest. A modern pluralist, multi-racial and multi-cultural democracy will, quite simply, come apart at the seams if such were to be its prescription.

History and the dead

"Special treatment for special needs" is one thing. Few would cavil with that. "Special treatment for some because forebears of some signed a document 150 years ago" is entirely another. History should be left to bury its dead. The Treaty is an historical artefact, to be revered as such. Attempts at reincarnation, so as to gain latter-day advantage, are not only politically unviable, but will make the Treaty, as a vehicle of special pleading, a focus of deep and growing resentment, and division.

Against this background, the not insignificant attempts, of late, by our Courts to give the Treaty some general and special status in our common law, notwithstanding that Parliament has wisely refrained from according it statutory force and effect (this for very obvious reasons, given its utter vagueness, not to say contradictoriness), must give particular cause for concern.

What we have seen has been an endeavour by the Courts (albeit that they have been given encouragement by negative injunctions laid upon the Crown in certain recent statutes ". . . not to act in a manner that is inconsistent with the principles of the Treaty . . .", whatever that might mean, for the document enunciates no "principles"), to set social and political policy, and even to supervise its carrying out, all, assuredly rather the province of Parliament and Government.

Where this may lead the Courts, if it continues much further, who may know. It is a dangerous trend which needs immediate curtailment. Parliament, in the 1983-90 period, opened the door to it, but the Courts have rushed through and are now well and truly in the policy area. It will take notable judicial leadership to shepherd them back to their proper place.

But what then are these myths which have been propagated, nurtured, and which have come to have such strong appeal for some.

It is suggested that they can be categorised into two groups. First, there are what might be called the myths for beginners. Secondly, there are the more advanced myths, or what might be called crypto-legal myths. Whilst they reinforce each other, it is worth attempting to separate them, and take them strand by strand.

Myths for beginners

(I) The cession myth

Plainly stated, this myth has it that, by the Treaty of Waitangi, the Maori people ceded sovereignty over the islands of New Zealand to the British Crown, and that the Treaty is accordingly a ". . . treaty of cession of sovereignty . . ." (P G McHugh, "The role of law in Maori claims" [1990] NZLJ 16, at 17) legally cognisable as such, and thereby "sacred and inviolable".

Like all myths, it has grown upon itself. Plainly, the Treaty of Waitangi was a part, one part and a not insignificant part, of the story by which New Zealand became, in 1840, part of the British Empire and legally a dependency of New South Wales (that is, until its erection into a separate colony as at 3 May 1841).

But the Treaty of Waitangi, of itself, and without more, did not and could not accomplish that. The title of British sovereignty over New Zealand does not rest upon the Treaty, alone. The Treaty, at most, was part of a *process* by which British sovereignty over these islands was acquired.

Historians[1] have painted the background against which evolving British (and particularly Colonial Office) policy in respect of New Zealand in the 1830s was developing. At that time, humanitarian (and evangelical) concerns for the welfare of native peoples were at their height. But at the same time, inexorable pressures for intervention were forcing the official hand, however reluctant it may have been. The number of British subjects living in New Zealand by the end of the 1830s, the need for some effective and settled authority, the not inconsiderable trade with New South Wales, the depredation wrought upon Maori society by the unleashing of the musket in the 1830s, and the consequent social dislocation, and the increasing trade interest of France and the United States, not to mention the presence of a strong and growing colonisation lobby in London (in the form of the New Zealand Company), all played their part.

Assertion of authority

Official steps followed, however uncertainly. The Whig Government of Viscount Melbourne was ultimately not prepared, however, nakedly to assert authority over the New Zealand islands, whatever the inevitability of such an assertion, without securing a respectable showing, on the part of the Maori inhabitants, of their acquiescence and assent. Humanitarian sentiment, and political caution, demanded no less. A treaty was the tool and manifestation by which such measure of assent was to be secured.

Other acts of state, and official emanations, of course preceded it, and followed it. The ground was laid by prerogative instrument. As is well known, the Letters Patent of 15 June 1839 altered the boundaries of New South Wales so as, explicitly, to include ". . . any territory which is or may be acquired in sovereignty by Her Majesty . . . within that group of islands in the Pacific Ocean commonly called New Zealand . . ."

Following the Letters Patent of 15 June 1839, Captain Hobson, on 15 August 1839, received his formal appointments, as respectively HM Consul in New Zealand

> . . . for the purpose of negotiating for the recognition of the Queen's sovereignty by the chiefs of New Zealand . . .

and Lieutenant-Governor

> . . . in and over that part of Our Territory . . . which is or may be acquired in sovereignty in New Zealand . . .

along with his Instructions from the Marquess of Normanby, HM Secretary of State for War & Colonies (from February to September 1839).

These Instructions, dignified as they are with their great rolling periods, show well the essential equivocation in official policy towards New Zealand, redolent as they are with references to obtaining the consent of the aboriginal inhabitants, but at bottom recognising (as did James Stephen, Permanent Under-Secretary, and their principal author), that the time for New Zealand to be gathered into the Imperial fold had come.

Quite clearly, and despite some window-dressing to the contrary in the Instructions, a treaty between "sovereigns" could not be had, as there was no recognisable "sovereign" in New Zealand. All that could be had, and all that was had, was a form of "treaty" or pact between the Crown on the one hand and an "acceptable" number of chiefs (or supposed chiefs, for there were chiefs and chiefs) on the other hand, the status and representative capacities of a number of the chiefs being in some cases unclear. Prima facie, no unified political authority existed in New Zealand capable of giving any form of general or representative assent to the assumption of British sovereignty.

Dispersed and petty tribes

The Instructions in effect recognised this, as witness the well-known passage where Normanby states, the first part of it being most misleading but the second part recognising the reality:

> I have already stated that we acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even to deliberate in concert. (R McNab (ed), *Historical Records of New Zealand*, Wellington, Government Printer, 1908, vol 1, pp 729-739, at p 731.)

Nor could Hobson, devoted servant as he was of his Instructions, rely entirely, or exclusively, upon them, or upon what they may have intended. He had also to take into account the local situation and political reality. For one thing, the boundaries of New South Wales were by proclamation of the Governor-in-Chief of New South Wales, Sir George Gipps, dated 14 January 1840, extended to include ". . . any territory which is or may be acquired in sovereignty by Her said Majesty . . . within that group of islands . . . called New Zealand . . .". In short, an act of state, somewhat ambiguous, to be sure, in its terms, proximately preceded the treaty-making (and it has of course been this date, namely, 14 January 1840, which, in our statutory law, has traditionally, and rightly, been taken as the date of the reception, into New Zealand, of English law, including the common law; see the English Laws Act 1858 and the English Laws Act 1908 (the latter Act remaining in force until 1 January 1989); see also the Judicature Act 1908, s 18, a provision still in force). And of course the day after his arrival in the Bay of Islands (he having arrived on 29 January 1840), Hobson proceeded, on Thursday 30 January 1840, to the Anglican Church at Kororareka where he read, inter alia, the Queen's commissions extending the boundaries of New South Wales and appointing him Lieutenant-Governor (his commission as Consul, under which he was supposed to treat with the chiefs for the recognition of the Queen's sovereignty over New Zealand being, however, apparently not read).[2] In short, Hobson made it known that he was proceeding, in his public acts, in the character, not of a consul, but of a Lieutenant-Govenor, and he was duly feted and treated as such. (The Treaty, however, he did, more cautiously, sign as "Consul and Lieutenant-Governor").

An amateurish document

The fact that the Treaty, in the way it was brought into being, and in itself, was and is an amateurish and hasty document, initially put together by Hobson and others on HMS *Herald*, with some subsequent input from Busby, and then translated into missionary Maori on the evening of 4 February by Henry Williams (possibly assisted by his son Edward), with the Maori version then being signed by the great majority of the signatories (although 39 did sign an English version, at Waikato Heads and Manukau harbour, in March and April 1840 respectively), but with a number of other English versions being given currency by Hobson at the same time, is all relatively well-known, and the Maori version, are not direct translations of each other (the Maori version having been translated from an initial English version which has been lost), and the fact that the gathering of signatures for the Treaty occupied, in all, a period of some eight months, through until the middle of October 1840.

Mrs Ruth Ross, who has written extensively as to the detail of the treaty-making process, has concluded:

> However good intentions may have been, a close study of events shows that the Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution. To persist in postulating that this was a "sacred compact" is sheer hypocrisy. (R M Ross, "Te Tiriti o Waitangi, Texts and Translations" (1972) 6 *NZJ Hist* 129, at 154)

Well before the Treaty had acquired its final tally of signatures, a tally which was always noticeably deficient as far as the interior areas of the country (Waikato, Taupo, etc) were concerned, and certainly before Hobson knew the outcome of Major Bunbury's quest for signatures in the southern districts of New Zealand, Hobson acted, on 21 May 1840, to proclaim British sovereignty over the whole of New Zealand. He did so pre-emptively, concerned with other issues (in particular restiveness at Port Nicholson, and reports of the expected arrival of the Nanto-Bordelaise Company's settlers from France).

Guardedly, his proclamation in respect of the North Island did make obeisance to the Treaty (although the adherence of chiefs over wide areas of the southern and eastern parts of the Island had either not been obtained, or was not

then known by Hobson to have been given, where such had been given). The proclamation in respect of the South and Stewart Islands simply asserted a right ". . . on the grounds of Discovery . . .". The Secretary of State for War & Colonies, by then Lord John Russell, on receiving a despatch from Hobson attaching copies of the Proclamations, had them printed in the *London Gazette* on 2 October 1840, thus formally completing the legal steps by which sovereignty was acquired.

Treaty only one step

Drawing the historical threads together, it can be seen that the Treaty was no more than one step, one act of state, along the path to complete and full annexation. To set it up as being the beginning and the end of the matter is an obvious travesty of the facts, and an errant injustice to what, inevitably, was a complicated train of events. The Treaty was part of the drama but by no means the sole or final Act.

Equally, and as much a travesty, is it wrong to treat of the Waitangi pact as if it were a treaty of cession between sovereign nations and, as such, ". . . sacred and inviolable . . .", to use the language of Lord Mansfield in *Campbell v Hall*, (1774) 1 Cowp 204, 98 ER 1045, at 208, 1047. That case concerned the peace treaty of 10 February 1763 between Great Britain and France, the "Peace of Paris", which brought the Seven Years War to an end, and in terms of which France ceded the sovereignty of Grenada (which the case concerned), along with that of Canada, Senegal, St Vincent, Tobago, Dominica & Minorca, to Great Britain.

To draw an analogy between that Treaty, and the Waitangi pact, is, it is submitted, quite fallacious. Yet McHugh argues, after citing *Campbell v Hall*, and the "sacred and inviolable" dictum:

> From this we get the legal restraint on the Crown acting in an executive capacity inconsistent with any promises in a treaty of cession of sovereignty such as the Waitangi document. (P G McHugh, *op cit*, p 17.)

It is respectfully submitted that we get no such thing from *Campbell v Hall*, which dealt with an internationally cognisable treaty, a wholly different thing from a domestic act of state such as the Waitangi pact, where the sovereign authority, for domestic and policy reasons, sought the affirmation of representatives of ". . . dispersed and petty tribes . . ." judged by the Marquess of Normanby as being ". . . incompetent to act or even to deliberate in concert", to an act of state, or state policy, namely, the assumption of British sovereignty over the New Zealand islands.

It might also be worth recalling that very clear judicial pronouncement as to the matter contained in the dictum of Prendergast CJ, in *Wi Parata v Bishop of Wellington*, (1877) 3 NZ Jur (NS) 72, SCt. There, Prendergast CJ stated, with reference to the Treaty:

> So far indeed as that instrument purported to cede the sovereignty — a matter with which we are not here directly concerned, it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. (p 78)

That statement has stood the test of time. In its clarity of exposition, and basic soundness of judgment, it is fitting testimony to the quality of that most learned Chief Justice's judicial work.

To summarise, treaty of cession, No; legitimising pact of affirmation and allegiance, Yes.

(2) The "Treaty as law" myth

It was always agreed and settled in our law that obligations undertaken in terms of a treaty (that is, even a legally cognisable treaty, quite apart from a mere domestic pact with a non-sovereign and unrepresentative group of persons), ". . . cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law." See *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*, [1941] AC 308, PC, per Viscount Simon LC (delivering the advice of the Board), at p 324.

To similar effect a whole line of cases, before and after, of which well-known examples are *Nabob of Arcot v East Indian Company*, (1793) 4 Bro CC 180, 29 ER 841 (Lord Commissioner Eyre); *Doss v Secretary of State for India in Council*, (1875) LR 19 Eq 509, Malins V-C; *Blackburn v Attorney-General*, [1971] 1 WLR 1037, CA, per Lord Denning MR, at p 1039; *& British Airways v Laker Airways*, [1985] AC 58, HL(E), per Lord Diplock, at pp 85-6.

The rule has always been that acts of state under which the Sovereign acquires territory (and treaties made as part of that process are themselves acts of state) are not cognisable or enforceable in law, as such and without more. They are obviously, and intrinsically, "political" in nature. As Professor R Higgins QC has stated it:

> An unincorporated treaty . . . has no formal standing at all in English law.[3]

The myth-makers, however, would clearly have it otherwise. By various means, they have been striving to find ways by which degrees or species of enforceability, and/or some legally cognisable status, might be given, at least to the "principles" of the Treaty, or perhaps even to the Treaty generally. This notwithstanding that the New Zealand Parliament has never been prepared to give direct legislative force to the Treaty, and indeed could not do so without rending the whole fabric of our law, both our common law and our statutory law.

A now familiar route taken by those contending for legal cognisance of the Treaty, or for some general common law recognition thereof, all contrary to the basic rule just cited, is to point to the proliferation (during the 1984-90 period) of statutory provisions in various enactments to the effect that the Act in question is to be interpreted and administered as to give effect to ". . . the principles of the Treaty of Waitangi." Apart from the State-Owned Enterprises Act 1986 (s 9), examples are the Long Title to the Environment Act 1986 and s 4, Conservation Act 1987. To these should be added provisions giving the Waitangi Tribunal direct (as opposed to merely recommendatory) powers, such as those set out in the Treaty of Waitangi (State Enterprises) Act 1988 (Parts I & II) and the New Zealand Railways Corporation Restructuring Act 1990 (Part IV).

Also of significance in this connection is the new Part IIIA of the Fisheries Act 1983, as inserted by s 74, Maori Fisheries Act 1989 (which section contains a provision referring directly to "Article II of the Treaty of Waitangi", but whether to the Maori version or to one of the English versions is not stated).

Having pointed to this legislative outpouring, this deluge of vagueness, the contenders for direct enforceability, or for some general common law recognition of Treaty "rights", in effect say:

> All these legislative references to, and invocations of, the "principles" of the Treaty, collectively amount to something, and accordingly confer a status upon the Treaty in our law.

Just what that status might be remains of course elusive. It would seem that it must be something immanent and pervasive, something contextual, infusing (perhaps) the law of New Zealand in some general way. After all, the ". . . principles of the Treaty . . ." (to take the now oft-used statutory phrase) are themselves unstated and elusive, so anything erected upon such elusive materials must indeed be enigmatic and mysterious (or as Churchill said of the policy of Russia, in a 1939 broadcast address: "It is a riddle wrapped in a mystery inside an enigma".

But the foregoing is indeed how the builders (the myth-makers) have reasoned in their creative work.

Treaty "principles" and "spirit"

To draw upon certain of the leading statements as set out in *New Zealand Maori Council v Attorney-General*, [1987] 1 NZLR 641, Heron J, and Court of Appeal ("the New Zealand Maori Council case"), the approach seems to be one of separating, and distancing, the "principles" from the Treaty itself, a most consummately metaphysical exercise to be sure. Thus we find Bisson J stating:

> With the advent of legislation invoking recognition of the principles of the Treaty no longer is it to be regarded as a 'simple nullity' (as in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72) and the application of its principles does not involve the enforcement of the Treaty itself as if totally incorporated in municipal law (cf *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 at p 324). (p 715, lines 37-42)

As to the interpretative approach which the Court adopts, we find Cooke P contending, not unfamiliarly, for a ". . . broad, unquibbling and practical interpretation . . ." (p 655, lines 43-4). After discussing the problem posed by the different texts of the Treaty, and the different shades of meaning which these contending texts embody (these problems being, in fact, truly insoluble), Cooke P states, somewhat disarmingly:

> What matters is the spirit. This approach accords with the oral character of Maori tradition and culture. (p 663, lines 46-7)

This approach, however, conveniently overlooks the fact that the Treaty is a *written* document (both in English and Maori) or rather a collection of different (and textually irreconcilable) documents, not a mere matter of "spirit" and certainly not something oral, or akin to the oral, or of an oral character. The distillation of its "spirit" is certainly no easy exercise; that assuredly may be granted.

No literal interpretation

In short, literal interpretation, the Court is saying, can have no place (the practical difficulties with a literal interpretation being, it seems, fully realised). Rather, the Court has plumped for a much different, and very loose, canon of interpretation. This is illustrated by Bisson J (at p 714, lines 13-15), with reference to a dictum of Lord Wilberforce in *James Buchanan & Co Limited v Babco Forwarding & Shipping (UK) Limited,* [1978] AC 141, HL(E). That was a case concerned with the interpretation of the Convention on the Contract for the International Carriage of Goods by Road, where Lord Wilberforce stated, at p 152 of the report, that the approach to be adopted should be one

> . . . unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.

The Court of Appeal clearly finds such an approach irresistible with Treaty "principles" and has embraced it with ardour.

Fundamental rights?

Equally disquieting, as showing even more, a disposition on the part of the Court to elevate, by judicial fiat, the Treaty, or its disembodied "principles", into "higher law", is this passage, again from the judgment of Cooke P:

> The submissions [for the applicants] were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. (pp 655-6)

It is submitted that this passage exemplifies a number of quite striking fallacies. The first is the fallacy that the Treaty is a document which in some manner relates to "fundamental rights". Yet there are no "fundamental rights" stated in, or to be derived from, the Treaty. The Treaty may be declaratory of certain things, but it does not give "rights", fundamental or otherwise. Only the law confers rights. It is neither a Bill of Rights nor even a "Clayton's Bill of Rights". Without direct incorporation by statute, in our municipal law, there is no part or provision of it which can be enforced. And what cannot be enforced via the front door should not be enforced via the back door.

If the contention is that its so-called "principles", that is, things judicially invented and pronounced, may bespeak rights, or "fundamental rights", then that is equally fallacious, because the "rights" then cannot be said, in truth or at all, to proceed from the Treaty, but rather from what people (Judges) today would like the Treaty

to be or say (when in reality it neither is nor says what *they* want).

Fallacies

Fallacious too because ". . . subsequent developments of international human rights norms . . ." are neither here nor there, in this context. With the Treaty, we are dealing with an instrument which, like it or not, is fixed in time, a time when modern concepts of "human rights" were largely, or even wholly, unconceived, slavery in the British Empire, for example, having only been abolished seven years before.

Fallacious too because Parliament has not seen fit to enunciate the surprising presumption that its legislation (*all* its legislation) must be interpreted so as not to permit conduct ". . . inconsistent with the principles of the Treaty . . .", "principles" which Parliament has never itself enunciated. If such a sweeping and vague, but potentially significant, presumption were to exist, one would expect to find it stated, by Parliament itself, in the Acts Interpretation Act. To impute to Parliament, by judicial creation, such a clog, shackle or fetter upon its workings is no mean feat of judicial legislation. And what if Parliament did legislate contrary to the "principles" of the Treaty? Would the Courts then develop this novel presumption further and purport to strike such legislation down?

Either the Treaty is law or it is not law. And plainly it is *not* law. The "principles of the Treaty", undefined, unstated and unknowable (except by judicial contrivance) as they are, should on on account be elevated to the status of the legally cognisable, let alone to a putative "higher law" status. That is taking judicial licence too far.

Whilst it can fairly be said that what has happened has occurred because Parliament allowed it to occur, even invited it to occur, by enacting, in various statutes, provisions referring to the ". . . principles of the Treaty . . .", the only effective response to this must be for Parliament now to remove the excuse by repealing those very provisions. That should be done as a matter of policy as they do our law no credit whatsover and have spawned a judicial creation which, feeding upon itself, must likely grow and grow, and continue to mutate, unless a complete and swift stop is put to it. Already, more than the mere excision of the provisions concerned in the various Acts may be necessary. But at least the excision of such provisions would cut the ground from under the framework so far (judicially) erected.

We have already seen, in *Attorney-General v New Zealand Maori Council* (unreported, Court of Appeal, CA 247/90, 1 November 1990) ("the radio case"), the Court of Appeal sustain a declaration granted by the High Court against the sale by tender of management or transmission rights or licences, in the AM & FM frequencies, for a period calculated to allow the Waitangi Tribunal to inquire into a claim ". . . that Maori have a need for a share or better share, of FM frequencies" (p 2 of the judgment of Cooke P), this in relation to a statute, namely, the Radiocommunications Act 1989, which contains no reference whatsoever to "the principles" of the Treaty.

In other words, the judicial wave has already broken upon new ground, and taken pure common law form. The radio case should accordingly serve as a warning and portent. If the trend is not stopped, by speedy and effective legislative action, the problem will surely only magnify and compound.

For we have not voted in this country for a judicially-created Bill of Rights, let alone for a Bill of Rights designed to advantage but one section of society. In the circumstances, only Parliament can call a halt to what is occurring, but it must act quickly.

(3) The "evolving Treaty" myth

This myth would have it that the Treaty is a "living instrument" (Cooke P, in the *New Zealand Maori Council* case, at p 656, line 2) or ". . . an embryo rather than a fully developed and integrated set of ideas" (Cooke P, also in the *New Zealand Maori Council* case, at p 663, line 55). Richardson J, in the same case, states, at p 673, lines 35-39:

> Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.

For another statement which should set off further warning bells, reference may be made to the judgment of Cooke P in *Tainui Maori Trust Board v Attorney-General*, [1989] 2 NZLR 513 (CA) ("the Tainui Case"), at p 530:

> The principles of the Treaty have to be applied to give fair results in today's world.

Finally, reference should also be made to the judgment of the Court, delivered by Cooke P, in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA), at p 656:

> The position resulting from 150 years of history cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.

These statements rather say it all. It is as though the Court believes that the Treaty is an ever-speaking, ever-changing constitutional instrument, a chameleon document for all seasons, capable upon interpretation of delivering beneficial results (for the lucky some) indefinitely into the future, a fructuous tree indeed and bountiful with it.

How far from reality. How far from that modest, hasty, simple, time-bound, document of February 1840; how far from that act of state designed to legitimise the assumption of British sovereignty. Would Hobson, or the chiefs to whom presents were distributed after signatures were obtained, have ever, remotely, believed that they were subscribing to a Bill of Rights for all time.

This myth is myth indeed. It is the very epitome of myth and of the apparent wishful desire of some of our Judges for a "higher law" constitution which, fortunately for the rest of us, does not exist and, with continuing good political management, will never be imposed upon us.

The more advanced, or crypto-legal, myths

Turning now to the more advanced, or crypto-legal myths, these appear to have, as a common feature, the somewhat touching belief that an act of state such as the Waitangi pact, or the elusive "principles" thereof, can be interpreted, and should be given effect, by analogy with private law duties existing between persons in certain everyday, juridically recognised, relationships.

Accordingly, these myths characteristically suffer from the defect which comes from proceeding upon the basis of a wholly inappropriate analogy.

The myths in question can be outlined with relative brevity.

(1) The partnership myth

This myth, whilst judicially embraced, is also one not infrequently heard in common parlance. To talk of "the Treaty partners" is jargon of the day much employed, for example, by bodies such as the Waitangi Tribunal and the erstwhile 1990 Commission.

For a judicial statement of the myth, what better than to quote again from Cooke P, in the *New Zealand Maori Council* case, at p 664, line 1:

> The Treaty signified a partnership between races . . .

For a statement from the Waitangi Tribunal, it may suffice to quote from the *Muriwhenua Report* (1988), para 10.5.2:

> It was a basic object of the Treaty that two people[s] would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.

These statements, and many more could be given, are notable for never, never, pointing to any such concept as having been expressed in the terms of the Treaty itself, whether in any of the English versions, or in the Maori version.

Indeed it may be hazarded that such a concept would have been quite foreign to those who signed the document in 1840. It was certainly no part of the Imperial ethos, and the British Empire was then approaching its zenith, to enter into "partnerships" with subject peoples.

What shares of "partnership"?

In any event, the concept surely falls to pieces when it is asked: in what shares do the "partners" participate? Cooke P, in *New Zealand Maori Council v Attorney-General*, [1989] 2 NZLR 142 (CA) ("the forests case"), gives this explanation:

> Partnership certainly does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Maori have some fair claim, other initiatives have still made the greater contribution. For example — and it is only an example — that might well be true of some pine forests (p 152, lines 40-44)

Pondering on the same question, in the *Tainui* case, in respect of coal and rights to mine coal, Cooke P further "explicated" the matter, in these terms:

> Perhaps that [inequality of shares as between partners] applies to the national coal mining enterprise. The existence of coal was known to Maori before the Treaty and apparently they made some domestic use of it; but the planning of the development of the industry would appear to have been essentially the result of Pakeha needs and endeavours. Still, many Tainui people have worked in the mines and expertise has been acquired. To take a single example, the present first plaintiff, now a university director, worked as a trucker and a miner in the Huntly coalfields for six years as a young man. Not only have Tainui made an important contribution to the growth of the industry but the industry is of course wholly built on the exploitation of a natural asset which was part of their land. In that way the coal case differs to some extent from the use of land for growing exotic pine forests. It also differs of course from sea fishing as the nature of the resource is not truly comparable. [1989] 2 NZLR 513, (CA), at p 527, lines 38-49.

Where, might it be asked, as a practical question, does this lead us or leave us, or indeed where does it leave the law, other than in a state of well-meaning confusion and obscurity.

Partnership, as a practical yardstick, or as a useful analogy, is a non-starter. It is a myth without a basis. Never, historically, did Maori and Pakeha (for Cooke P does speak of a "partnership between races") agree upon a "partnership" as such, whether a 50/50 partnership or a partnership of some other division, in relation to resources or anything else. Peoples do not enter into partnerships. The concept is utterly, and woefully, inappropriate, on every count. And as a metaphor, it serves nought but to confuse and raise impossible, and unfair, expectations.

(2) The "fiduciary duties" myth

Perhaps apprehending that the partnership analogy is a defective one, the Court of Appeal, in the *New Zealand Maori Council* case, and subsequently, has probably laid greater stress upon the notion that a fiduciary relationship exists between the Crown and the present-day Maori people.

In the *New Zealand Maori Council* case, Cooke P put it in this way:

> What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. (p 664, lines 38-43)

Needless to say, the Waitangi Tribunal has quickly, and most fully,

adopted this concept. See, for example, the *Muriwhenua Report*, para 10.5.4, p 193.

Emotive invocations

Associated with the principal statements as to this matter are numerous emotive invocations of good faith, co-operation, loyalty, and even honour.

Such statements have a long lineage. For the Treaty has always evoked questioning, and such questioning has tended to draw forth official statements asserting that good faith underlays it. The most famous imputation upon the Treaty was probably that delivered by Joseph Somes, a govenor of the New Zealand Company, in 1843. He stated:

> We have always had very serious doubts whether the treaty of Waitangi, made with naked savages by a consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment.[4]

Lord Stanley's official rejoinder, as Secretary of State for War and Colonies, is also well known and of course defensively asserted complete and absolute good faith on the part of the Crown.

But where does good faith, or the absence thereof, get us? That an act of state was made in good faith does not of course mean that good faith as such is, by virtue of its presence at the relevant historical moment, thereby mysteriously transmuted into an on-going, never-ending, incident of a whole complex web of relationships between the Government (the Crown) and a particular section of society. That is to draw a very long bow.

One would hope that our Government considered itself to be under a generalised duty to act in good faith towards *all* citizens.

It is unnecessary, and unwarrantable, to use the Treaty, or to seek to formulate a "principle" therefrom, in such a way, or so as to have an effect, as would cast upon successive Governments a perpetual obligation to act towards one section of society ". . . with utmost good faith . . ." (to use an expression of Cooke P, at p 664, line 47, in the *New Zealand Maori Council* case), regardless of the interests of all other sections of society, given that correlative duties (if there are any "duties" in issue) must surely, and equally, be owed to those sections of society as well and as much.

And again, there is of course no basis for such reasoning in the Treaty itself. It is also distasteful to speak of a generalised obligation of good faith as being owed by the Government (the Crown) to a particular section of society only.

And if the answer to this is that such an obligation is owed to all, then it may be wondered (correctly) what the Treaty has to do with the matter.

Perhaps this supposed "duty" is no more than flim-flam and flummery. It certainly has every such appearance.

Again it is a transposition from the language of private law relations which, in the public and constitutional sphere, makes nonsense or worse (for if it be a basis for favouring one group, then it becomes positively dangerous).

At another point in his judgment in the *New Zealand Maori Council* case, Cooke P confuses the matter by speaking of the Pakeha and Maori as the Treaty partners and as owing ". . . towards each other . . ." a duty to act ". . . reasonably and with the utmost good faith . . ." (p 667, lines 8-10).

Now it is not the Crown (Government) which owes the "duty" but Pakeha and Maori, reciprocally. Once again, such generalised talk makes little or no sense, except as well-intentioned rhetoric.

(3) An emergent myth — a "duty to consult"

In the *New Zealand Maori Council* case, such a duty was postulated, but firmly rejected. (See Cooke P, at p 665, lines 5-14; Richardson J, at p 683, lines 13-27; and Somers J at p 693, lines 34-7.)

But in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) ("the forests case"), Cooke P, for the Court, states:

> It may be as well to add some observations, in the hope of helping resolution of the problem. In the judgments in 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument. (p 152, lines 29-33)

It would therefore seem that the Treaty has of late given birth, following an earlier miscarriage, to this yet further "duty".

How, literally, the ". . . parties to the Treaty . . ." could carry out this duty requires particularly vivid imagination. The Court, surely, got it right, the first time, in the *New Zealand Maori Council* case. Such a formless "duty" is indeed ". . . elusive and unworkable . . ." (per Cooke P [1987] 1 NZLR 641, at p 665, line 6), and for the reasons which he so rightly stated in that case.

Concluding remarks — the Treaty and myth-making

The call needs to go out that a practical, unembellished, and down to earth view should be taken of the Treaty. We need to stop dreaming and embroidering. Equally, we must stop mythologising the Treaty and trying to make it into what it is not.

Richardson J, in the *New Zealand Maori Council* case, put it well when he stated:

> It was a compact through which the Crown sought from the indigenous people legitimacy for its acquisition of government over New Zealand. (at p 681, lines 3-4)

That, in truth, is what it was, and what it was all about.

It is *not*, and never will be, a Bill of Rights or a constitutional document of any kind. Its modesty, its purpose, and its non-legal character, together preclude this. Nor can such a document ever grow into such a thing, or be prodded, or conjured, into becoming such.

Its mana revolves around its historical and symbolic significance. We can all share in that.

But to seek to "politicise" the Treaty, and give it present-day political currency as an agenda-setting instrument for advancing particular claims or purposes for a particular section of society, as was certainly attempting to be done

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Void dispositions and bank accounts

By Andrew Borrowdale, Lecturer in Law, Canterbury University, and Paul Kellar, a practitioner of Christchurch

It is suggested in this article that banks may be acting too cautiously in freezing company accounts when winding-up proceedings are commenced by a third party. The authors analyse the relevant case law and point out that the Australian legislation protects banks acting in good faith in the ordinary course of business.

Banks frequently respond to the commencement of winding up proceedings against a corporate customer by freezing the company's account. This ensures that the bank does not fall foul of s 222 of the Companies Act 1955 which provides that in a compulsory winding up disposition by a company of its property after the commencement of winding up is void. Winding up proceedings may of course be quite unrelated to the solvency or otherwise of the company. Accordingly a financially healthy company may find itself with substantial assets beyond reach in a frozen account.

Under s 222 the Court may validate any disposition at any time. But even assuming that a Court is prepared to give a blanket validation in advance of all transactions through the account, this involves the expense and delay of an application. It is possible that banks have reacted with an excess of caution where the account in question is in credit, and that the payment of cheques drawn on the account does not fall within s 222.

Payment of cheque by bank where account is in credit

The weight of authority suggests that there is no disposition of the company's property by the bank in paying a cheque drawn on it by the company when the account is in credit. This is because either the bank is merely the conduit through which the disposition is made or payment does not amount to a disposition of company property at all.

In *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 254 an account was operated between the date of commencement of winding up and the date of the order. At all times the account was in credit. A total of $13,000 was paid out of the account on cheques drawn by the company. The bank sought a declaration that the payment of these cheques did not amount to a disposition of the company's property. The declaration was granted. Street CJ in Eq said:

> The word "disposition" connotes in my view both a disponor and a disponee. It does not operate to affect the agencies interposing between the company, as disponor, and the recipient of the property, as disponee . . . The intermediary functions fulfilled by the bank in respect of paying cheques drawn by a company in favour of and presented on behalf of a third party do not implicate the bank in the consequences of the statutory avoidance prescribed by [s 222] (at p 258).

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during the 1984-90 period, whether by legislative action (slipping into statutes a "principles of the Treaty" clause), or by the manipulation of public opinion by propaganda campaigns (as were seen last year), is mischievous. That the Courts have chosen to run with the political flow, over this period, has been disappointing.

For by inflating the Treaty, and by generating Treaty "principles", all aimed at advancing the interests of one section of society, as opposed to society as a whole, the matter generally will be seen by the rest as unfair and unjust. Indeed, by many, it is probably already seen in this way. See, for example, the well-judged remarks of Mr R J S Munro, MP for Invercargill, concerning the "radio case". He is reported as saying that ". . . legislative changes must be made to prevent such "politically charged" matters being finally determined by non-elected judges".[5] That is a statement by a Government Member of Parliament reflecting concerns that are clearly now "out in the open".

And if the interests of one, or any, group in society, are properly to be advanced, whether preferentially or generally, there are other, and far better, fairer, and more neutral, ways of achieving that.

To say, at the end of the day, that the Treaty involves a special relationship between one section of society and Government, in which others sections do not share and from which, ipso facto, they must therefore be excluded, is to follow an effective recipe for social decohesion. □

1 See, for example, A H McLintock, *Crown Colony Government in New Zealand*, Wellington, Government Printer, 1958; Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin New Zealand Limited, 1987; J Rutherford, *The Treaty of Waitangi & the Acquisition of British Sovereignty in New Zealand 1840*, Auckland, Auckland Univ College Bulletin (No 36), History series no 3, 1949.
2 McLintock, supra, pp 56-7.
3 Professor R Higgins QC, chapter on treaty-making and enforcement under UK law, in F G Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law*, London, Sweet & Maxwell Ltd, 1987, Ch 7, p 129.
4 McLintock, supra, pp 68-76.
5 *New Zealand Herald* 6 May 1991, p 2.

The difficulty with this analysis is that undoubtedly a disposition has been made to the third party. Presumably a bank has no mandate to make payments which are void in terms of s 222. If the disposition is effected by the bank, even in its capacity as a mere intermediary, the bank acts without authority and should not therefore be entitled to debit the amount of the cheque against the relevant account.

A preferable approach was taken in *Re Loteka Pty Ltd (in liq)* (1989) 15 ACLR 620. Here the company was ordered to be wound up on 16 September 1988 but the bank did not become aware of the order until 7 October. In the interim a number of cheques had been paid by the bank. The liquidators of the company sought orders declaring that these payments were void and requiring the bank to pay to them the amounts concerned.

McPherson J dismissed the application. First, he held that there was no disposition of the property of the company, or, if there was such a disposition, that it was not in favour of the bank but the payee of the cheque:

> In paying the customer's cheque, the bank debits the customer's account with the amount of the cheque drawn in favour of the stranger. In doing so, the bank, if the customer's account is overdrawn, lends its own money to the customer. That involves no disposition of the customer's property to the bank. Equally, if the account is sufficiently in credit to meet the cheque, no disposition of property of the customer takes place in favour of the bank. The amount standing to the credit of the customer's account is simply diminished thus reducing pro tanto the indebtedness of the bank to the customer. It is the payee of the cheque that receives the benefit of the proceeds of the cheque. All that happens between customer and banker is an adjustment of entries in the statement recording the accounts between them. (at p 626.)

Secondly, McPherson J held that the basis on which payment of a cheque constituted a disposition by the company to that person was delivery of the physical document:

> (T)he true reason for concluding that there is a disposition of company property in favour of the [creditor] . . . is not that his acceptance of the cheque accounts to conditional payment of a debt due to him, but that the drawing and delivery of the cheque involves the transfer to him of ownership of a chattel until that moment was vested in the company. The form on which the cheque is written is a piece of paper that belongs to the company. It is drawn by completing and signing it, and issued by delivering it to the creditor with the intention of passing ownership in it. It may seem odd that the law should view a cheque or other bill of exchange which is a valuable instrument as a mere chattel; but there is no doubt that it is so regarded. (at p 626.)

The only authorities which suggest that payment by the bank of cheques drawn on an account in credit is void under s 222 is *Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711, and *Ramsay v National Australia Bank Ltd* [1989] VR 59 in which the judgment in *Gray's Inn* was approved. Both these cases are discussed below. In *Gray's Inn* Buckley LJ said that it was indisputable that all payments out must be dispositions of the company's property (at p 716). But this was in the context of payment out of an *overdrawn* account, and *Gray's Inn* was distinguished in *Loteka* on this ground.

However, since the creditor has been paid, it is obvious that a disposition has occurred (see *Re Reuth Bros Ltd (in liq)* (1986) 3 NZCLC 99,543). The approach in *Loteka* is that there has occurred a disposition of the cheque itself, being property of the company, and this is a disposition in which the bank has taken no part. If this is correct, then the disposition occurs on delivery of the cheque to the customer.

This view conflicts with the reasoning in the unreported English case of *Ashmark Ltd v Nitra Ltd* (1988, High Court, Blayney J). In that case a petition for the winding up of Ashmark was made on 8 July 1988. On 7 July the company, which owed Nitra nearly £83,000, had given Nitra a cheque for almost £12,000. The cheque was paid by the drawee bank on 11 July. The question for decision by the Court was whether the disposition had occurred before or after the commencement of winding up on 8 July.

It was held that there was no disposition until the cheque was paid by the drawee bank on 11 July, ie after commencement of winding up, with the consequence that the disposition was caught by the s 222. This decision was based on the rule that a bill of exchange (including a cheque) of itself does not operate as an assignment of funds in the hands of the drawee available for payment thereof (s 53 Bills of Exchange Act 1908). Furthermore, the cheque to Nitra was no more than an unconditional order by the company to the drawee bank to pay Nitra the sum named in it. Until the drawee bank made the payment in accordance with the order there was no disposition.

It probable that the reasoning in *Loteka* is to be preferred in this respect. A cheque represents a binding contract that the payee be paid the sum of the cheque, if not by the drawee bank then by the drawer. That contract is binding upon issue. From the moment it is issued it constitutes a valuable right of action against the drawer which crystallizes on dishonour. As such it is a disposition by the drawer.

Payment of cheque by bank where account is overdrawn

In *Loteka* it was said that there was no disposition of the company's property to the bank where the bank pays a cheque on an overdrawn account. Rather, the bank is lending its own money to the customer (at p 626). However, if the reasoning in *Loteka* is correct, and a disposition by the company occurs when it issues a cheque, it would follow that in this situation too the company has disposed of its property, namely the cheque itself. Accordingly, the amount paid to the disponee on presentation of the cheque could be recovered by the liquidator for the benefit of creditors generally, and the bank, unless otherwise secured, would share rateably in the proceeds of the recovery.

Payment of cheque to credit of overdrawn account

The leading authority is *Re Gray's Inn Construction Ltd* (supra), a decision of the English Court of Appeal. A petition for winding up of the company was presented on 3 August 1972 and an order was made on 9 October. During that period approximately £25,000 had been paid into the account of the company and £24,000 paid out. The account was at all times overdrawn to the extent of £3,600 or more. As a result of the company continuing to trade after 3 August the creditors were £5,000 worse off than they would have been had trading ceased on that date.

In the trial Court, it was held that the payment of moneys to the credit of a company's account, whether it is in credit or not, does not constitute a disposition of the company's property. On appeal, this was said by Buckley LJ to be incorrect:

> When a customer's account with his banker is overdrawn he is a debtor to his banker for the amount of the overdraft. When he pays a sum of money into the account, whether in cash or by payment in of a third party's cheque, he discharges his indebtedness to the bank pro tanto. There is clearly in these circumstances, in my judgment, a disposition by the company to the bank of the amount of the cash, or of the cheque. It may well be the case, as [counsel] has submitted, that in clearing a third party's cheque and collecting the amount due upon it, the bank acts as the customer's agent, but as soon as it credits the amount collected in reduction of the customer's overdraft, as in the ordinary course of banking business it has authority to do in the absence of any contrary instruction from the customer, it makes a disposition on the customer's behalf in its own favour discharging pro tanto the customer's liability on the overdraft.(at pp 715-716.)

There is no case which suggests that this reasoning is incorrect. On the contrary, it has been approved by the Full Court of Victoria in *Ramsay v National Australia Bank Ltd* (supra), although in that last case it was found on the facts that no disposition had occurred. In *Loteka* both *Gray's Inn* and *Ramsay* were distinguished on the basis that those cases involved the receipt by the bank of payment of the debt represented by the company's overdraft (at p 625). McPherson J went on to say in *Loteka*:

> In such a case a bank may, like the creditors in *Mal Bower*, be said to have been the "disponee" of the cheques or their proceeds. (at p 625.)

One can conclude that the payment in by a company after the commencement of winding up is a disposition to the bank within the meaning of s 222, with the consequence that it is void and the bank is liable to make repayment at the instance of the liquidator.

Payment of cheque to account in credit

On the same reasoning, even payment in to an account in credit is a disposition in favour of the bank. Once the sum is credited to the company's account, the company has only a contractual right to repayment and has no property in the money which has passed to the bank. In *Gray's Inn* Buckley LJ said:

> In the present case the company's account with the bank was overdrawn, so I need not consider what the position would have been if any cheque had been paid in when the account was in credit, but I doubt whether even in those circumstances it could be properly said that the payment in did not constitute a disposition of the amount of the cheque in favour of the bank. (at p 716.)

As long as there are no payments out of the account after commencement of winding up, this finding does not cause concern to banks since on winding up the amount standing to the credit of the account is paid to the liquidator in any event.

But there may be implications for the right of set off and combination of accounts. In *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] BCLC 1 it was held that s 222 precluded a combination of accounts. In that case the bank had paid an amount under an indemnity given by it to a third party at the request of its customer. Under a counter-indemnity, the bank was entitled to debit the customer's account for the amount paid to the third party. Payment and debit were both found to have occurred after the commencement of winding up of the customer. It was held, on the authority of *Gray's Inn*, that the debit amounted to a disposition of the customer's property, and the bank could consequently not set off the amount of the debit against a credit balance in another account.

Reform

The equivalent Australian provision (s 468 of the *Corporations Act* 1989) exempts certain dispositions from the operation of s 222. In particular, it exempts

> payment of money by a banking corporation out of an account maintained by the company with the banking corporation, being a payment made by the banking corporation –
>
> (i) on or before the day on which the court makes the order for the winding up of the company; and
>
> (ii) in good faith and in the ordinary course of the banking business of the banking corporation.

There is no such exemption in the New Zealand statute. But for practical purposes the position will change upon the enactment of the Companies Bill. Under the Bill liquidation commences upon appointment of the liquidator, and not upon filing of the application as at present. Accordingly there will be no hiatus during which a solvent company can be denied access to its funds. □

Personal injury by accident: Some problems of interpretation

By Rosemary Tobin, Lecturer in Law, University of Auckland

The Accident Compensation Act 1982 provides a code for compensation for personal injury resulting from accident. This is a general description. The precise terms of the Act have called for considerable judicial interpretation in particular circumstances. Rosemary Tobin analyses the decisions of the Courts in this area up to this time. She concludes that the Courts have adopted an extensive rather than a restrictive interpretation, including mental as well as physical injury, and accepting that involvement in the accident need not be direct, provided it is proximate.

> To find out the meaning of particular provisions in social legislation of this character calls, in the first instance for a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them. Meticulous linguistic analysis of words and phrases . . . should be subordinated to this purposive approach. (*Jones v Secretary of State for Social Services* [1972] AC 944 at 1005, per Lord Diplock.)

It is now seventeen years since all proceedings for damages arising directly or indirectly out of a personal injury by accident were barred in New Zealand! During that time there have been many cases decided by the Courts as plaintiffs sought to argue against a decision of the Corporation, the statutory body set up to administer the scheme, that their claim was not compensable under the Accident Compensation Act 1982.[2] This last year or so has been no exception. The cases were not brought solely by those seeking cover; the Corporation has a right of appeal where, for example, it is dissatisfied with a decision of the Appeal Authority. Defendants too have used the provisions of the Act. It became the practice for the defendant, in actions brought for false imprisonment, malicious prosecution and negligence, to argue in Court that the injury which the plaintiff had suffered at their hands was a personal injury by accident, and therefore that any action by the plaintiff was barred from proceeding. This tactical move necessitated the Court referring the question of cover to the Corporation for determination before the claim for compensatory damages could proceed. (s 27(3)) The Act is no bar to a claim for exemplary damages. (*Donselaar v Donselaar* [1982] 1 NZLR 97; *Auckland City Council v Blundell* [1986] 1 NZLR 732; *Green v Matheson* [1989] 3 NZLR 564.)

There has recently been a series of decisions in both the High Court and the Court of Appeal which have considered the meaning of the phrase "personal injury by accident" which is the basis of entitlement under the Act. In this article it is proposed to examine these cases, and consider the issues raised by the various decisions.

Cover

Before considering these recent decisions however, it is necessary to bear in mind s 27 and s 2 of the Act; both being relevant to the cases under consideration. One of the purposes of the Act as set out in s 26(1)(c) is to make provision for the compensation of an injured person or the dependants of a deceased person who has suffered personal injury by accident. To that end s 27(1) prohibits all proceedings for damages at common law arising out of a personal injury by accident:

> [W]here any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand . . .

The focus of the Act is thus upon the accident victim, not upon the alleged wrongdoer; he or she is no longer a part of the equation where the injured party has suffered a personal injury by accident.

The pivotal phrase granting entitlement under the Act, personal injury by accident, has caused great difficulty in interpretation.[3] When the original Act was passed the legislature made no attempt to define the phrase.[4] This was rectified in 1973, to some extent, by the insertion of both an inclusive and an exclusive definition. Section 2 of the Act states:

> "personal injury by accident" –
>
> (a) Includes –
>
> (i) The physical and mental consequences of any such injury or of the accident:
> (ii) medical, surgical, dental, or first aid misadventure:
> (iii) Incapacity resulting from an occupational disease or industrial deafness to the extent that cover extends in respect of the disease or industrial deafness under sections 28 and 29 of this Act.
> (iv) Actual bodily harm (including pregnancy and mental or nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961 irrespective of whether any person is charged with the offence and notwithstanding that the offender was legally incapable of forming a criminal intent:

(b) Except as provided in the last preceding paragraph, does not include –

(i) Damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it, and the effort, strain, or stress arises out of and in the course of the employment of that person:

(ii) Damage to the body or mind caused exclusively by disease, infection, or the ageing process:

The phrase itself derives from workers' compensation legislation but it was accepted by commentators[5] and the Courts[6] alike that while cases in that area could be helpful they were by no means delimiting. The philosophy of the Act is to provide compensation for any personal injury caused by accident, irrespective of fault. Thus the Act is fundamentally different from the workers' compensation legislation, which limited compensation for injury to an accident suffered at work, and as a result the broad purpose of the Act has to be considered when deciding whether or not a personal injury by accident has occurred.

Definition of accident

The starting point in decisions interpreting the phrase, which have usually concentrated on the meaning of the term "accident", has been that of *Fenton v Thorley* [1903] AC 443 where Lord McNaughton defined an accident as "an unlooked for mishap or untoward event which is not expected or designed".[7] This was echoed in the Report of the Royal Commission of Enquiry (the Woodhouse Report) which preceded the enactment of the legislation. It saw the general basis for entitlement as "bodily injury by accident which is undesigned and unexpected so far as the person injured is concerned, but to the exclusion of incapacities arising from sickness or disease" (para 289(a)). Not all mishaps nor untoward events which befall a plaintiff entitles him or her to cover under the Act. One of the difficulties facing the Courts has been to decide what mishap or which event is within the scope of an Act dealing with personal injuries. While accident is to be given its natural and ordinary meaning (*Green v Matheson* [1989] 3 NZLR 564), the incident complained of must be considered from the viewpoint of the victim (*G v Auckland Hospital Board* [1976] 1 NZLR 638 approved by the Court of Appeal in *Green v Matheson* [1989] 3 NZLR 564). As a result intentional acts such as assault (*Re Chase*)[8], battery (*Donselaar v Donselaar* [1982] 1 NZLR 97; *Dandoroff v Rogozinoff* [1988] 2 NZLR 588) and rape (*G v Auckland Hospital Board* [1976] 1 NZLR 638) have been classified as an accident, and the victim entitled to compensation upon demonstrating personal injury as a result of the act.

In *Green v Matheson* supra, the Court of Appeal considered it obvious that in an Act dealing with compensation for personal injuries the phrase covered a mishap causing harm to the person, and could not include such things as harm to financial or property interests or reputation even though, in ordinary parlance, these were mishaps causing harm. Nor could damages for breach of ordinary commercial contracts or defamation fall within its ambit. The Court was also of the view that an action for negligence would not normally fall within the statutory bar unless the duty of care allegedly breached was one which had been imposed for the protection of the plaintiff's personal safety.

As a matter of process when any matter is before the Court it must first determine the relevant cause of action which must be assigned to the ascertained facts. Once that has been done the Court must determine the true nature of the injury suffered by the plaintiff for which any form of damages are claimed. (See comments of Henry J in *Dandoroff v Rogozinoff* [1988] 2 NZLR 588.) It is only then that the Court is in a position to determine whether the claim before it is for damages arising directly or indirectly out of a personal injury by accident. If so it is barred by the legislation.

Briefly it is the thesis of this article that initially the Courts were uncertain about the scope of the legislation, and as a result approached each case on an individual basis developing principles for the interpretation of the phrase "personal injury by accident" on an *ad hoc* basis. This caused no difficulty when most of the decisions were made by the Appeal Authority, which with a limited number of Judges sitting was able to deliver decisions in conformity with each other, relying on the principles which it had developed. However since 1980, there have been an increasing number of appeals to the High Court where individual Judges have expressed opinions at variance with each other. This has led to the result that stated principles are in conflict, and require immediate resolution by the Court of Appeal, although some of the difficulties have been removed with the recent decisions by that Court of *Green v Matheson* and *Willis v Attorney-General* [1989] 3 NZLR 574.

With this brief introduction it is proposed to consider some of the issues which have arisen in recent cases. The first of these is the extent to which a claim based on trespass to the person, in particular, false imprisonment, is barred by the Act. This matter has been settled by the Court of Appeal but it is the generality of the words spoken or perhaps the difficulty of reconciling those words that have given rise to some of the problems in the later High Court decisions.

The second issue is whether a third party claimant who suffers a mental injury as a direct result of an accident to another is entitled to cover. The question arose in two recent cases (*Cogan v ACC* [1990] NZAR 145 and *FG v ACC* [1990] NZAR 155) where the Appeal Authority decided that the claimants were entitled to cover. The Corporation appealed. In the one case which has been decided in the High Court, *ACC v F* [1990] NZAR 492 the Judge overturned the decision of the Appeal Authority. At this point it is pertinent to note that the Corporation had been making lump sum payments to third parties where, for example, that third party had suffered mental distress upon finding the dead body of her murdered child. (As just one example of this see the report of the payout to Mrs O'Reilly in *New Zealand Herald* Thursday July 26 1990.)

The third issue is whether there must be an external event, that is an

accident, which causes the injury, before the plaintiff is entitled to cover under the Act; or can the injury for which the plaintiff claims and the accident suffered by him or her be one and the same? It is in this area that the conflict between the various High Court decisions can be seen most clearly.

False imprisonment

False imprisonment, malicious prosecution and other tortious acts to the person including assault and battery which almost inevitably result in feelings of upset, distress and humiliation on the part of the plaintiff have been a source of controversy.[9] There was no difficulty where these emotions were attendant upon physical injury, as here it was obvious that the plaintiff had suffered a personal injury by accident. The problem arose where there was no physical injury, just the natural emotional response to the tort. The difficulty that plaintiffs in actions such as the above had to overcome was the extended definition of the phrase personal injury by accident; that is the reference to "mental consequences" in s 2(1)(a)(i) of the Act. Invariably a plaintiff in an action for false imprisonment included a reference to distress, humiliation, embarrassment, anger and/or other similar transient emotions in his/her statement of claim. Were these emotional consequences "mental consequences" in terms of s 2(1)(a)(i) such that the incident causing them was turned into an accident? If so this meant that the claim was barred by the Act.

Emotional distress and accident

It became a matter of practice for the defendant in an action for false imprisonment, once there were allegations of emotional distress expressed in the statement of claim, to raise the statutory bar, and, as outlined earlier the claim then had to be referred to the Corporation for consideration. Where this was done it had the effect of delaying the plaintiff's action for some time as the Corporation deliberated the matter. On the other hand there were High Court decisions where this approach was rejected as, in the view of the Judge concerned, no question of personal injury by accident was raised by the natural emotional response to the alleged wrongful conduct. (See *Howley v Attorney-General* noted in [1986] BCL 1185 (HC).) In a 1986 case that reached the Court of Appeal, *Auckland City Council v Blundell* [1986] NZLR 732, in which the plaintiff had alleged, *inter alia*, false arrest and/or imprisonment and malicious prosecution, counsel for the defendant had accepted that malicious prosecution and conspiracy were outside the purview of the Act and the Court therefore did not feel itself impelled to pursue that matter further. Moreover as counsel for the plaintiff, in order to expedite matters, removed any reference to claims for general aggravated damages for false imprisonment and/or arrest from the statement of claim the Court was not required to consider this either although it did indicate that it was arguable that such a claim was barred by the Act.

The matter came squarely before the Court of Appeal in *Willis v Attorney-General*. The case was decided contemporaneously with *Green v Matheson* and the Court of Appeal directed that the judgments in these two cases should be read together. Certainly both cases have valuable comments to make on the parameters of the phrase "personal injury by accident". The facts of *Willis* were relatively straightforward. Two of the three plaintiffs imported four Ford Mustang motor vehicles into New Zealand from the United States. Once the cars arrived the plaintiffs were allegedly detained by Customs officers and the cars seized. Two of the plaintiffs were charged with offences under the Customs Act 1966 and the Sales Tax Act 1974. The charges were dismissed in the District Court. The plaintiffs pleaded three causes of action: false imprisonment, malicious prosecution and negligence. After two days of legal argument in the High Court the Judge held that certain questions should be referred to the Corporation for consideration. This question of referral arose because of allegations in the statement of claim of humiliation and distress even though the plaintiffs had, as has become the practice, entered a specific disclaimer denying any allegation of personal injury by accident.

Cooke P delivering the judgment of the Court agreed that on its face the action was remote from the field of the legislation. Acknowledging that the Act was not coincident with the common law action for negligence which it had been designed to supplant he nonetheless considered that any interpretation which took the bar beyond that field would require careful scrutiny. This was so particularly where any link with the subject matter of the Act was tenuous. He continued (p 577):

> "Personal injury by accident" is an integrated phrase, to be seen and applied as a whole and without an unnatural breaking down which would rob it of the impact it makes as a whole. Perhaps it can be called holistic, in that the sum is more than the parts. But we are concerned with the ordinary use of language, not philosophical concepts. It is not an expression that would naturally be used in ordinary speech to describe malicious prosecution or breach of a duty of care to safeguard the plaintiff's proprietary or economic interests or reputation. The fact that damages for distress and the like may be claimed, and in some cases recovered, on these causes of action does not in the natural and ordinary use of language convert the incident complained of and its consequences into personal injury by accident. In *Auckland City Council v Blundell* . . . counsel rightly conceded that claims for damages for malicious prosecution are unaffected by the Accident Compensation Act. Having regard to the scope of the Act and the natural and ordinary use of language, we think that the same applies where the duty of care alleged to have been broken is not one imposed for the protection of the plaintiff's personal safety. . . . The position regarding false imprisonment is less clear.

In *Green* the Court had definitively adopted the view first expressed in *Auckland City Council v Blundell* that once there was a personal injury by accident then all of the emotional or psychological effects experienced by the victim fell within the statutory words "the physical and mental consequences of any such injury or of the accident". In the instant case Cooke P confirmed that, by virtue of the wording used

in the extended definition, these emotional consequences were not brought in unless there had been a personal injury by accident in the first place.

The pleadings were examined and the Court confirmed that the tort was correctly identified as false imprisonment which it defined as the unlawful total restraint of the person. Unlike the torts of battery and assault, force or the threat of force is not the gist of the action; although the Court did acknowledge that the tort could be brought about by force. Thus viewed in the light of the purposes of the legislation and in the natural and ordinary use of the language false imprisonment was outside the purview of the Act, and any claim for compensatory damages for false imprisonment was therefore not barred by it.

What is also of interest, is the comment made by the Court that where there are mental consequences, and remember the Court accepted that these included distress and humiliation, which are brought about by both battery and false imprisonment an action for compensatory damages will still lie – it is enough that the false imprisonment is a substantial cause of the action (p 579).

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

First of all it is difficult to see quite what the Court meant in the opening sentence. There seems an inherent contradiction between it and the view adopted by the Court that a personal injury by accident must arise before the question of mental or emotional response needs to be considered. This contradiction can only be resolved if the Court was concerned with a victim of the tort who had either experienced a battery as well as the false imprisonment in which case there is clearly an overlap with personal injury by accident, or who suffered from, for example, some pre-existing mental condition. In the latter case the emotional distress coupled with the pre-existing condition could be sufficient in certain circumstances to lead to personal injury requiring cover under the Act. A difficulty also arises in respect of the suggestion that a plaintiff can claim damages for mental consequences caused by both false imprisonment and assault or battery. Are the damages referred to compensatory damages? If so this also contradicts earlier statements by the Court which state categorically that compensatory damages cannot be claimed for the tort of assault or battery, although in *Willis* itself these statements by the Court were confined to acts causing physical damage of some kind, that is a battery, to the plaintiff. The better view would seem to be that a plaintiff must attempt to evaluate that part of the mental consequences attributable to the false imprisonment only and claim compensatory damages for those mental consequences alone. Only exemplary damages can be claimed for any distress suffered as a result of the battery.

Careful scrutiny

Willis has by no means solved all of the issues associated with the intentional torts. In the decision the Court said that interpretations taking the bar in the Act beyond the field of the common law actions for negligence required careful scrutiny. Had the Appeal Authority and later the High Court had the benefit of these words from the date of enactment of the Act the difficult problems which have been associated with the intentional torts might never have arisen; an action for compensatory damages for battery, assault and false imprisonment would always have been available. It is now too late to reconsider matters as far as a battery causing physical injury is concerned but the position in respect of assault can still be rectified. In *Re Chase* [1989] 1 NZLR 325 the Court with almost no analysis of the Act or deliberation of the bounds of the tort stated that the intentional tort of assault causing only apprehension of harm was within the bar. This statement was *obiter* but has been accepted without comment in subsequent cases. In *Willis* the Court confirmed that claims for assault and battery were barred, but did so only in the context of the physical injuries incurred as a result of the tort. It left unresolved the question of a technical battery, such as the unwanted kiss, in which the plaintiff suffers no real physical injury. Nor did the Court consider in any depth why a tortious assault, which by definition requires the plaintiff to apprehend harm, but which does not result in physical injury as such, should be within the statutory bar; the necessary careful scrutiny posited by the Court was glaringly absent. It may well be that the Court's mind was directed only to the criminal charge of assault which inevitably does cause physical injury and can justifiably be seen as a personal injury by accident from the viewpoint of the victim, but if this is so the matter clearly requires reconsideration when it comes before the Court again.

The decision itself is difficult, if not impossible to reconcile with the principle espoused by the same Court in *Green*. It would seem that false imprisonment viewed solely from the viewpoint of the victim is just as much a mishap or untoward event as experiencing a battery or being the subject of research and experimentation without consent. Then too while the tort is one imposed primarily for the protection of the liberty of the individual it is at least arguable that incorporated in this is a concern for the protection of the safety of that individual. In the writer's opinion the difficulty in reconciling the two decisions is irretrievably linked to the issue of the intentional torts discussed above. By the time fifteen years had passed it was too late to decide that the tort of trespass to the person, or more specifically that of battery was outside the bounds of the Act. So what the Court of Appeal chose to do was to make a policy decision when it determined

that the tort of false imprisonment was not one that entitled a claimant to cover under the Act. While this has certainly resolved the difference of judicial opinion in the High Court, and for that alone it is to be welcomed, it may not have resolved all hard cases in this area and it has still left other matters unresolved.

The fact that force was not necessary to make the tort complete was one of the deciding factors in the conclusion reached by the Court. Where then does this leave torts such as intimidation, malicious prosecution, conspiracy and the like? Again from the point of view of the victim experiencing the tort, and suffering emotional consequences as a result, there is a mishap causing harm to the person, but is it a personal injury by accident? In *Blundell* counsel had accepted that a claim for malicious prosecution and conspiracy was beyond the Act, so for obvious reasons the Court did not pursue the matter. Force is not the gist of an action of either malicious prosecution or conspiracy, and not all threats made in the course of intimidation involve a threat of the use of force. Moreover in both *Willis* and *Green* the Court acknowledged that the phrase "personal injury by accident" would not normally be used to describe a breach of a duty of care to safeguard the plaintiff's economic interests. The effect of these decisions of the Court of Appeal means that the emotional effects suffered as a result of these three torts are beyond the bar, and any plaintiff will be able to claim compensatory damages for them.

Can a claiment suffer another's accident?

In *F v ACC* the High Court was asked for the first time[10] to consider whether a claimant had cover under the Act when the mental injury suffered was allegedly as a direct result of an accident to another; or to put it another way could claimants succeed in claiming compensation under the Act when they suffer mental consequences as a result of their proximity to an accident? There is no specific provision in the Act covering a third party claimant such as F, but neither is there any provision in the exclusory part of the definition which would indicate a denial of this type of claim. Then too under the common law today such a claim may succeed in negligence if there is a breach of the relevant duty of care and provided the accident is suffered by someone sufficiently proximate to the plaintiff. (See the observations of Lord Wilberforce in *McLoughlin v O'Brian* [1983] AC 410.) The Corporation took cognisance of this development in the common law as is evidenced by the following extract from the booklet published by it, *Unintentional Injury: New Zealand's Accident Compensation Scheme*. After a general discussion on what is required to demonstrate mental injury the commentary continues (p 16):

> The mental consequences may be a direct result of the physical injury received, or result from the accident even though no physical injury was sustained. A claim may also stand for "mental consequences" as a result of witnessing an accident, or as a result of being advised of the accident shortly thereafter. In these two latter cases, factors such as the closeness of the relationship between the claimant and [the] injured person, the way the claimant perceived the accident and its immediate effects, the time gap between the accident and perception, and the nature of the injuries sustained, will be considered in determining the claim.

Despite this information available to the public from the Corporation itself Holland J decided that no action would lie for mental consequences without a contemporaneous or earlier physical injury to the claimant. It is not so much the decision itself which is necessarily wrong on its facts, rather it is the observations which His Honour made about claims for nervous shock or mental trauma which must be seriously questioned.

The facts of the case were not disputed. As a result of medical misadventure (compensable under the Act) F's wife was injured to the extent that he was no longer able to have sexual intercourse with her. As a direct result F claimed that he had suffered mental consequences, namely reactive depression, which had caused a significant deterioration in the general quality of his life. Accordingly he lodged a claim for compensation under the Act for his reactive depression claiming that this was the mental consequence of the accident and therefore compensable. The claim was accepted by Judge Willis sitting as the Appeal Authority, in *FG v ACC* [1990] NZAR 492. The Corporation appealed.

After a review of the latest decisions including *Green* and *Willis* Holland J continued (p 499):

> The respondent may have suffered personal injury in his reactive depression or neurosis. It may be that literally this was a consequence of an "accident" to the extent that he could not have sexual relations with his wife. Such an accident was not, however, one of the type included in the holistic definition of the phrase in the sense that the phrase may be more than or different from the parts. . . . The conclusion I have reached is supported by the use of the word "the" instead of "an" in s 2(1)(a)(i). The "personal injury" referred to must mean a physical injury of some kind. If the claimant has suffered a personal physical injury by accident then quite clearly by virtue of the provisions of s 2(1)(a)(i) any mental or physical consequences that flow from that injury or from that accident will be compensatable, but where as here there has been no physical injury to the respondent, even by the merest physical touch, he cannot be said to have suffered personal injury by accident so as to allow his mental illness to be compensatable. *In other words, the mental consequences must be parasitic on a contemporaneous or earlier physical injury to the claimant.* (Emphasis added.)

There were in all three reasons the Court decided against the claim, one major reason with two minor or supporting factors. The major reason was one of policy, the application of which led Holland J to conclude a physical injury was necessary before mental consequences could be compensatable. This was a novel case and policy considerations played an important part in the decisions both in the Appeal Authority which decided in favour of the plaintiff and in the High Court which ruled against him. In

overruling the Appeal Authority Holland J looked closely at the scheme of the Act. He laid emphasis on the fact that the Act was described as a code and considered that the lack of an exhaustive definition of a personal injury by accident was itself a policy consideration. His Honour then warned of the danger in relying upon definitions of these words in the context of claims for personal injuries caused by negligence, and of the reliance upon the common law principles relevant to those claims. In this he concurred with Blair, who in his treatise on the Act, *Accident Compensation in New Zealand* (1983), warned of the inappropriateness of applying common law criteria in determining personal injury claims (at 5.5). It should be noted that Judge Willis of the Appeal Authority too had accepted that there could be only limited reference to the common law in making a decision, but had found the observations of Lord Wilberforce in *McLoughlin v O'Brian* [1983] AC 410 helpful. Blair similarly had been of the view that in finding the line which had to be drawn for the "borderline" cases help could be obtained by the dicta of Lord Wilberforce; that is that the relationship between the accident victim and the claimant should be closely scrutinised, as well as the proximity of the claimant to the accident scene in time and place, together with an examination of the nature of the accident (at 5.6).

Imposing a limit

Noting that the Court of Appeal had taken a policy decision in determining the limits of the accident compensation system in *Willis* Holland J was satisfied that he too should adopt a similar stance and impose a limit in cases of this kind. In imposing the limit he confined the application of the Act to those who "directly" suffered the accident by deducing that it was highly unlikely that Parliament had intended such cases to fall within the purview of the Act. But is this so? It is certainly unlikely that Parliament even considered third party cases of this kind, and indeed such cases were not alluded to in the Woodhouse Report, or the Commentary on it, which preceded the enactment of the legislation. But it could be argued that by enacting the extended definition Parliament intended to cover *all* cases of personal injury by accident, whether the accident was suffered directly or indirectly, except those specifically excluded.

It is at this point appropriate to consider the words of Lord Diplock cited at the beginning of this article. If policy is to be a persuasive or a concluding factor in third party claims under social legislation of this kind then it must be appropriate to examine the principles behind its enactment. These principles are those found in the Woodhouse Report: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency. The report, in advancing a no-fault compensation system, concentrated primarily upon the elimination of the vagaries of the common law negligence action, which it saw as a "capricious response to a social problem", although it did acknowledge that no form of compensation would be able to avoid all of the "hard" cases (para 289(b)). This report spelt out the social philosophy behind the legislation; comprehensive entitlement for bodily injury by accident undesigned and unexpected by the person concerned. Injury, not the cause of the injury, was seen as the issue. It was moreover this report that Cooke J clearly had at the forefront of his mind when he examined the connotations of the phrase "personal injury by accident" in *Willis*. It must be remembered too that F's common law action, had he had one, would have been in negligence, that is the same common law action which the legislation was designed to supplant. Hence policy considerations, especially taken in conjunction with s 5(j) of the Acts Interpretation Act 1924,[11] dictate that provided there is evidence available to the Corporation to show that the mental trauma is *caused* by the accident (irrespective of who directly suffers it), the claimant should succeed. That is once His Honour had reached the conclusion that F had suffered a personal injury which was literally the consequence of an accident then F was entitled to cover.

The second factor militating against cover was the fact that there were two sections of the Act, ss 65 and 82, which specifically made compensation available to persons other than the injured party. In evaluating this factor it must be remembered that Holland J saw the injured party as the *wife*, so bearing this in mind the effect of these two sections of the Act cannot be used to support the conclusion His Honour reached. It was evident while His Honour was prepared to accept that two persons could be injured by the same accident, one directly (the wife) and one indirectly (the husband through the wife) he was not prepared to extend this proposition to cover under the Act. Yet s 27 bans damages arising either directly or indirectly out of the accident and by analogy there would seem no reason why the personal injury entitling the claimant to cover could not arise indirectly also.

The third factor was a matter of statutory interpretation. Holland J saw it as significant that the words used in s 2(1)(a)(i) referred to "the" accident and not "an" accident. Linguistically these words prima facie may point against cover. But how much weight should be accorded the words of this subsection in supporting the conclusion reached by the Court? In *Green* the Court of Appeal in its deliberations decided that this phrase only applied once there has been a personal injury by accident in the first place. It described the provisions of s 2 as "additional or for greater certainty" (p 571). The question therefore for Holland J was whether F had cover under the general provision of personal injury by accident. If he was entitled to cover pursuant to s 27 then he could not lose that cover because of the specific reference to mental consequences of the accident in the extensory definition.

Accident or continuous process

A better argument against compensation may well have been that F's reactive depression which presumably built up over time did not have sufficient of the character of an accident to entitle him to cover. There has always been a distinction between an accident, and what the Courts have termed a "continuous process" where the claimant was unable to point to any one incident or series of specific incidents as the cause of the injury.[12] The latter case where an injury built up over a period of time has always been one for which no compensation could be paid.[13] If the

medical evidence demonstrated that F's reactive depression was this kind of personal injury then the Court was undoubtedly correct in declining compensation under the Act.

What of His Honour's dictum that mental consequences must be parasitic upon a physical injury? This statement is patently incorrect. First it ignores the clear words of the Act itself which specifies that a personal injury by accident includes "the . . . mental consequences of . . . the accident". There is no requirement of a personal physical injury. There is also nothing in either *Green* or *Willis* which would limit personal injury in this way, on the contrary dicta in both cases illustrate that mental injury is sufficient to constitute personal injury. The statement also ignores the direction to juries suggested by the Court of Appeal in *Blundell* which specifically recorded that personal injury included not only obvious physical hurts but mental consequences (p 739 per Cooke J). Similarly mental consequences have always been compensable under the workers' compensation legislation: *Yates v South Kirkby Collieries Limited* [1910] 2 QB 538. This same point attracted comment in *ACC v E* [1991] NZAR 116 where Greig J "respectfully disagreed" with the construction offered by Holland J, and had no hesitation in holding that mental injury without any physical injury was personal injury by accident and within the scope of the Act.

Even if, in the final analysis, Holland J is correct and there must be an accident which must cause physical injury to *the* claimant there may, in an appropriate case, be another argument which could be advanced on behalf of a third party. Lord Wilberforce made the following observation in *McLoughlin v O'Brian* (p 418):

> Whatever is unknown about the mind-body relationship . . . it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact.

If this statement is correct then any third party in a *McLoughlin v O'Brian* situation should still be able to claim for all the mental trauma which they have suffered. The argument must be that they, in observing the aftermath of the original accident, suffered their own accident. Consider the case of a mother who finds the body of her daughter after she has been raped and murdered. There is no question but that the daughter has suffered a personal injury by accident, but could it not be argued that the impact on the senses of the mother after observing the aftermath of her daughter's death is itself an accident which led to any emotional trauma which follows: the injury? In this way a claimant has his or her own accident to point to, and it is this accident which has led to any mental trauma suffered by the claimant. If the combined effect of the words of the Court of Appeal in *Willis* and *Green* are applied to this situation, and the claim of a plaintiff is considered in its entirety, then a plaintiff in a *McLoughlin v O'Brian* situation must have cover.

There is one further point to note. If Holland J is correct in holding that the accident must be suffered by the claimant, and it is acknowledged that F having suffered no accident himself does not have cover; it does not follow that F is able to sue at common law.

There is a suggestion by His Honour that in certain circumstances a claimant who suffers mental consequences as a result of a wrongdoer might still have a right of action at common law. With respect this is not so. The focus of the bar is not on the person suffering the injury but on whether the claim for damages arises out of the injury. The words of s 27 are clear: ". . . where any person suffers personal injury by accident . . . no proceedings for damages arising *directly or indirectly* out of the injury shall be brought . . ." (Emphasis added.) In F's case the wife has suffered the injury, and whether the reactive depression has arisen directly or indirectly out of the injury any proceedings by the husband are barred. Thus if Holland J is correct F not only has no cover under the Act, but has lost any possible common law remedy as well.

Personal injury by accident or accidental injury?

Recent cases in both the Appeal Authority and the High Court have illustrated again some of the difficulties faced by those earlier Courts who had to interpret and apply workers' compensation legislation. Certain of these difficulties have arisen where the chain of events is physiological in both origin and ultimate result. The issue raised by these later cases is whether it is necessary for a claimant to show a causal nexus between an external event or happening, the accident, and the resultant personal injury in order to receive entitlement under the Act. This is perhaps best exemplified by the words of Henry J who considered that such a causal nexus was necessary. In *Dandoroff v Rogozinoff* [1988] 2 NZLR 588 he said (p 599):

> [The Act] is concerned with injury resulting from some incident or happening which can *itself* be classed as an accident, and understandably includes mental as well as physical consequences, the former having long been recognised as being a legitimate component of general damages recoverable in tort. To confine the inquiry solely to whether the injury was unwarranted from the viewpoint of the person injured is in my view erroneous; the injury must be one which has resulted from an accident, properly so described. (emphasis added)

This is in accord with the reasoning of Holland J in *F*, and in the vast majority of cases will present no difficulty; in motor vehicle accidents, sporting injuries, household injuries and in work related accidents it is usually a simple matter for the claimant to point to some external event, unexpected and undesigned, which led to the injury, usually physical, suffered by him or her. But there are cases where this is not so easy to do. These are the cases where it is said either that "the accident is the injury", or that "there would have been no accident but for the injury". Is a claimant who suffers this type of "accident", that is one which does not involve an episode external to the person concerned, entitled to

cover? And how appropriate is it to rely as heavily as the Court has found it necessary to do on the workers' compensation cases? Is it enough that there be an accidental injury? Both Davison CJ in *Wallbutton v ACC* [1983] NZACR 629 and Greig J in *Mitchell v ACC* [1991] NZAR 105 thought that it was.

In *Wallbutton* bending down to pick up a milk bottle had an adverse effect on an already diseased back. The Appeal Authority had declined the claim on the basis that there had been no element of accident in the sequence of events which had occurred. Davison CJ in allowing the appeal relied upon the meaning of the word "accident" as decided in the workers' compensation cases. In particular he referred to the words of Lord Diplock spoken in *Jones v Secretary of State for Social Services* [1972] AC 944 and those spoken by Lord MacNaughton in *Fenton v Thorley* [1903] AC 443. He adopted the two types of accident postulated by Lord MacNaughton in the latter case and agreed that the term embraced both (p 633):

(a) an event which was not intended by the person who suffers the misfortune, and
(b) an event, which although intended by the person who caused it to occur, resulted in a misfortune to him which he did not intend.

The act of bending down in order to pick up the milk bottle was an act that the claimant had no doubt carried out many times before with no adverse effects. On this particular occasion there was an element of mischance, misadventure or some fortuitous occurrence which caused the unusual result; the injury to her back. In ordinary parlance she had injured herself accidently. Put another way the act of bending down, an event intended by the claimant, resulted in a mishap which was not intended by her, namely injury to the diseased back. Looking at the matter in this way it was not necessary in order to constitute an accident that there should be an event external to the person concerned. The extra strain imposed upon the back by the act of the claimant was sufficient to constitute personal injury by accident under the Act, and the Judge held her entitled to cover. In *Wallbutton* it was possible to point to a positive act by the claimant which led to the personal injury, although it was not external to her; the action in bending down; in *Mitchell* it was not.

Disease or infection

Mitchell was a near miss sudden infant death as a result of an apnoeic attack which left the child severely brain damaged. The Appeal Authority had dismissed the appeal against the Corporation's ruling that his condition did not give rise to cover under the Act. Medical evidence put before the Court could not positively identify the cause of the attack. There was no incident or any physical action which might have precipitated it, nor was there any evidence that it had been caused by disease or infection, and no evidence at all that it had been exclusively so caused. The paediatrician had suggested that virus infection, metabolic disturbance or epileptic trigger resulting from a previous attack were all possibilities.

Section 2(b) excludes certain damage to the body or mind from the phrase "personal injury by accident"; in particular damage due exclusively to disease or infection. As both were raised in *Mitchell* it is appropriate to look more closely at the exclusory definition. There does appear to be a difficulty in reconciling the opening words of s 2(b) which excepts that damage – "[e]xcept as provided in the last preceding paragraph" with the general definition of personal injury by accident found in s 2(a). Read literally these words could be construed as meaning that even those damaging incidents specifically excluded could be covered by the Act if they fell within the terms of the general definition of personal injury by accident. This was discussed in *ACC v Booth* [1990] NZAR 529[14] where Holland J resolved the difficulty by deciding that the exception applied only to those instances where there had been a separate personal injury by accident from which the claimant received an open cut or wound which subsequently became diseased. If this happened the claimant could recover for both the original injury and the subsequent disease. If there was no independent personal injury by accident, that is the only possible personal injury by accident was the disease or infection itself then it was within the exclusion and noncompensable. Although this interpretation was not explicitly considered by Greig J all that was said in *Mitchell* is reconcilable with this approach.

In *Mitchell* because the reason for the apnoeic attack was not known to be due exclusively to disease or for that matter to disease at all His Honour had to determine if the attack could be independently classified as a personal injury by accident. To do this he had to determine whether or not it was a condition of a personal injury by accident that there be an external event or some causative bodily movement. First he considered the Act itself. He decided that the answer lay in the plain meaning of the words used in the exclusory part of the definition. After referring briefly to *Green* and *Willis* Greig J decided that the two exceptions in s 2(b) implied that had the damaging events alluded to not been specifically excluded then these could have fallen within the phrase "personal injury by accident". That this is so is borne out both by the interpretation of the opening words advanced by Holland J, and by the words of s 2(b)(i) which does allow certain incidents of cardiovascular episodes caused by effort, strain or stress to fall within the defined phrase, although the bulk of such episodes are excepted. The Judge then turned to s 2(b)(ii) which *inter alia* excludes damage to the mind caused exclusively by disease. On the plain and ordinary meaning of the words used this implied that if the damage to the mind suffered by the claimant was not caused exclusively by disease then that damage too could be personal injury by accident. As no external action or event was required for such damage it followed that on the ordinary meaning of the words used in the Act an external action or event was not an essential requirement of a personal injury by accident.

Relevant case law

After reaching this conclusion His Honour then turned to consider the relevant case law. He referred to *Wallbutton* with approval and then turned his attention to dicta of the House of Lords in both *Minister of Social Security v Amalgamated Engineering Union* [1967] 1 AC 725

and *Jones v Secretary of State for Social Services*. It will be recalled that in both of these decisions their Lordships considered, although only as a subsidiary point, the meaning of the phrase "personal injury caused by accident" as used in the National Insurance (Industrial Injuries) Act 1946. In these cases the sequence of events leading to the injury suffered by the worker in each instance did not involve a cause external to him, and as a result it was difficult to isolate any event or occurrence which could be described as an accident and which was separate from the injury. An examination of the words spoken by their Lordships indicates that all recognised two distinct elements to the event or happening: (a) the personal injury component as evidenced by the physiological or psychological effect on the sufferer, and (b) the cause of that effect whether it was some external event, or some intended activity of the sufferer. This still took Greig J only as far as the decision in *Wallbutton*. He needed to go further as in *Mitchell* there was no intended activity rather the involuntary cessation of an activity. He noted that there had been a gradual but steady extension of the meaning of the relevant phrase in the English Acts and pointed out that the reason for requiring the external cause or bodily movement was linked to the need to show a causal connection between the injury and employment. Because this particular requirement is absent in the Act His Honour thought that authority supported his conclusion that a claimant need not be able to point to an outward external action or cause whether occurring by some outside means or by some action of the person concerned. Greig J continued (pp 114-115):

> [O]ne decides what happened first. What that was was a cessation of breathing. That was involuntary. Although there may be a possibility of disease as causing it it is not the sole cause and it is certainly not shown that it was the cause or even a cause. That must be treated as an untoward event, an unexpected happening. The result of that is the tragic state in which this child now lives. That clearly has followed from the apnoea and the physiological effects and injuries which followed. If one looks at the matter without subtlety I think the only conclusion that can be made is that this was an injury by accident, an unexpected untoward mishap. The fact that it came from a stoppage in an essential human activity does not alter the real effect, the real meaning of the events and the occurrences.

In *Wallbutton* there was an intended activity, a voluntary act which led to the injury. In *Mitchell* it was the cessation of an activity, an involuntary act on the part of the child, which led to the injury. The precise sequence of physiological events culminating in the injury in each case could not be detailed, but is this necessary? The answer must lie in the words spoken in *Green* and *Willis*. That is once there is a personal injury which has the necessary element of unexpectedness or fortuitousness to it even though it is not possible to point to an event external to the injured party that personal injury is compensable under the Act. A precise identification of the sequence of events separating out the injury component and the accident component is not required in social legislation of this kind, and indeed leads only further into a Serbonian Bog. It seems more appropriate to speak of accidental injury when there is an intended activity with the unexpected result of personal injury, or where there is involuntary failure in an essential human activity.

One further point: the decision in this case is in accord with the words used in *Green* and *Willis* but it does illustrate the potential width of the words used by the Court of Appeal. Moreover it opens the way to claims not only for cot death but for any sudden death which cannot be shown to be within the defined exclusions, all of which until now, have not been compensable. There is something of a quantum leap involved in moving from an intended activity imposing additional stress or strain which causes injury, and the failure to carry out a normal activity, in this case breathing, which leads inevitably to personal injury. Then again too it could be argued that that the case simply illustrates the very real difficulty of drawing the dividing line in the "hard cases" between injury by accident which is compensable, and injury by disease which is not. It may well be that policy decisions will call a halt to the extension evidenced by the decision in *Mitchell* in the same way that a policy decision was used to draw a line in *Willis*.

Psychiatric breakdown

Accidental injury was seen as the appropriate term in *ACC v E*. This case was also a decision of Greig J and further confirms that his concept of a personal injury by accident is more advantageous to a claimant than that of Holland J. Here there was an intended external event, which would not normally have been classified as an accident, as opposed to an intended bodily movement. The outcome of the event was a mishap from the adventurer's point of view. Mrs E was sent by her employer to a management course which she had been warned was very strict, time consuming, and which necessitated a great deal of concentration. Four days into the course she suffered a psychiatric breakdown, was admitted to hospital, and since then she has required psychiatric attention for depressive symptoms. Was this a personal injury by accident? The Appeal Authority thought so. The medical evidence confirmed that before going on the training course she was fit and well and had never exhibited any symptoms of mental illness although there were hereditary factors which may have contributed to her vulnerability. It pointed to the stress incurred as a result of the course as the trigger for the mental breakdown.

The Corporation appealed on three grounds. The first ground was that the decision of the Appeal Authority failed to recognise that the causative incident must be something unexpected and undesigned. This was categorically rejected by His Honour who pointed out that this had never been the case. In the light of cases such as *Fenton v Thorley* cited with approval by the Court of Appeal and in the light of *Wallbutton* itself it is somewhat surprising that this ground was advanced at all. Here there was an event with an untoward result. In view of the authorities His Honour found no substance to this ground of appeal. The second

ground advanced by the Corporation was that there was a need for the accident or causative trigger to be clearly defined in time. This ground was rejected also as here it was plain that the causative factor was the management course, which was clearly defined in time, as was the moment Mrs E had broken down and been taken to hospital. His Honour confirmed again that the separation between accident and injury as evidenced in some of the workers' compensation statutes is not present in the Act: "[t]he phrase can equally be rendered as accidental injury". This was not an example of a continuous process developing gradually from day to day in such a way that no identifiable event could be said to be causative. The third ground was based upon some of the words spoken by Holland J in *F*; namely that a physical injury was required before any mental consequences could be claimed as personal injury by accident. Greig J first referred to the early workers' compensation cases, and confirmed that he was satisfied that mental injury alone was sufficient. Second he had no difficulty in distinguishing the present fact situation from that of *F* which had been argued on the basis that the only person who had suffered an accident was not F himself but his wife. To the extent that the case was authority for the proposition that before any mental injury was compensable there had to be a physical injury he declined to follow it. As he considered not only the authorities plain but the purpose of the legislation equally plain that ground too had to fail.

The management course was attended as part of the claimant's employment. Cases of nervous shock incurred as a result of an accident at work, for example assisting a fellow employee injured while working at a coal face, have been treated as personal injury by accident under the Workmen's Compensation Act 1906 (UK). Cozens-Hardy MR in *Yates v South Kirkby Collieries Limited* said (p 541):

> [W]hen a man in the course of his employment sustains a nervous shock producing physiological injury, not a mere emotional impulse, he meets with an accident arising out of and in the course of his employment.

While it has been said that in defining pesonal injury by accident there is "considerable danger in referring to definitions of these words by the Courts in different contexts[15] an analysis of the present Act and the compensation provided under it demonstrates that it is appropriate to refer to relevant decisions made by the various Courts under the workers' compensation legislation. In particular both the inclusory and exclusory definitions allow certain claims in the course of employment which supports an argument that interpretations based on the phrase in workers' compensation legislation has a role to play in the context of an Act also firmly rooted in social objectives. Indeed for this reason dicta of the House of Lords in *Fenton v Thorley* have been treated as highly persuasive. The decision not to separate accident and injury in the Act does mean that the phrase can extend much further than jurisprudence under the earlier legislation would indicate.

Summary

In the writer's opinion the following tentative conclusions can be drawn on the principles to be applied in developing jurisprudence on the phrase personal injury by accident.

1 The parameters of the phrase in a unique piece of social legislation such as the Act can be best determined by bearing in mind the words of Cooke J in *Willis:* the phrase is total and non-technical, to be seen and applied as a whole, holistic with its sum being more than its parts. The effect of these words has been to broaden the parameters of those incidents resulting in personal injury which can be encompassed by the Act.

2 The phrase is wide enough to include:

(a) Personal injury which is caused by some event external to the sufferer. *E.*
(b) personal injury incurred as a result of an intended movement of the sufferer which has an unexpected and unfortunate effect upon him or her. *Wallbutton.*
(c) personal injury incurred as a result of an involuntary act by the sufferer but which has the necessary element of fortuitousness about it, and where it is possible to say that the injury was not due exclusively to disease or infection. *Mitchell.*

That is the phrase is wide enough to include both personal injury by accident and accidental injury.

3 There is nothing in the legislation which would limit the injury incurred to physical injury. Any claimant who suffers mental injury alone as a result of a personal injury by accident is entitled to cover, in particular but not limited to the situation, where the mental injury is work related.

4 Any claimant who is sufficiently proximate to an accident, and who suffers mental injury as a direct result of that accident is entitled to cover, provided that the mental injury is not progressive. This is particularly so, but is not limited to the situation, where the personal injury is incurred as a result of another person's negligence, and where if cover is declined the injured party is left without a remedy. □

1 In its initial form the Accident Compensation Act 1972 ("The Act") which came into effect on 1 April 1974 gave cover only to earners and motor vehicle accident victims. With the change of government in 1972 an Amendment Act was passed which extended cover to non-earners. There were several amendments made to the original Act which was enlarged and redrafted and emerged as the Accident Compensation Act 1982.

2 A claimant who is dissatisfied with a decision of the Corporation can apply in the first instance for a review pursuant to s 101. A right of appeal from a decision of the Review Officer lies to the Accident Compensation Appeal Authority, s 107 (ACAA). If either party is dissatisfied with the decision of the Appeal Authority the matter can go to the High Court on a question of law or public importance, s 111. From there a matter can go to the Court of Appeal on a point of law, s 112.

3 See for example the discussions by: Palmer, *Compensation for incapacity* 1979 pp 244-262; Blair, *Accident Compensation in New Zealand* (2nd ed) 1983 Ch 4, 5; Miller, "The Accident Compensation Act and Damages Claims" [1987] NZLJ 159 and 184; and McGregor Vennell, "The Mental Consequences of Accident – Problems of Interpretation of the Accident Compensation Act" (1988) 14 *NZ Recent Law* 28.

4 All s 2(1) of that Act did was state that the phrase included "incapacity resulting from an occupational disease to the extent that cover extends in

continued on p 253

The future of Accident Compensation

By Craig Brown, Professor of Law, University of Western Ontario, Canada and John Smillie, Professor of Law, University of Otago.

This article was written in late May and early June. By the time it is published decisions by the Government about the Accident Compensation Corporation may have been announced. The authors however consider that the views they express are relevant to an understanding of the issues involved and that the article is therefore of continuing relevance. The stand they take is that the disparity in benefits for accident victims and those suffering from sickness is unjustified. This is not a view that everyone would agree with in principle. As this article makes clear, whatever principles are accepted or ignored, the issue is a complex one. The article also raises very directly the question of what is affordable as well as what is proper.

An article canvassing some of the issues raised by arguments for the reintroduction, or as it might be said the return, of the right of claims in tort, by Professor Jeffrey O'Connell, Professor Craig Brown, and Margaret Vennell was published at [1988] NZLJ 399.

Introduction

Major changes to the Accident Compensation scheme (ACC) seem inevitable. Faced with increasing costs, public dissatisfaction with the unequal treatment afforded accident victims and those incapacitated by sickness, and complaints from the main providers of funds (employers), the government in December 1990 appointed a Ministerial Working Party on Compensation for Incapacity and Accidents. This article was written in May 1991. At that time the Working Party had reported privately to government and some broad indications of government thinking had been released through the press. However the government had also indicated that disclosure of the details of its plans for reform would be withheld until the July 1991 budget. So, at the time of writing, we can only speculate as to the final form of the government's proposals.

The latest inquiry comes hard on the heels of earlier reviews of the ACC scheme by the Royal Commission on Social Policy (1988), the Law Commission in its Report on *Personal Injury: Prevention and Recovery* (1988), and the previous Labour government which introduced its Rehabilitation and Incapacity Bill in 1990. All the recent inquiries focus attention on two broad aspects of the scheme: extension of coverage beyond accidental injuries to embrace incapacity from sickness; and restructuring of benefits, administration and funding. We believe that extension of coverage to all forms of disability is essential, and if that is to be achieved major changes to benefit entitlements and the funding base is inevitable.

There seems to be general acceptance that the present wide disparity in the treatment afforded accident victims and persons incapacitated by sickness is unjustified. The ACC scheme presently provides victims of accidental injury with income-related benefits which replace 80%

The view that accident injuries and sickness should be regarded as indistinguishable is not one that is necessarily just in the opinion of many people. The most important section in the Accident Compensation Act 1982 from a legal point of view, is s 27 depriving people of their common law rights to sue for damages on the ground of negligence for injury suffered. Nobody of course has ever been able at law to sue Nature or some such entity for appendicitis or arthritis or any other of the multitudinous ailments that flesh is heir to. If compensation for accident is to be treated as a welfare payment only on the same basis as sickness, then it would seem in principle that the right to sue for damages on the ground of negligence must be returned to citizens. To treat negligence however as being of the same order as disease is obviously contrary to any normal sense of justice.

The basic problem with the view that accident compensation is a welfare payment, and only a welfare payment, would seem to many people to be based on a mistake of categorisation. The point that many would argue would be that the real issue is one of causation, as distinct from consequences. An accident involves human actions, rather than a force of nature. The consequences, disabilities or illness, may be similar; but they flow from causes that are totally dissimilar. That there are some overlapping situations, like a work related illness is irrelevant to the argument because if there is negligence involved then damages should be claimable.

Finally, it would be argued by many that if the distinction between accident and illness is to be ignored in terms of the payments made, then the whole accident compensation scheme should be abolished as it is irrelevant.

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of lost income up to a very high salary ceiling of $76,648 per annum (giving a maximum weekly benefit of $1,179), lump sum awards of up to $27,000 for non-economic loss, and full coverage of medical and rehabilitation expenses. In contrast, a person disabled by illness is required to meet a significant proportion of the cost of medical treatment and to subsist on a very low flat-rate sickness benefit. However extension of ACC to cover all disability would add substantially to its cost, and with 1990 expenditure running at over one billion dollars many doubt the ability of the New Zealand economy to sustain the present limited scheme.

Uncertainty about the additional cost of extended cover and reluctance to accept radical changes to the existing benefit levels and funding base led both the Royal Commission on Social Policy and the Law Commission to recommend that extension to sickness be implemented in gradual stages. While the Labour Government's Rehabilitation and Incapacity Bill would have extended income-related compensation to all persons rendered incapable of continuing in their employment due to physical or mental disability, the cost implications of this proposal were never fully revealed. Nevertheless, the present government's election policy committed it to bringing "health care and income maintenance entitlements in respect of sickness and accidents into line with one another", and one of the key objectives set the Ministerial Working Party was "to ensure that, in the event of incapacity, everyone has access to an acceptable level of income support and to health care services". At the same time, the Working Party was directed to advise on appropriate levels of government-funded benefits, the potential for widening the funding base, and the possibility of involving private insurers on a competitive basis.

So the challenge for the present government is to devise a new scheme which would provide adequate levels of income support to all disabled people on a fair and sustainable basis. The danger is that this task may prove too daunting or the consequences politically unacceptable. Preliminary indications of government thinking suggest that instead of extending reduced benefits to greater numbers, the government may decide to restrict ACC coverage to work related injuries in order to preserve income related benefits at their present high levels while avoiding major changes to the funding base. Individuals would be left to make their own provision for income support in the event of non-work related disability through private insurance. We believe that retrenchment of the scheme along these lines would be a retrograde step.

Any fundamental change to the ACC scheme requires re-examination of the principles on which the present system is based. We supported the introduction of the present scheme in 1974 as a sensible and humane response to the vagaries, inequities and inefficiencies associated with the common law tort action, and the low short-term benefits paid under the Workers' Compensation scheme. We also accept as valid the five fundamental principles which the 1967 Woodhouse Commission considered any fair system of compensation for disablement should serve and promote: community responsibility, comprehensive entitlement, real compensation, complete rehabilitation, and administrative efficiency.

However we also recognise that these principles represent broad statements of ideals which leave considerable room for value choice in their practical application, and carry the potential for conflict one with the other. The details of the scheme recommended by the Woodhouse Commission and largely adopted in the present legislation represents one view of the balance that should be struck between these competing values. In particular, the present scheme compromises the goal of "comprehensive entitlement" in order to realise a very generous conception of "real compensation" which reflects maintenance of living standards rather than basic income support. Initial restriction of earnings related ACC benefits to victims of accidental injury could be justified as a temporary first step on the way to truly comprehensive entitlement, dictated by political strategy and uncertainty as to cost. But Woodhouse recognised that there is no logical or fair basis for distinguishing between victims of injury and sickness, and removal of this glaring example of unequal treatment is now long overdue.

But if the scheme moves towards more truly comprehensive entitlement, its ability to fund real compensation (as presently understood) will diminish. It will therefore be necessary either to rethink the Woodhouse conception of real compensation or find new sources of funding. This in turn focuses attention on the principle of community responsibility. How much should the general community be responsible for? Should some sections of the community contribute more than others? What proportion of the burden should properly be left to the responsibility of individual citizens?

In this paper we examine these questions. We look at the way in which the five Woodhouse principles are given form in the present scheme and consider their continued viability as foundations for an extended scheme. We then present the broad outline of a reform which we believe comes as close as possible to achieving a fair and workable balance between the various competing values and objectives.

Community responsibility

Perhaps the single most important tenet of the Woodhouse philosophy, accounting for the change from the common law to the present system, is the notion that the community as a whole should bear responsibility for compensating the disabled. It is an attractive idea. It extends the sensible practice of loss-spreading utilised by insurance and acknowledges the loss to society, both tangible and intangible, when an individual is disabled.

These arguments apply just as strongly to disability from sickness as they do to accidental injury. An extended scheme covering sickness would be even truer to the principle of community responsibility. But to accept the general principle does not settle the means of implementing it. Choices remain about how the costs should be allocated between sectors and individual members within the community.

The present scheme is funded by contributions from employers and

the self-employed, motor vehicle owners and ordinary taxpayers. Taxpayers contribute to the scheme through the consolidated fund according to a progressive scale of taxation which relates contribution rates to income levels. However the contribution to the scheme from general taxation is relatively minor (about 8.5% in 1989). Motor vehicle owners contribute a relatively small proportion of the total cost of the scheme (about 17% in 1989) through a flat rate levy paid as part of the annual vehicle registration fee.

About 70% of the cost of the scheme is contributed by employers and the self-employed in the form of levies (on employee payroll in the case of employers and income in the case of self-employed persons) which vary according to the accident risks associated with particular occupational categories. Employers have complained that the level of contribution required of them is unfairly burdensome and places them at a commercial disadvantage. In particular they resent having to meet the cost of non-work accidents suffered by their employees. This complaint has little merit. Employers (and the self-employed) pass on the cost of ACC levies to consumers of the goods and services they produce and/or to their employees in the form of lower wages. The ACC levies represent a very small component of the ultimate market price of goods and services, and overseas employers face employers' liability insurance premiums of similar or greater amount. In practice, the employers' levy is simply a form of indirect tax which falls relatively equally on all consumers and employees.

The truly significant fact is that about 90% of the cost of the present ACC scheme is contributed by the community at large on a relatively flat-rate basis which bears no correlation to income levels. Yet those who benefit from the scheme do so largely on the basis of their pre-accident earnings since benefits are paid as a percentage (80%) of actual lost income up to a very generous limit of $76,648 per annum. In the language of taxation, this is a highly regressive arrangement which results in significant redistribution of wealth from the less well-off to the more well-to-do.

The Woodhouse Commission described its recommended scheme as a system of social insurance. This is inapt; social insurance schemes relate contribution levels to benefit levels. In fact the present ACC system represents an anomalous form of government welfare scheme which funds generous income replacement benefits for a favoured class by means of a regressive form of indirect taxation. Adoption of the recent government suggestion that ACC should pay the full cost of public hospital treatment of injury victims (much of which is presently met by the health vote funded by income tax) would exacerbate the situation further.

Both the Woodhouse Commission and the Law Commission recognised that logically a scheme which pays income related benefits should be funded entirely from general taxation revenue. However, for pragmatic political reasons, the already existing mechanisms of compulsory workers' compensation premiums and third party motor vehicle liability insurance premiums were adopted to fund the ACC scheme. Accident victims could be provided with 24 hour no-fault cover at no greater cost than before.

This pragmatic solution has always operated unfairly. If the scheme is extended to cover incapacity from sickness as well as injury, the links to the pre-existing funding mechanisms will become much more tenuous and it becomes even more difficult to defend a regressive contribution base, at least if benefits remain income-related. Unless there is a shift towards true community responsibility for funding the scheme through progressive tax levies, radical changes to entitlements and benefit levels will be required. More on that below.

Another challenge to the principle of community responsibility is presented by the suggestion that the private sector be given a significant role in the ACC scheme. The ideas of private sector administration and community responsibility do not sit comfortably together. In the first place, private insurers need profits. In seeking to maximise profits, they practise forms of discrimination, excluding some risks entirely and varying premium rates on the basis of assessed risk rather than income. If the market were completely unregulated some people classified as "poor risks" would be unable to secure cover on any terms and others would be unable to afford the premiums required for adequate cover. Presumably ACC or some other government agency would have to make special provision for these poor risks. Hampered by the limitations of its "pool", this state agency would face significantly higher average costs. It should also be noted that the private insurance industry is unlikely voluntarily to accept responsibility for long-term earnings related compensation. So in order for private sector activities to conform to public needs, considerable regulation would be required both of price and product.

But if private insurance cover is made compulsory and the scope and price of that cover is controlled by the government, the perceived advantages of the competitive market in providing safety incentives are greatly diminished. At the same time, the cost of administering the scheme would inevitably increase due to duplication of administrative functions and the need to make profits. The present cost of administering the ACC scheme is about 7% of total expenditure – a figure that compares most favourably with the 30% of premium income absorbed by insurance companies administering the old workers' compensation scheme and the 40-50% absorbed under the motor vehicle compulsory third party liability insurance scheme. This reflects overseas experience. In Canada, for example, policy makers have consistently favoured public over private models for delivery of workers' compensation, basic health insurance and even compulsory motor vehicle insurance.

One current proposal to divide up the field so that ACC retains responsibility for work-related accidents while compensation for non work-related disability is allocated to the private sector would run contrary to the principle of community responsibility and further undermine the integrity of the principle of comprehensive entitlement by extending the unequal treatment of similar disabilities by reference to cause.

However there may be a role for private insurers to offer supplementary protection in co-operation with ACC. We return to this in the final section of our paper.

Comprehensive entitlement

One of the objections to the common law tort action as a compensation system is that it discriminates unfairly among accident victims on the basis of cause. While citizens contribute on a relatively equal basis to the insurance funds which finance the system, only those whose disability is caused by another person whose conduct can be designated as wrongful get access to the funds. A no-fault regime removes that form of discrimination. However, if the no-fault scheme is limited to accidents, the old discrimination is replaced by a new, albeit less restrictive, one. Removing that boundary line is a logical step to more truly comprehensive entitlement.

The Woodhouse Commission acknowledged that it was compromising the ideal of comprehensive entitlement by limiting cover to accidents. At the time, the restriction was justified by pragmatic reasons of cost and political acceptability. Support can also be found in the concept of a "social compact" advanced more fully in the Law Commission Report (paras 4, 189). The idea is that accident compensation represented a trade-off – existing common law rights were given up in return for new statutory entitlements to compensation benefits. Since the rights given up related mainly to injury inflicted by external forces it seemed appropriate to regard that as a priority for the new no-fault approach.

Politics being what they are, we accept the initial pragmatic decision to adopt an incremental approach. First remove the fault criterion. That has been done. Then remove the accident criterion. That, we trust, will soon be done. This would leave a scheme embracing all disability which results in incapacity to continue employment at the previous level. Logic compels us eventually to consider other forms of need such as involuntary unemployment – a condition which was virtually unknown in 1967 but is all too common today. No doubt economic reasons can be advanced for treating the disabled more favourably than the unemployed – while the former cannot work the latter are available for work and must be given an incentive to secure it by taking advantage of retraining opportunities open to them. The important thing is to ensure that the arrangements made at any one stage do not, by their form, cement in place new inequalities which impede further advance towards truly comprehensive entitlement. For this reason, it is essential now to re-examine the existing ACC benefit structure.

Real compensation

The most direct consequence of the "social compact" theory of accident compensation reform was the generous benefit package that emerged. To gain political support for the reforms it was deemed necessary to create benefit entitlements comparable, in both type and amount, to those previously available at common law. Accordingly, high limits were placed on income replacement benefits, medical and rehabilitation expenses were completely covered, and lump sum payments were made available for non-pecuniary loss.

Like other aspects of the scheme, this choice of benefit levels is understandable given the political context in which the initial scheme was introduced. But if the scheme is to be extended to all forms of disability they must be reassessed and revised. Indeed, even the present limited scheme seems to require additional funding to sustain the existing level of benefits. All the recent inquiries have recognised the need to restructure benefit entitlements. The Rehabilitation and Incapacity Bill introduced by the Labour Government in 1990 would have abolished lump sum payments for non-economic loss and extended the waiting period before benefits are paid from one to two weeks. These proposals make good sense. But the level of income-related benefits should not be spared from serious reassessment. To date, the only suggestions for reform in this area are relatively minor and subject to disadvantages. The Labour Government's Bill would have reduced the level of periodic payments from 80% of pre-accident earnings to 75%, thereby further disadvantaging low earners. The Royal Commission on Social Policy's recommendation that earnings related compensation should give way to flat rate benefits after two years would discriminate unfairly against the seriously disabled while achieving only modest cost savings.

We believe that more radical change is called for. Government guaranteed income support benefits should either be fixed at an affordable flat rate level or, if abolition of income related benefits is deemed politically unacceptable, the income ceiling should be reduced from its present high level to that of the average national income (presently just over $500 per week gross). Reduction of average benefit levels would serve two important purposes. First, it would free up funds allowing wider distribution to victims of sickness as well as accidents. Secondly, it would mitigate the severely regressive nature of the present scheme. It must be remembered that we are discussing a scheme, funded largely by flat-rate forms of indirect taxation, which responds to an acknowledged community responsibility to provide financial support for the disabled. Reduction of the level of benefits payable under ACC does not mean that these benefits cannot be supplemented by separate arrangements funded on a different basis, and we provide the outline of such a system in the final section of this paper.

Complete rehabilitation

Complete rehabilitation should continue to be a basic goal of an extended scheme, but the way in which that goal is pursued may have to change. Decisions as to the future of the New Zealand health-care system generally will obviously influence the shape of ACC reform. However the basic principles of community responsibility and comprehensive entitlement require that all victims of incapacity receive similar cover for medical and related expenses (physiotherapy, occupational therapy etc) regardless of the cause of disability. This may involve patients bearing some reasonable proportion of the costs themselves. Other aspects of rehabilitation, such as occupational retraining, do not fall naturally under the health-care umbrella and should therefore continue to be a

charge on the disability system.

Administrative efficiency

The principle of administrative efficiency is central to the debate about public versus private delivery of compensation. As we stated above, experience indicates that open competition among private insurance carriers, or private carriers and a public agency, will not lead to lower costs. If statutorily defined entitlements are involved competition would have to be constrained by regulation in terms of both product and price. In these circumstances the theoretical benefits of competition are all but impossible to achieve. In terms at least of the basic benefit levels representing the community's responsibility, a public carrier is essential. It is another matter for excess cover.

Where to now?

We believe that the ACC scheme should be extended immediately to cover incapacity from sickness as well as accidental injury. However we have also come to the view that the Labour Government's solution of merely extending the present scheme, as presently funded, accompanied by curtailment of some benefit types, will not suffice. Even if the costs of such an extended scheme could be met with little disruption to existing funding arrangements, it is impossible to defend the highly regressive regime that would result. The less well-off would be heavily subsidising the income protection afforded the more well-to-do.

As the Woodhouse Commission itself acknowledged, a system of income replacement which protects existing standards of living should be funded from general taxation levied progressively. If it is not political feasible to move away from the historical, largely flat-rate funding sources (employers, the self-employed and motorists) the regressive impact of this regime should be strictly contained. Ideally this would be achieved by providing an affordable flat-rate income-support benefit to all earners incapacitated by disability. Alternatively, if the idea of income-related compensation is now so firmly embedded as to preclude total abolition, the maximum ceiling for such payments should be reduced to the level of the average national income. As recommended by the Royal Commission on Social Policy (Vol 3, pt 2, p 588), the scheme should also provide specially targeted benefits for disabled non-earners to cover the cost of housekeeping services or childcare assistance where need is clearly established. The scheme would also cover the cost of occupational retraining for victims of disability.

Other rehabilitation expenses and medical costs generally should be met or subsidised from the health budget but, in any event, on the same basis for all patients regardless of the cause of disability.

The disability scheme should continue to be administered by a government agency. However other forms of compensation for disability, such as lump sum payments and benefits to compensate for income loss in excess of the disability benefit, should be made available on a competitive basis by private insurers. This cover would be purchased by individuals in need of such additional protection and the premium cost would reflect both the risk of disability and the level of protection required. The role of the government in this area would be to monitor consumer protection standards and, perhaps, participate in the market to ensure that appropriate supplementary cover is available to all who seek it.

In this way subsidisation of the better off by the less well off is minimised and the private sector is given reasonable access to the field while the integrity of the fundamental principle of community responsibility is maintained. Real compensation is made available but only guaranteed by the state to an affordable maximum level. This permits a major advance towards truly comprehensive entitlement by extending cover to all victims of disability. We also believe that such a simplified scheme would enhance administrative efficiency.

While the basic principles that informed the original Woodhouse reform remain valid, we believe that in order to meet current and future needs a new balance must now be struck between those principles and the values they embody. We are confident that adoption of the changes we have proposed would provide a significantly improved scheme within affordable limits. □

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respect of the disease under ss 65 to 68 of this Act". This was seen as unsatisfactory and after consultation was amended.

5 See for example Palmer, *Compensation for Incapacity* (1979) pp 249, 250; Blair, *Accident Compensation in New Zealand* (2nd ed) 1983 at 4.6.

6 See for example *Decision No 38* 1 NZAR 263 at 265 and 267 (ACAA); *Re Petty* 1 NZAR 428 at 431 (ACAA); *Re Rivers* [1982] NZACR 321 at 322 (ACAA); *Dean v Accident Compensation Corporation* [1982] NZACR 321 at 322 (ACAA); *Dean v Accident Compensation Corporation* [1982] NZACR 345 at 350 (CA).

7 Note that the Corporation itself adopted these words in their *Guidelines for Personal Injury By Accident* [1981] NZACR 242 at 243 – "As a matter of general principle personal injury by accident means any form of damage to the human system which is unexpected and which was not designed by the person injured".

8 *Re Chase* [1989] 1 NZLR 325 at 329 – "an assault falling short of physical harm is nevertheless an accident from the point of view of the victim." per Cooke J.

9 For a discussion of the problems raised see McGregor Vennell, "The Mental Consequences of Accident – Problems of Interpretation of the Accident Compensation Act" [1988] *NZ Recent Law* 28; Miller, "The Accident Compensation Act and Damages Claims (1)" [1987] NZLJ 159; Barnard, "The Relationship between Compensation in Tort and the Accident Compensation System" [1990] *NZ Recent Law Review* 162; Hughes, "Damages for the Mental Consequences of False Imprisonment" [1990] NZLJ 117.

10 While it was the first time this particular type of claim had come before the High Court the Appeal Authority did have another occasion to consider the matter. *Cogan v ACC* [1990] NZAR 145 was a claim made by a mother for the mental trauma she had suffered as a result of an accident to her daughter. Mrs Cogan gave birth to twin daughters. When they were three months old they were given standard inoculations but different batches of the vaccine were used for each twin. It appeared that the vaccine used for one was defective and the baby received severe brain damage as a result. The mother claimed for the mental effect upon her of caring for the handicapped child and seeing the other twin develop as a normal child. The Appeal Authority (B H Blackwood Esq) found that she was entitled to compensation.

11 Section 5(j) – "Every Act, and every provision or enactment thereof, shall be deemed remedial, . . . and shall accordingly receive such fair, large, and liberal construction and

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Practice survey: Job satisfaction and attitudes

By John Caldwell, Senior Lecturer, School of Law, University of Canterbury

Mr Caldwell has written up in this article the results of a survey of practitioners that he conducted earlier this year in Auckland and Christchurch. He subsequently also made a brief survey of a group of senior students at the University of Canterbury. There is a somewhat surprising conclusion in that almost a third of practitioners indicated that they would not choose to practise law if they had the choice over again. On the positive side however the assessment was that the majority, a large majority, of experienced legal practitioners approached the demands of modern practice with a sense of relish and had satisfaction from providing good service to clients.

Introduction

In February this year a survey of practitioners with experience was conducted, in an attempt to gauge their attitudes to the various aspects of legal practice. Students in Law Schools frequently seek information about the nature of a career in legal practice, and, to date, many law teachers have had to rely on essentially anecdotal evidence. This survey aimed to unearth some data of a firmer nature.

To this end, one hundred experienced practitioners in both Christchurch and Auckland were selected for the survey. Selection (from those listed as partners, associates, or sole practitioners (including Barristers) in the New Zealand Law Register), was essentially random, but some weighting was given to gender. One of the aims of the survey was to discover if there were any significant attitudinal differences between either the two cities or sexes.

The response rate was pleasingly high. In Auckland, 81% of the selected practitioners responded, and in Christchurch 90% of those selected replied. In total, therefore, 171 practitioners completed the survey. In each city around 70% of the respondents were in a partnership, and, overall, 53% had been in legal practice for between ten and twenty years. Approximately 20% of the respondents in each city had been in practice for more than twenty years.

The questions

Practitioners were asked to reply to the various questions by circling their response on a scale from "1" (very low) to "5" (very high). As discussed further below, questions were asked on the personal importance attached to (i) client satisfaction, (ii) monetary rewards, (iii) professional camaraderie, and (iv) the concept of justice in legal practice. More general questions were asked about stress levels, job satisfaction, and the conflict of values, if any, between professional responsibilities to clients and personal values and beliefs. Finally, each practitioner was asked whether he or she would still choose a career in legal practice, if in fact he or she were in a position to pursue any vocation.

Practitioners were invited to make additional written comments, and many took the opportunity of so doing.

Stress in legal practice

In the response to the question "how stressful do you find your career?", 14% of all respondents regarded their stress level as being very high ("5"), whilst 53% rated it as high ("4"). Moderate stress (at "3") was recorded by 26%, whereas only 5% ranked their stress low ("2"), with 2% ranking it very low ("1").

Stress levels were marginally higher in Christchurch than in Auckland. Thus 70% of Christchurch practitioners recorded their stress as being very high or high (compared to 63% of Auckland practitioners); and 19% of Christchurch practitioners gave their stress level a "5" rating compared to only 9% of the Aucklanders.

Whilst the stress levels recorded were indeed predictably high, the comment was frequently made that stress was not to be seen as an entirely negative feature of legal practice. For many legal practitioners, high stress was seen as adding to the excitement and challenge of legal practice. It was also often noted that stress levels were usually variable, and so the pressure was by no means unremitting.

The economic recession, though, had clearly accentuated stress for practitioners. It was further suggested by two practitioners that young graduates were likely to be ill-

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interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit."

12 *Roberts v Dorothea Slate Quarries Company Limited* [1948] 2 All ER 201(HL) at 205 per Lord Porter. This same argument may also militate against the Appeal Authority's decision in *Cogan* discussed supra at fn 10.

13 Discussed in *Re Rivers (Decision No 773)* (1982) 3 NZAR 204 (ACAA) where a long distance runner was declined compensation when plantar fasciitus developed as a result of the continuous pounding of the pavement over a lengthy period. This can be compared with *Re Lucas (Decision No 1042)* (1983) 4 NZAR 91 (ACAA).

14 In this case the claimant suffered food poisoning as a result of eating some saveloys. The question was whether the injury fell within the exception to the definition of personal injury by accident: s 2(b)(ii). He decided that it did.

15 See Holland J in *Polansky v ACC* [1990] NZAR 481 at 485.

prepared for the commercial realties and competition of modern legal practice, and that they might consequently experience particularly severe stress. However, a number of practitioners noted that work-related stress did diminish as experience increased — though extra stresses resulting from partnership responsibilities could then begin to emerge.

Overall, it was clear from various written comments that support from a practitioner's colleagues, friends and family was, together with an appropriate lifestyle, very important in dealing with the high levels of stress.

Job satisfaction

Stress is high in the legal profession, but so too is job satisfaction. Seventy-one per cent of both Auckland and Christchurch practitioners rated their job satisfaction as being either high or very high. The Auckland practitioners, though, were more likely to feel their job satisfaction was at the highest possible level: 31% of Auckland practitioners ranked it at "5", compared to just 17% of Christchurch practitioners. In each city, only around 5% of practitioners ranked their job satisfaction as "low"; and, strikingly, but one practitioner (in Christchurch) ranked it as "very low". (These findings on job satisfaction in Christchurch were entirely consistent with a survey conducted by the Canterbury District Law Society eight months earlier: *The Canterbury Tales*, February 1991, p 2).

The stimulus and variety of legal practice were often cited as the sources of high job satisfaction. It was also clear that practitioners did derive real satisfaction from assisting clients with their problems (even if clients were increasingly being perceived to be more demanding and more difficult to please). Job satisfaction for some, though, was waning as legal practice became more commercially oriented; and a number of female practitioners wanted to warn young female law students of the future difficulties that they might face in combining legal practice with motherhood.

Monetary rewards

There was little overall difference between the two cities in the practitioner response towards the importance of money in legal practice. Overall, 13% ranked monetary rewards as being "5" in importance; 44% ranked them "4", 35% ranked them "3"; 7% ranked them "2"; and 1% ranked them "1".

However, a breakdown of the responses by genders revealed some interesting differences between the two sexes and cities. For example, 18% of Auckland *female* respondents accorded monetary rewards a "5" ranking (compared to just 6% of Auckland men); whereas 18% of Christchurch *male* respondents ranked monetary rewards at "5" (compared to only 5% of the Christchurch women).

Conclusions, if any, on this are perhaps best left to the reader. But it is of interest that the survey did reveal Auckland male practitioners to be less enthusiastic about pecuniary rewards than their Christchurch counterparts. This was further confirmed by the finding that 42% of Auckland male practitioners rated the financial returns as being of middling importance, whereas a lesser percentage of their Christchurch counterparts (30%) so ranked them. Strangely, enough, attitudes in the two cities were once again reversed with the female group of practitioners: 37% of Christchurch female respondents ranked monetary rewards at "3", compared to only 11% of Auckland women. Of the Christchurch female respondents, 26% respondents regarded monetary rewards as being of very low or low importance, whereas only 7% of the Auckland female respondents responded in this way.

Professional camaraderie

Overall, 7% of all respondents regarded professional camaraderie as being of very low importance in legal practice, and 17% ranked it as low. A third of respondents regarded it of moderate importance, whereas 29% ranked it high, and 13% very high.

In a breakdown of responses by city, 21% of Auckland respondents ranked this aspect of legal practice as being of the highest importance, compared to only 7% of Christchurch respondents. Auckland women placed particular emphasis on camaraderie. Twenty-nine per cent of Auckland female respondents accorded it the maximum rating — compared to 17% of the Auckland males.

Client satisfaction

Client satisfaction emerged as easily the most important feature of legal practice; and there was little difference, here, between the Christchurch and Auckland respondents. Combining both cities, 53% of respondents ranked client satisfaction at "5" in importance; and 39% ranked it "4". Only 1% (2 Christchurch practitioners) accorded it a "1" ranking.

In a breakdown of responses by gender, however, there was some difference in weighting between the Auckland male and female practitioners. Thus while 71% of the female practitioners in that city ranked client satisfaction at the highest level of "5", only 44% of the male practitioners did so. (Exactly the same percentage of Auckland males, though, gave client satisfaction a "4" ranking). In Christchurch, the difference was not so marked: 51% of Christchurch men rated it "5", as did 58% of Christchurch women.

Justice

In response to the question "how important is the concept of justice to you as a practising lawyer?" There was some difference between the two cities on whether the concept was regarded as being of the very highest importance. In Auckland, 57% of all respondents ranked it "5", in comparison to only 41% of Christchurch respondents (with 25% of Aucklanders ranking it "4", in comparison to 36% of Christchurch respondents). The essential difference lay in the response of Christchurch *male* practitioners who were more likely to rank it "4". Thus 52% of Christchurch female respondents did rank it "55" (which is reasonably consistent with their female and male Auckland counterparts), but only 39% of Christchurch men did so.

Only 9% of Christchurch and 6% of Auckland respondents regarded the concept of justice as being of low or very low importance.

However in written comments, far larger numbers of practitioners did suggest that the legal system, whilst underpinned in its theory by the concept of justice was clearly imperfect in its practice. Thus, several common lawyers stated that though "justice", even if difficult to

define, was of the highest importance to them personally and professionally, it was a most elusive notion to achieve. Many commercial and property lawyers felt the question was of less relevance to their day-to-day practices.

A significant number of older practitioners also suggested that as experience was gained in legal practice, youthful idealism waned and a more pragmatic approach towards the law was adopted. Client needs and commercial realities became dominant, and personal integrity and honesty perhaps assumed more importance than the concept of justice. As one Auckland commercial litigation lawyer noted, "sometimes you achieve a result that you know in your heart is wrong, but is great for your client. It is not justice – you feel uncomfortable about that, but elated at the result".

Conflict in values

A clear majority of respondents in both cities experienced low levels of conflict between their personal values and beliefs and their professional responsibilities. A high 59% of Auckland practitioners, and an even higher percentage of Christchurch practitioners (69%) regarded the level of conflict as being either low or very low. Correspondingly, a greater overall percentage of Auckland practitioners did experience moderate conflict (23% of Auckland practitioners so responded, compared to 16% in Christchurch).

A surprising percentage of Christchurch female practitioners (26%) recorded a high level of conflict at "4". Only around 13% of Christchurch male practitioners (or of Auckland practitioners of either sex) rated the conflict at such a significant level. Just one practitioner, in Auckland, responded with a "5" ranking to this question.

Clearly, then, most, but not all, practitioners feel personally comfortable with their professional responsibilities. The view of one practitioner that his work was that of an "intellectual harlot" was not at all widely shared. Practitioners felt that their personal subjective values had little to do with their objective professional responsibilities to their clients; and the view was strongly held that practitioners should not attempt to be judgmental or value-driven in their work. Commercial and property lawyers frequently suggested that any conflict might be more apparent in common law work, but the common lawyers also tended to minimise this. If ever a real problem of conscience arose for a practitioner, then the file tended to be referred to a colleague.

Several practitioners suggested that the real conflict in values lay not so much with professional responsibilities to clients, but in responsibilities to family. Practice management was also seen as a possible source of value-conflict.

Choice of career

This question revealed some interesting differences between the cities and between the genders. In Christchurch, 36% of all respondents declared that given a choice they would not pursue law again (with no great differentiation in response between the genders). About the same percentage of Auckland female practitioners (35%) would also have chosen differently; but only 17% of Auckland male practitioners declared a preference for a different career path.

Most written responses to this question came from the dissatisfied practitioners. A number of female practitioners still identified elements of sexism within the legal profession. But perhaps the most common theme emerging from the discontented group as a whole was the feeling that legal practice had lost much of its lustre due to the increased emphasis on the monetary side of the law. Indeed disillusionment with fee targets, fee competition, advertising and time-recording echoed throughout responses to all questions from a significant minority of practitioners. There was a discernible nostalgia for the more conservative kind of practice of years gone by – a style of practice which, as perceived by this group, was less business-driven and more "human".

Equally, though, it must be said that most experienced practitioners, in both centres, declared themselves content with their choice of career.

Difference in student expectation

In order to gauge whether the expectations of law students were matched by the realities of practice, the 1991 Administrative Law class at Canterbury was given the same survey (with questions adapted to match the students' status). This limited survey comprised 41 students.

In comparing the responses of Christchurch practitioners to Christchurch law students, it was apparent that students are aware, at least intellectually, of the stress they are likely to encounter in practise. In fact, 88% of students expected their stress level to be high or very high (compared to 70% of Christchurch practitioners who responded at that level). The student expectations of job satisfaction were also very high: 83% of students expected to find their job satisfaction to be high to very high (compared again to 71% of the Christchurch practitioners who so responded).

Most of the other responses closely paralleled responses from the practitioners. Perhaps most striking of all, 36% of both the practitioner and law student respondents said they would not choose a career in legal practice, if given a choice. Students, however, expected to experience a conflict of values that does not exist for the majority of experienced practitioners: whereas around 60% of students expected to find a moderate conflict of values, 69% of Christchurch practitioners experienced a low level of conflict.

Conclusion

The finding that over a third of experienced Christchurch practitioners of both sexes (and of Auckland female practitioners) would not choose to practise law again provided a disquieting underlay to the more positive results of this survey. This subterranean discontent seemed to be caused not so much by the economic recession, but by the perceived new style of legal practice. Undoubtedly a significant minority of practitioners feel that the practice of law has become just another form of business enterprise.

However, it does seem that the majority of experienced legal practitioners still approach the demands of modern practice with a sense of relish, and that good service to clients is still regarded as being of paramount, if not sole, importance. In difficult economic times, the bulk of experienced practitioners, in at least two major cities, seem in good heart. □