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Youthful accused, police powers and politics

The Supreme Court of Canada recently struck out a criminal prosecution because of what it held to be an unreasonable delay in bringing the matter to trial. This was the now notorious case of *R v Askov* in which the Supreme Court of Canada gave judgment on 18 October 1990. A digest of the case can be found in *The Lawyers Weekly* of 16 November 1990. The delay in bringing the case to trial was nearly two years after the preliminary hearing. This was held to be so long as to breach the requirement of the Canadian Charter of Rights for a speedy trial in criminal matters. The New Zealand Bill of Rights Act 1989 is based on the Canadian Charter and has a similar provision to the Canadian one in s 25(b).

One result of the Canadian Supreme Court decision has been the dismissal of a very substantial number of prosecutions – a figure of almost 50,000 in Ontario alone has been reported. The matter was further complicated by one of the Supreme Court Judges, Mr Justice Cory who wrote the principal judgment, making a public statement that the wholesale dismissal of prosecutions was not intended by the Supreme Court. In the judgment he wrote, however, Mr Justice Cory had stated that six months was about the limit and over eight months was too long. This is the test that lower Courts have been generally applying. The superior Courts of Canada are thus in a confused situation where they are told publicly by a Supreme Court Judge not to treat as binding on them a decision of the Supreme Court to which he was a party! It is hardly surprising that there have been calls for his resignation.

The decision in *Askov* has been described by Mr Justice Leggatt of the Supreme Court of British Columbia as a "public relations disaster for the Bench". This comment is in an article in *The Lawyers Weekly* of 6 September 1991, p 1, and other extensive comment can be found in the issue for 1 February 1991 at pp 10 and 11. The case illustrates the need for Judges at appellate level to be aware of the effects of the law, and public perception of it, while at the same time ensuring that justice is done in particular cases whatever journalists might say and many people feel.

Our own Court of Appeal has received some criticism for its decision on the Bill of Rights Act 1990 in R v Crime *Appeals* 227/91 and 228/91. Two articles, one critical and one supportive were published in the *New Zealand Law Journal* in November, [1990] NZLJ 398 and [1990] NZLJ 400. In those cases the Court adopted a broad meaning of the word "arrest" and applied a *prima facie* exclusionary evidential rule for breaches of the Bill of Rights.

All of this controversial judicial decision-making is relevant to what happened recently, on 2 December 1991, in the case of *R v Irwin*. On that date Mr Justice Fisher dismissed an indictment for murder. He held that the statement obtained from the accused was inadmissible because of failure to comply with the provisions of the Children, Young Persons, and Their Families Act 1989. Without the statement of the accused, the Judge held, there was insufficient evidence for the case to go to a jury. A second accused had already pleaded guilty and been sentenced.

The Public Questions Committee of the Auckland District Law Society issued a statement on the case because of the public outcry, and the understandable distress of the family of the murdered man. The statement is the opinion only of the members of the Committee of which the present Convenor is Miss Jan McCartney. It does not necessarily reflect any official view of the Auckland District Law Society. The statement is detailed and clear, and is published in full in this issue of the *New Zealand Law Journal* at [1992] NZLJ 48.

Subsequent to that statement being issued there has been a report on the case by the Police Complaints Authority, Sir Peter Quilliam, a former Judge of the High Court and a former Crown Prosecutor. There are two comments in particular in Sir Peter's report that deserve note. One passage received considerable publicity when the report was published, and it is an issue that has again been given prominence by the media, apparently as part of a campaign to have the legislation repealed. On the front page of the Wellington *Evening Post* of 25 January 1992, under a banner headline, a Sergeant Mike O'Leary is reported as criticising the Act, supported by a Sergeant Tony Moore. Sergeant O'Leary is quoted as saying:

> But these kids know exactly that we can't deal with them — that we can't force them to come to the station or be interviewed. Most are well aware of all their rights .... It's just a joke.

In saying this the sergeant was echoing the criticisms made of the Act by the Police Association at the time Jason Irwin was discharged. In his report Sir Peter Quilliam referred to this issue on p 13 of the typescript in a passage which was emphasised in part by the media. The report read:

> I am aware from my review of many complaint files over the period of nearly three years that the Authority has been existence that there are many, and increasing, numbers of young persons who are not only criminally minded, but who are fully alive to the rights granted them under the Act and who know how to escape the consequences of their conduct by relying upon those rights. The sense of frustration which has been expressed by members of police over this is not hard to understand. The result of all this is that an instinctive desire to bring a criminal to justice may weigh more heavily than an appreciation of the need to follow a statutory requirement precisely. I do not condone that but I recognise that it may occur.
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> Those members of police who are having to deal with young offenders on a daily basis (as for instance in a city the size of Auckland) should be expected to have a regular working familiarity with their obligations under the Act and, however much they may disapprove of them, to comply with them.

What needs to be noted, but was not emphasised by the media, is that Sir Peter specifically states that he does not condone the lack of balance in the attitude of some police officers; and that even if they disapprove of their obligations under the Act police officers should comply with them.

This could be put more strongly. Police officers are sworn to uphold the law. They should therefore be meticulous in observing the obligations they themselves have under the law. The police in some areas have already arrogated to themselves the power to act as police, jury and sentencing Judges under the so-called diversion scheme which replaces a system of judicial law by a system of arbitrary penalties imposed by policemen — see [1989] NZLJ 301, 310, 313 and 400. This scheme purposely avoids the protections of the law. It is mainly applied to young people and will now be available as a way around the protections against coercion set out in the Children, Young Persons, and Their Families Act. The fact that it will normally be a scheme exercised "responsibly" is irrelevant to the serious issue of principle involved in it.

Another aspect of increased police political pressure has been that very recently the Police Association and some policemen have conducted a campaign to denigrate and in effect replace the Parole Board. A Member of Parliament, who was formerly a policeman, is reported to have demanded that the Parole Board members be "sacked" because of one particular decision. He has emphasised that he was speaking out because of his police background and associations. The Minister of Police, apparently at the instigation of his department, wrote to the Minister of Justice to have the Parole Board decision reversed. The spokesman for the Justice Department and the Parole Board has attacked the media over the issue; but it is the police who are running the campaign, the media merely reports it — or perhaps more accurately keeps it going by reporting police comments. The situation is disgraceful and dangerous.

What concerns there may be about any particular offender — and I for one have felt that the retributive and restorative moral aspects of penal policy have been insufficiently recognised in New Zealand — the point is that it is not the responsibility of the police. Their functions should be limited. With the campaign waged two years ago by traffic officers to get powers of arrest, and this latest campaign, New Zealand is becoming an ever more authoritarian society. Freedom for all does involve an element of risk; and certainly requires considerable restrictions and clear limits on the exercise of police power.

It would seem, and it is certainly common gossip in Wellington, that there has been for some time a marked tension between the Police Department and the Justice Department. The diversion scheme is in one sense a determination by the police in some cases to replace the Justice Department's Probation Service, as well as the judicial system; and this latest campaign is equally clearly an attempt to subvert the Parole Board and the Justice Department's policies and programmes for the rehabilitation of offenders.

Another shot in the campaign was the police criticism reported on the front page of the *Evening Post* of 1 February 1992. On that occasion police officers were strongly critical of the Justice Department policy of prison leave. This is a policy that, in its occasional practice, I have publicly criticised. The point is however that it is not for the police to run a campaign on the question. This latest criticism must inevitably be seen as part of a larger campaign against the Justice Department. The police function is to investigate and solve crimes, and to apprehend criminals. It is not to usurp the very different functions and responsibilities of the Justice Department.

It is not necessary to postulate a conspiracy theory. Police officers take their work seriously, and understandably can become obsessed with the enemy, "the criminals", rather than concentrating on their duty, on their larger duty to all citizens; and thus accepting restrictions for a greater good. Total war is never justifiable. Nor is total policing.

Police power and political influence is growing; and with it a disturbing emphasis on rule by uniformed men as against rule by a system of law.

All of this is very relevant to the issues that were given so much publicity in the Jason Irwin case. There is however a separate issue that is important more particularly from the point of view of the public perception of the legal system. It is the question of the strength of the prosecution case on the charge of murder. This is the second comment by Sir Peter Quilliam in his report on the Jason Irwin case that is particularly deserving of note. At pp 16 and 17 of the typescript Sir Peter wrote:

> I am, however, concerned at some public comments which have been made to the effect that a young murderer has been allowed to walk free upon a technicality. I consider such comments to be

irresponsible and unfair. There is no means of knowing what would have been the outcome if the statement had been admitted and the case had gone to trial. I am bound to observe, however, that it is far from a foregone conclusion that there would have been a conviction for either murder or manslaughter. In my respectful opinion, the difficulties for the Crown in achieving either verdict were formidable.

One final point that should be recorded is the very proper attitude that has been taken by several senior police officers. This includes the officer in charge of the relevant police district in a television interview, and Deputy Police Commissioner Steve Rusbatch when Sir Peter Quilliam's report was released. The Deputy Commissioner accepted and regretted that the police had not followed proper procedures, and stated that further training would be undertaken. At the same time he took the opportunity to claim that the police found the Act to be complex.

Finally it should be noted, as the Auckland Public Questions Committee Report makes clear, that the rights of juveniles in this area of the law are the same as the rights of all adult New Zealand citizens. It is just that, because of their immaturity, the police are strictly obliged to explain to the young fully and carefully the inherent rights to freedom of all New Zealand citizens living in a democracy under the rule of law.

P J Downey

Since the above was written and typeset, a further report has been received from the Public Issues Committee of the Auckland District Law Society. It too concerns police power and practices. It is published in this issue at [1992] NZLJ 54 under the title "Turnovers and Road Blocks".

PJD

Motor Vehicle Dealers Licence Applications

The following notice will be of interest to practitioners who have clients seeking a licence under the Motor Vehicle Dealers Act 1975

The two important issues in applications for a motor vehicle dealers licence are the fitness of the chief executive officer in the case of a company or the fitness of the individual where he or she applies for a licence and the financial aspects of the applicant for a licence. The issue of finance arises under s 14(2)(b) and s 14(6) of the Motor Vehicle Dealers Act 1975. Where there is an application for approval of a chief executive officer under s 20 of the Act or removal of business premises under s 18A of the Act the financial position of the company or individual holding a licence may become an issue as in the case of a licence application. While the geographical location and the size of the business is relevant as to the issue of finances, in broad terms the Motor Vehicle Dealers Licensing Board has sought to impose a standard of finance in funds provided by shareholders to funds employed representing 40% of the capital on the basis that that capital is paid up share capital. Greig J's judgment in *Ron West Motors Ltd v The Motor Vehicle Dealers Licensing Board & Anor* addresses financial issues and the judgment is important as to finances where those issues arise.

A note on the case and its full reference is given in *Butterworths Current Law* at [1990] BCL 1416. Copies of the judgment are available from Butterworths. Judgment Service – PO Box 472, Wellington, telephone (04) 385 1479.

The entry in *Butterworths Current Law* reads as follows:

> **1416 — Licensing board — Motor Vehicle Dealers — Application to transfer principal place of business refused — Whether illegal, irrational — Focus on dealer's share capital — Motor Vehicle Dealers Act 1975, ss 14, 18A, 113** — A licensed motor vehicle dealer (RW) sought judicial review of the Motor Vehicle Dealers Licensing Board's refusal to transfer RW's principal place of business pursuant to s 18A. The Board had at the same time refused an application (by MVDI) for interim suspension of RW under s 113, an application for suspension under s 112 being adjourned pending the outcome of the review proceedings. The s 18A decision had been made for reasons relating to RW's finances. Greig J discussed the Act and the nature of review proceedings, illegality and irrationality being the only classes possibly arising in this case. As to illegality, the Board was bound by the Act to consider whether RW was a proper person. The decision on s 113 was not inconsistent as different considerations applied. As to irrationality, it could not be said that a focus on the stability of the dealer company capital was inappropriate.
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> The application was dismissed. *Ron West Motors Ltd v Motor Vehicle Dealers Licensing Board* (High Court, Wellington, 20 July 1990 (CP 886/88) Greig J). [19 pp]

Case and Comment

Accident Compensation

Accident Compensation Corporation v E (Court of Appeal, 20 December 1991, CA 147/91, Richardson J (presiding), Gault and McKay JJ); *Accident Compensation Corporation v Mitchell* (Court of Appeal, 20 December 1991, CA 148/91, Richardson J (presiding), Gault and McKay JJ).

> In the present legislation there is no definition of either personal injury or accident. As a result, the boundaries of the scheme have been extended over the years to cover situations which most people would have difficulty in reconciling with the common view of what an accident is. (Accident Compensation A Fairer Scheme, 1991)

The Government might have hoped that after the issue of this statement the Courts would have adopted a more restrictive interpretation of the words "personal injury by accident" (the phrase) as found in the Accident Compensation Act 1982 (the Act) when asked to determine whether a particular injury fell within its boundaries. If this was so then the delivery of the Court of Appeal decision in *Accident Compensation Corporation v E* and *Accident Compensation Corporation v Mitchell* may have been a disappointment. In these two decisions the Court of Appeal upheld the High Court decisions of Greig J which, in the former case, confirmed the approach taken under the worker's compensation statutes of the United Kingdom which had been adopted by the Appeal authority, and in the latter allowed recovery for a near cot death situation where there was no evidence that the apnoeic attack was due exclusively to disease. Both cases focus on the quality or characteristics of the incident being classified as an accident although *E* goes further and considers whether mental consequences alone are sufficient to found a claim.

ACC v E

The facts of the case itself were discussed and analysed by the writer in "Personal Injury By Accident: Some problems of interpretation" [1991] NZLJ 239 so will not be repeated in detail here. It is sufficient to note that the case involved a woman who suffered a psychiatric breakdown on the fourth day of a strict, time-consuming management course. Greig J accepted that her injury was compensatable under the Act. The Corporation appealed.

There were four questions for determination:

(a) whether the particular injury suffered by E would fall within the phrase;

(b) whether the incident alleged to have caused the injury had to be unexpected and undesigned for the injury to fall within the phrase;

(c) whether the injury could fall within the phrase when there is an injury but the specific causative incident of the injury is not identifiable, or not identifiable as occurring at a particular time; and

(d) whether mental consequences or disturbance not accompanied by physical injury to the claimant can fall within the phrase.

Gault J delivering the judgment of the Court of Appeal recognised that the first question logically fell for consideration only after the others had been considered.

His Honour reviewed the history of the phrase which had been adopted against the background of an extensive body of case law in the fields of workers' compensation and insurance legislation, although in that legislation the phrase was often qualified by the words "arising out of and in the course of the employment". First of all he pointed out that the leading case under the earlier legislation of *Fenton v Thorley & Co Ltd* [1903] AC 443 had established that "accident" should be given its popular meaning of an unlooked-for mishap or untoward event, unexpected and undesigned by the victim. This was extended by the House of Lords in *Jones v Secretary of State for Social Services* [1972] 1 All ER 145 to encompass both (1) an event which although intended by the person who caused it to occur resulted in a mishap which was not intended and (2) an event which was not intended at all. With this background to guide him His Honour then turned to the New Zealand case law.

In New Zealand the phrase had been considered by two Court of Appeal cases, *Green v Matheson* [1989] 3 NZLR 564 and *Willis v Attorney-General* [1989] 3 NZLR 574, where it had been emphasised by Cooke J that the natural and ordinary meaning was to apply and that the inclusive definition contained in the Act was "additional or for greater certainty". Both *Willis* and *Green* involved cases in which there were clearly distinguished causal events and their consequences. Gault J pointed out that this did not mean however that an interpretation where the accident was in the suffering of the injury should be excluded. After pointing out that the phrase was "personal injury by accident" not "personal injury by *an* accident" His Honour said:

> Further, to interpret the expression narrowly would be to exclude injuries in respect of which compensation has been paid as a matter of course in the past, such as back injuries sustained in the course of normal lifting work or muscle injuries sustained in sport. Cover for such injuries has been commonplace under the workers compensation Acts and has been commonplace under the Accident Compensation Act as least since

the decision of Davison CJ in *Wallbutton v Accident Compensation Commission* [1983] NZACR 629 which followed the House of Lords in *Jones v Secretary of State for Social Security* (supra).

Counsel for the Corporation had based his argument that it was necessary to attribute an injury to some incident which itself could be described as accidental upon words by Lord Wilberforce in *Minister for Social Security v Amalgamated Engineering Union (Re Dowling)* [1967] 1 AC 725 and also upon a passage in *Dandoroff v Rogozinoff* [1988] 2 NZLR 588 at 599 where Henry J referred to injury resulting from an incident which could *itself* be classified as an accident. Gault J pointed out that both *Jones* and *Dowling* were decisions based on questions of jurisdiction and had to be read carefully with this issue in mind. While he thought the decision in *Dandoroff* was correct he considered the broad dictum of Henry J was difficult to reconcile with the meaning of the phrase as expressed in *Jones* and was inconsistent with the workmen's compensation decisions. He concluded that Greig J had been correct when he said that it is not and never has been necessary to show some causative event which was unexpected and undesigned. The answer to the second question was therefore no.

In terms of the third question the Corporation had argued that the mental disorder caused by the management course should be likened to incapacity produced as a result of a continuous process rather than by an accident. This question was dealt with quickly. His Honour was of the opinion that the finding that the mental disorder was caused by the course virtually decided this issue. While the breakdown had occurred on the fourth day of the course this could not convert what had happened into incapacity produced as a continuous process; the course was clearly the triggering event.

The fourth question was seen as a matter of statutory interpretation. It will be recalled that Holland J in *Accident Compensation Corporation v F* [1991] 1 NZLR 234 had been firmly of the view that unless the mental consequences were attendant upon a contemporaneous or earlier physical injury to the claimant they could not fall within the phrase. Greig J in the High Court had expressed disagreement with that view considering it plain that personal injury by accident could be mental consequences without any physical injury or trauma. The Court of Appeal concurred. Gault J, referring to the words of the inclusive definition s 2(1)(a) which states that the phrase includes "the physical and mental consequences of any such injury or of the accident", said:

> We see no other construction than that mental consequences of the accident are included within the term personal injury by accident whether or not there is also physical injury. There is no reason not to construe the word "or" disjunctively.
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> It would be a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not some physical injury however slight, also is sustained. Further it would create major difficulties should it be necessary in particular cases to separate physical and mental injuries.

His Honour considered that not only was there nothing in the judgment in *Willis* which was inconsistent with this conclusion but could find no policy reason for excluding cover under the Act for purely mental consequences. Moreover he was of the view that if Holland J was to be understood as saying more than that the claimant must himself (or herself) suffer an accident before they can be compensated for mental consequences then Holland J in *F* was in error.

In the light of the answers given to these three questions there was no doubt that E had suffered a personal injury by accident and was entitled to compensation under the Act. The Corporation had argued that just as in *Willis* where mental consequences of false imprisonment were held outside the Act on policy grounds a similiar finding should be made in respect of the particular circumstances of this case. If such a finding was not made then the Corporation considered that this could lead to a whole range of "dramatic experiences", such as suffering a bereavement, being compensatable; that is the floodgates would be opened. Gault J rejected this pointing out that in this area it was not possible to define accurately where borderlines would be drawn. Obviously each case would be considered in light of established principles, but if the exercise was to be constrained on policy grounds His Honour considered that a matter for the legislature.

Mitchell

Once again the facts of this case were discussed in the article referred to earlier. Both the review officer and the Appeal Authority considered that the infant claimant, severely brain damaged after an apnoeic attack, had not suffered a personal injury by accident. There was no evidence that the attack was caused by disease or infection. The basis of the Appeal Authority's decision was the the notion of "accident" involved some action which in turn caused the disability. Greig J in the High Court had rejected this argument basing his decision on the line of workers' compensation cases where the phrase had been qualified by the necessity for the accident to arise out of the employment of the claimant. The absence of this qualification in the Act meant that dicta from these cases had to be read with this factor in mind. The Corporation appealed to the Court of Appeal which was asked to decide: (1) whether an event (i) which is not intended by the victim; and (ii) the cause of which cannot be identified so that there is no discernible external "action", comes within the phrase and;
(2) whether damage, including damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode or caused by disease, infection or the ageing process, if not expressly excluded by paragraph (b) of the definition of the phrase falls within it.

The Court upheld the High Court decision with both Gault J and Richardson J delivering a judgment. As the case was decided at the same time as *E* it was unnecessary to review the

authorities again. Gault J did acknowledge that even in terms of the second limb of the meaning of accident postulated by *Jones* some external factor as a causative incident had still been required by the English Courts, even though that incident might be a normal activity or event. It was in this way that the causative incident assumed its character as an accident — because of its result — the injury. However it had been pointed out by Lord Reid in *James Patrick & Co Pty Ltd v Sharpe* [1954] 3 All ER 216 at 221 that the need to show an external factor was necessary because of the requirement that the injury be employment related. This qualification being absent from the Act His Honour considered that, as there was no direct authority which could assist, it became necessary to approach the matter as one of statutory interpretation.

While he agreed that with such a non-exhaustive definition the express inclusions and exclusions might provide assistance in interpreting the general expression he did not accept it as a necessary inference that injuries outside the express inclusions were excluded or that injuries outside express exclusions were included. The inclusions and exclusions could have been provided merely for the avoidance of doubt. It was, he thought, a matter in each case of applying the ordinary and natural meaning of the phrase in the light of the inclusions and exclusions. Doing this it would not be straining normal usage to say, from the viewpoint of the victim, that the injuries suffered occurred accidentally though the cause was not known. Richardson J while agreeing that express exclusions may be for avoidance of doubt stated that the more usual legislative reason was to take out something that might otherwise fall within a general definition. Thus he saw the partial exclusion as an indication that the legislature considered that internal accidents could come within the ordinary meaning of the phrase.

Gault J pointed out that while the difficulty of establishing cause and sheeting home fault was a strong reason for establishing the accident compensation system there was no doubt that since its inception compensation for accidental injuries had been extended well beyond the consequences of tortious acts. Prior to this decision the Corporation had not gone beyond situations where it had been possible to identify an event external to the body which could be said to have triggered the injury — (*Wallbutton*). However His Honour did not consider it readily apparent why injury arising while picking up milk bottles should be regarded as an accident but unexpected injury received for unknown reasons while lying in a cot should be seen differently. Any distinction could only be explicable if the phrase were "personal injury *caused* by accident" but then the causative event would need to be an unexpected mishap. Law and practice had long passed beyond that.

Moreover His Honour noted that when the Accident Compensation Amendment Bill (No 2) 1973 was reported back from the Statutes Revision Committee the requirement of an untoward event external to the body included in the definition when it was first introduced into Parliament was deliberately omitted. Not only that but the recently introduced Accident Rehabilitation and Compensation Insurance Bill 1991 (the Bill) now provides for narrower cover. He said:

> It would not be correct to hold that it is a necessary inference that the legislature intended that an external triggering event or factor is not necessary for cover under the Act in its present form and is now acknowledging that. However, it can be said that there is a recognition that the present definition is capable of bearing that broad meaning which it is intended to exclude.

His Honour then considered the principles upon which the scheme was based. In his opinion a comprehensive system of compensation for personal injury by accident built on the social philosophy of community responsibility would provide for the infant claimant. However His Honour acknowledged that those responsible for establishing the scheme would not have unanimously agreed that it was intended to cover such persons. Thus in the end he was driven back to the words used. Once it was accepted that these extended to unexpected injury suffered in the course of normal activity without the necessity that it be employment related there was no logical reason to require an external event. The infant claimant was entitled to cover under the Act. Although His Honour considered the second question did not really require determination it followed that such damage could fall within the definition.

Richardson J too was satisfied that the Act provided cover for the claimant. Looking at both s 26 and the s 2 definition of the Act two points emerged, the most significant of which was that the personal injury must be "by accident", and not by *an* accident. That is, in its terms, the phrase did not need the identification of particular action as giving rise to the injury; accidental injury was enough.

> There is nothing in the phrase "personal injury by accident" which requires a separation, an interval, between that which produces the injury and the injury. Thus, the onset of an injury in the course of ordinary work is a sufficient causative incident without the need to establish a precipitating external event.

The second point which His Honour saw as significant was that the only other qualification in the provision of cover was that the accident be suffered in New Zealand. As there was no requirement that it be employment-related authorities under the workmen's compensation statutes were not determinative. Two conclusions followed: first on the ordinary use of language there was no justification for reading the further requirement of an external triggering action into the phrase, and second there were no authorities which constrained the Court to reach a contrary conclusion. Applying this analysis he concluded that the infant had suffered a personal injury by accident. His Honour like Gault J referred to the policy underlying the Act in concluding that an interpretation which was capable of covering all accidental injuries whether

precipitated by an external triggering event would better reflect the philosophy behind "this major social legislation". The appeal was dismissed and the two questions answered in accordance with Gault J's judgment.

Comment

E and Mitchell have succeeded in their individual claims. It may be that the victory is a pyrrhic one for other claimaints in their position. The Bill now before a select committee provides a far more narrow base for a claimant. In effect the legislature took up the invitation first issued by Greig J, although not explicitly, when the High Court decisions of these two claimants were delivered, and then confirmed by Gault J upon the delivery of the Court of Appeal decisions. "Personal injury" and "accident" are now defined separately and moreover defined in such a way that any claimant in the position of either E or Mitchell will not succeed.

"Personal Injury" is specifically restricted along the lines advanced by Holland J in *F*, that is, as (a) the physical injuries to a person and (b) any mental disorder suffered by that person which is an outcome of those physical injuries to that person and (c) any mental disorder suffered as a result of certain offences. Thus while Gault J thought it a "strange situation" if cover for serious mental consequences caused by an accident were to depend upon physical injury, the Bill has provided for just that. There is moreover no possibility of anyone in E's position arguing that the injury is work-related as work-related injuries rely upon the definition of personal injury. What of those persons who suffer serious mental injury as a result of an accident to someone very close to them, that is the nervous shock cases? Their position has still not been definitively decided by the Court of Appeal under the Act, but because of the definition of personal injury they will be left to their common law remedy, if any, under the regime proposed by the Bill.

What of *Mitchell*? A claimant in his position has no difficulty with the personal injury definition. Their problem is with the definition of accident. Paragraph (a) defines accident as "a specific event external to the human body where that event involves the application of an external force or resistance that is abnormal in application or excessive in intensity", and just to avoid any doubt continues "but the fact that an injury occurs shall not of itself be construed as an indication or presumption that there has been an external force or resistance that was abnormal in application or excessive in intensity". Thus infants who suffer cot deaths or near cot deaths are not entitled to any compensation at all. *E* fails in this respect as well; indeed, in requiring force that is "abnormal in application or excessive in intensity", will mean that other claimants successful under the Act will also lose any remedy. One looks forward to the future Court decisions on the meaning of those words.

Since the enactment of the 1972 Act the various tiers of the appellate Courts have carefully developed and refined the case law in this area. The decisions have been based not only on the principles behind the Act itself but on the earlier predecessors of the Act, the workmen's compensation statutes, and on the application of the rules of statutory interpretation. After 20 years it may well have been time for a rethink, in part at least, but it seems most unfortunate that this rethink appears to derogate from the original principles expressed so succinctly in the Woodhouse Report, for surely any system of accident compensation based on comprehensive entitlement would not deny the claimants in these cases.

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Words

Whether

This word now seems to be regarded as inadequate on its own – being generally expanded to "whether or not". In most cases this is unnecessary. The form is found regrettably in some recent legislation, which we were told was to be drafted in simpler and more intelligible language. Section 310 of the Resource Management Act 1991 empowers the Planning Tribunal to make declarations of various kinds, paras (b), (c) and (d) being prefaced with the words "Whether or not". Ironically, s 153 of the Town and Country Planning Act 1977, which s 310 of the 1991 Act broadly replaces, uses the proper economical form, viz ; ". . . may declare whether any specified use . . .". (It is true that doubts have been expressed whether negative declarations may be made under s 153, but such doubts have not been based (and could not logically or linguistically be based) on the absence of the words "or not".)

We find similar prolixity in s 15(1)(b) of the Crown Minerals Act 1991, which requires every draft minerals programme to specify ". . . whether or not prospecting . . . is to be permitted". On the other hand it should be noted that in a different context the extra words are needed. An example is s 20(2) of the same Act, which says: "A . . . minerals programme shall be prepared whether or not any changes are proposed. . .". The point is that when "whether" is used as an interrogative conjunction, as it generally is, the indirect question implied may be answered yes or no without any need to add "or not".

Incidentally, the closing words of the same section (s 20(2) of the Crown Minerals Act) include another clumsy form. In the laudable pursuit of avoiding sexist language the use of "he or she" ought to be a last resort. The passage I refer to provides that the Minister "shall not grant a prospecting permit unless *he or she is* satisfied that. . .". The same meaning is conveyed, and more elegantly and concisely, if the italicised words are omitted.

Peter Haig

Admissibility of statements under the Children, Young Persons, and Their Families Act

The Public Issues Committee of the Auckland District Law Society issued a report on 20 December 1991 arising out of the discharge without trial, of Jason Irwin who had been indicted for murder. The reasons given by Mr Justice Fisher for his decision were the failure of the police to comply with the provisions of s 23 of the Children, Young Persons, and Their Families Act 1989 in a substantial number of ways. The decision was the cause of considerable media comment. This, and other aspects of the case, are referred to in the editorial for this month — [1992] NZLJ 41. Because of the importance of the issue, and for the information of the legal profession, the report of the Public Issues Committee is published in full. The views of the Public Issues Committee are its own and do not necessarily represent the opinion of all lawyers nor officially of the Auckland District Law Society. The Committee comprises a group of 13 practitioners with Miss J McCartney as the present Convenor.

The outcome of the trial of Jason Irwin on a charge of murder can be seen as unsatisfactory from all points of view. The family of Steven Slavich believe that they have been denied justice. The police have felt the need to apologise for their mistakes. Jason Irwin although acquitted has lost the opportunity to respond to the charge.

While the Te Awamutu police readily acknowledged their omissions, the President of the Police Association Mr Graham Harding reportedly described the provisions of the Children, Young Persons, and Their Families Act ("CYPF Act") as "unworkable". Criticism has been directed at legislation which allows an accused to walk free only as a result of "technicalities" and "legal niceties".

In this paper we attempt to explain what happened in the *Irwin* case and why the written statement made by Jason Irwin was ruled inadmissible. We set out the relevant provisions of the CYPF Act and examine the objects of that Act and the reasons why safeguards are required when a child or young person is the subject of a criminal investigation. We refer to comparable provisions under the recent Bill of Rights Act 1990 when an adult is suspected of crime. We then address the police complaint that the provisions of the CYPF Act hamper or render unworkable a criminal investigation.

The *Irwin* case

From our consideration of press coverage of the case, there has been a failure by the press to succinctly and fairly set out the facts of the case. It is important that the full picture be given because it is only then that the public can appreciate the strengths (or otherwise) of the case against Jason Irwin, the reasons why his statement to the police was ruled inadmissible and the effect of the Court's ruling on the Crown case.

The charge brought by the Crown against Jason Irwin was that he and another youth, Rogers, formed a common purpose to commit an aggravated robbery involving the use of firearms in order to gain the possession of a car and that Irwin knew the commission of murder was a probable consequence of the plan. At the date of the trial of Irwin, Rogers had already pleaded guilty and been convicted of murder.

The evidence to support the charge brought by the Crown was that Irwin and Rogers formed a plan that they would abscond from their homes and go off on an expedition for an indefinite period. For that purpose, Rogers stole firearms and other weapons from his father's safe. The intention was that the youths would steal a Ford Falcon from Whakatane and travel north. They would pay for their trip and food by stealing. They left their homes in Rogers' car and travelled as far as Te Aroha before running out of petrol. The deceased, Steven Slavich, stopped in his Ford Fairmont car to assist them and they were seen getting into his car. Rogers shot the deceased twice and the car moved off with Mr Slavich being dragged along the road. As the car moved off Irwin leapt from the car.

In the absence of a statement from Irwin, the Court found that on the evidence there was no logical basis upon which a jury would conclude that the elements of the Crown case had been satisfied. Those elements were first that Irwin knew that Rogers was carrying a firearm when he entered the deceased's car and that Rogers intended to use the firearm. Secondly, that Irwin knew in advance that Rogers would take the car from the deceased using violence or threats as opposed to some form of theft at some time unknown. Thirdly, that intentional or reckless killing by Rogers was a probable consequence of going with Rogers in the deceased's car.

The statement by Jason Irwin

When Irwin was taken to the police station he was interviewed for 20 minutes by Detective Constable Macky who put a series of questions and recorded the answers in his notebook. The answers included a concession by Irwin that he and Rogers had planned the exercise of taking a car and that "we had planned out we would stop him and say can you do such and such and then Shane would hold the gun up to him and then we would just drive off".

The statement was to be relied on by the Crown as evidence that Irwin knew Rogers was carrying a firearm when he entered the deceased's car, Rogers intended to use the firearm (although only to hold the gun up) and the taking of the car would involve the use of, at least, threats. However, the statement did not

show that intentional or reckless killing by Rogers was a probable consquence of going with Rogers in the deceased's car.

The Children, Young Persons, and Their Families Act

The Act became law on 1 November 1989. The offence with which Irwin was charged took place on 25 February 1991 when Irwin was 15 years old. The Act applies to children (defined as a boy or girl under the age of 14 years), and young persons (defined as a boy or girl over the age of 14 years but under 17 years).

Part IV of the Act deals with youth justice. The principles of the legislation are set out in s 208, the first section of Part IV. Those principles include:

(a) That age of itself is a mitigating factor in determining whether a sanction should be imposed, and in determining the nature of the sanction.

(b) That the vulnerability of young people entitles them to special protection during any investigation relating to the commission or possible commission of an offence by them.

The Act marks a shift from what has been described as 60 years of a paternalistic welfare approach towards a criminal justice model with the emphasis on due process and accountability.

The Act is intended to deal with young people where possible by keeping them away from entrenchment in a criminal justice system that saw them coming into contact with adult offenders. The Act is intended to emphasise the importance and responsibility of the family. However, where appropriate the Act requires that young persons be held accountable for their actions.

The provisions relating to the rights of children and young persons and police powers of arrest and questioning

Those provisions are set out in ss 214-232 of the Act. By way of summary:

Section 214 sets out in extremely careful terms the circumstances in which the police may arrest a child or young person without warrant. Whenever this procedure is adopted by an enforcement officer, he or she must furnish a written report within three days of making the arrest.

Sections 215-232 spell out in some detail the rights of children and young persons, the limitation on the powers of police to arrest and to question children and young persons and to use statements they may make as evidence in Court.

Sections 215-218 state that when a child or young person is questioned or arrested his or her rights must be clearly explained. Among other things it must be clear to the child or young person that:

(a) He or she is not obliged to make a statement.

(b) Any statement may be used as evidence in proceedings.

(c) He or she is entitled to consult with, and/or make a statement in the presence of a barrister/solicitor and/or another adult such as a parent or guardian, or another adult of the young person's choice.

Sections 221-226 provide that statements obtained are not admissible as evidence unless an officer has explained the child or young person's rights to him or her, unless the child or young person has had an opportunity to consult with a barrister/solicitor and/or other person, and unless the statement is taken in the presence of an adult who is not a member of the police.

The procedural difficulties in the *Irwin* case

The defence submitted that on analysis, of eight distinct matters requiring explanation under s 215(1) only two had been given by the end of the initial interview of Irwin at the Paeroa Police Station. They were the caution that Irwin was under no obligation to make or give any statement (the conventional adult caution) and the explanation that any statement made or given may be used in evidence in any proceedings (again the conventional adult caution). It was only after the first critical interview had been completed that any allowances were made for the youth of the accused and therefore the requirements of the Act.

The omissions included:

(a) The accused was not told that he did not have to accompany the detective to the Paeroa Police Station nor that he could have left at any time thereafter. The Court held it to be true that if the accused had declined to go with the detective he would almost certainly have been arrested. But if arrested Irwin would have been entitled to immediate explanations relating to future interviews (s 217) and would have had time to consider those before arrival at the police station.

(b) There was a failure to tell the accused before the end of the initial interview that he could at any time withdraw the consent which he had obviously given to the interview at the outset.

(c) Finally the accused did not receive any explanation that he was entitled to consult with, and/or make a statement in the presence of a barrister or solicitor and/or another adult until the initial interview was over. Even when the explanation was eventually given the Court found there were many deficiencies. The trial Judge, the Honourable Mr Justice Fisher said (at p 9):

> When the accused was told that the statement could be taken in the presence of an adult he was given the clear impression, not once but twice, that it would need to be either a lawyer or *another adult*. In fact he was entitled to both. Secondly, he was not told the range of persons contemplated in s 222. These include parents, guardians and adult members of the family. Thirdly he was not told that when the nominated person or persons arrived, he was entitled to a consultation with him, her or them before the interview was continued. Fourthly the detective may have unwittingly given the impression that a statement had to be made. In the detective's evidence he said "when I told him that the statement had to be made it was required by law to be

made in the presence of an adult, a solicitor or a lawyer". The appropriate explanations not having been given under s 215(1)(f), it follows that there was no valid waiver of consultation for the purpose of s 221(2)(b) and no valid presence for the purpose of s 221(2)(c). The social worker Mr Radford did not qualify because he had not been selected following a proper choice by the accused.

Fisher J held that there was an irrevocable non-compliance with the explanation provisions before requiring the accused to accompany and before questioning the accused. There was no proper compliance with the explanation provisions even after the initial interview. In consequence there was no compliance with the consultation and presence provisions even after the arrival of the social worker.

In the *Irwin* case the Crown did not question the various deficiencies but relied on s 224 of the Act which provides:

> No statement shall be inadmissible pursuant to s 221 of this Act on the grounds that any requirement imposed by that section has not been strictly complied with or has not been complied with at all, provided that there has been reasonable compliance with the requirements imposed by this section.

The Crown submitted that there had been reasonable compliance with the requirements of the section. In dealing with that submission Fisher J commenced with the principle contained in s 208(h) that during a criminal investigation the vulnerability of young persons called for their special protection. The Judge said it was not the letter of the rules that matters, it was whether in substance the youth understood that he did not have to accompany the officer, understood that he could consult with a lawyer and independent adult before giving a statement, understood that he could have them present and understood that he could stop the interview and leave at any time until arrested. The Judge said it must be the cumulative effect of those provisions that matters without preoccupation with any particular provision.

The Judge considered that s 224 expressly envisages the possibility that one of the requirements in s 221 may not have been complied with at all. The question was whether there had been reasonable compliance with the requirement(s) of s 221.

Fisher J said that he could envisage some cases in which preliminary deficiencies might be curable if the full statutory explanation was then given, followed by a full discussion between the accused and his or her lawyer, with the interview voluntarily continued with the lawyer and/or properly nominated adult person. But, the Judge found such was not the case with Irwin. At no stage were proper explanations given nor was there any meaningful opportunity for consultation. Those were all matters of substance and not form, and the statement was accordingly ruled inadmissible.

By way of comparison Fisher J referred to *Crime Appeal* CA 311/91 — a decision of the Court of Appeal involving the investigation of a young person in which a conventional adult caution was given. Unlike the *Irwin* case the whole of the interview took place at the home of the accused so the need for the explanation that the young person was not obliged to accompany the officer did not arise. The accused in that case had been told from the beginning that he was entitled to legal advice. He was told that his mother would remain during the interview and did so. He was told at the beginning that if he consented to give a statement he could withdraw the consent at any time. Those were important distinguishing factors from the *Irwin* case. Even then, the Court of Appeal described the case as "not far from border line" and warned that "we are far from suggesting that these sections impose mere formalities and may be disregarded with impunity by investigating police officers".

The Committee's view of the ruling in *Irwin's* case

We respectfully agree with the finding of Fisher J that breaches of the provisions of the Act in the *Irwin* case were individually significant and cumulatively overwhelming. It is our view that this case is far from one where a statement was ruled inadmissible because of "technicalities" or "legal niceties". In our view any reasonable person considering the mandatory requirements of s 215 and comparing those requirements to what in fact happened in Jason Irwin's situation would come to the view that he did not receive the information that he was entitled to. He was never made aware of his rights in respect of accompanying the officer, was not made aware that he was able to withdraw his consent to giving a statement at any time and was not made aware that he was entitled to consult a barrister or solicitor and/or a person nominated by him. In the absence of that information it cannot be said that any concession was made to the youth of the accused and his need for special protection in an investigation.

The reasons for special safeguards when a young person is being investigated

If anyone should continue to question the need for special protection of young persons when interviewed by the police we would refer them to this Committee's 16 June 1980 paper dealing with the withdrawal of murder charges against two 15-year-old boys in respect of the death of a man in Gribblehurst Park, Mt Albert (the Gribblehurst Park case). In that case two boys had confessed their involvement in the murder in written statements obtained from the boys in the absence of their parents. Those statements were later confirmed by the youths in the presence of their parents. Their confessions together with certain preliminary scientific evidence formed the basis of the decision to charge the boys with murder. Subsequently it was found that the scientific evidence did not in fact support the murder charges and further that the statements also contained factual inconsistencies which raised doubts as as to the boys' involvement. The Commissioner of Police commented that the (later) police enquiry revealed that some members of the police involved "had in some respects not complied with the principles to be observed when

questioning suspects".

The 1980 paper considered the question of just what were "the principles to be observed when questioning suspects particularly suspects who are not adults". The paper was of course written well before the enactment of the CYPF Act. This Committee even then considered that it was necessary to go further than merely laying down guidelines for the police when suspects under investigation were not adults. The paper recorded:

> The chilling and intimidatory effect on a youthful suspect of apprehension and subsequent questioning by a large policeman cannot be underestimated. This is clearly demonstrated by the present case in which, on the basis of the Commissioner's denial of threats and assaults, two 15-year-old youths were induced to sign false confessions of murder simply under pressure of police questioning and without the making of any threats or assaults against them.

In that paper the Committee called for clear statutory rules to be complied with when the police are interviewing youthful suspects. The paper went on to consider the argument that such statutory rules may make the work of the police in apprehending youthful suspects more difficult. However, it recorded that the police in their own handbook of general instructions had to a large extent recognised the need for such requirements. The paper concluded that while the safeguards might involve the occasional delay and frustration for the police they would not prevent the police obtaining a confession of guilt if the proper procedures were followed and would also prevent innocent youths confessing to crimes they had not committed.

The police procedure in dealing with statements and confessions from young persons prior to CYPF Act. Prior to the CYPF Act in the absence of any specific procedural safeguards to protect youth suspects, the police laid down certain self-imposed standards contained in General Instructions issued by the Commissioner of police pursuant to the Police Act 1957. The relevant General Instructions provide:

Interviewing Children and Young Persons

(1) In an interview with anyone under 17 years of age, extreme care must be exercised so that an untrue admission of guilt or incorrect information is not obtained on account of youth or lack of maturity. Any admission must be carefully scrutinised before acceptance, and corroboration should be sought.

(2) In an interview with a child under the age of 14 years, a parent, guardian, or teacher must be present, unless there is very good reason to the contrary. Only in unavoidable circumstances should such a child be taken to a police station.

(3) An interview with anyone of or over the age of 14 years and under 17 is, where practicable and having regard to the particular circumstances, to be carried out in the presence of a parent, guardian or teacher.

(4) When it is necessary to interview pupils at a school the police must be completely in plain clothes, unless in the particular circumstances this is impracticable. The headmaster should be asked to arrange the interview and be requested to be present throughout.

(5) Where anyone under 17 years of age is interviewed without a parent or guardian being present, a parent or guardian is to be promptly informed. In doing so the feelings of the

Police powers and control

Upon one view, it is the contradictory and apparently unattainable obligations cast upon police and other investigators which has led them into bending and twisting rules with consequent risks to the safety of convictions which follow. In 1978 the then Metropolitan Police Commissioner (Sir David Macnee) told the English Royal Commission on Criminal Procedure that the reason for abuse of police authority was the artificiality of some of the rules imposed upon police by the law. He blamed Parliament for failing to give police the power they needed:

> [M]any police officers have, early in their careers, learned to use methods bordering on trickery or stealth in their investigations because they were deprived of proper powers by the legislature. Most frequently criticised is the denial of any right to arrest a person for interrogation and the obligation imposed by law to take a suspect, reasonably suspected for having committed an offence, as soon as practicable before a justice. How, police ask, can they perform their duties for society under such absurd constraints? Yet once an officer sworn to uphold the law, begins to twist and bend the law, cynicism and manipulation have set in which may pervert that officer's performance of other duties and undermine the integrity of his or her work.
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> That is why the Australian Law Reform Commission in a report of 1975 proposed a new statement of police procedures, improved training of police and a more realistic control of police activities, subject to more modern and appropriate checks and balances. The police welcomed the *powers*. They opposed bitterly the *controls* and *checks*. Although Bills to implement the report were twice introduced into the Australian Parliament, neither passed into law. As recently as April 1991 another Bill was enacted which is partly derived from the Law Reform Commission's report. Public criticism of this new measure claims that the law makers have caved in entirely to the police objections. Certainly, a number of old common law rules have been overthrown.

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parent or guardian should be respected, and all information not contrary to the interests of justice or the person interviewed is to be given. The police should offer any appropriate advice or assistance.

Those general instructions were a code of conduct for the police but because they did not have the force of law they had not always been adhered to in practice.

The Police National Headquarters Handbook

By October 1989 (that is prior to the Act coming into force) the Police National Headquarters had already published a handbook entitled "Practice and Legal Notes for Children, Young Persons, and Their Families Act". Pages 66-75 are the relevant pages of the handbook and give a good indication of the police's attitude. In those pages the police themselves acknowledge that children and young persons are less likely than adults to be aware of their rights and of the resources available to them, that the officer undertaking questioning may be seen as an authority figure and that the young person may feel pressured to make statements which an older person would not make. It is recorded that there have been instances where young people have confessed to crimes which they did not commit. The handbook sets out in diagrammatic form the rights to be explained to children or young persons before they are questioned in relation to any offence (s 215), the rights to be explained to children or young persons when a decision is made to charge them (s 216) and the rights to be explained to children or young persons upon their arrest (s 217). It is recorded in the handbook that rights must be explained to children or young persons in both the manner and language that is appropriate to their age and level of understanding. A further diagram shows the basic provisions relating to admissibility of statements made by a child or young person in a Court.

The handbook refers to the "reasonable compliance" provisions of s 224 in the Act, but records "however, if past experience with such provision in other Acts is any indication, it is likely that the Court will take a narrow interpretation of what is required and exclude statements if the procedures are not followed to the letter of the law."

The police complaint that the provisions of the CYPF Act are unworkable

In our view the provisions are clear and comprehensible. In interviewing a youth, it would not be unduly difficult for a police officer to work his or her way through the provisions particularly with the use of the Police Handbook. It is very noteworthy that in the *Irwin* case the police officer did not say he could not comprehend the provisions relating to interviewing young persons suspected of crime. The officer acknowledged that he knew of the Youth Justice Checklist – Steps for Investigation Form but did not have one with him. He said that the Paeroa Police Station was not unfamiliar to him but that he did not know the location of all documents at the station.

It is further noteworthy that the provisions of the CYPF Act have been considered previously in a judgment namely *R v Fitzgerald* T183/90 (unreported, High Court, Auckland, Thorp J). That case dealt with the admissibility of a statement made by a young person where the objection taken was that the police officer did not inform the accused, first, that he had the right to have a private discussion with a lawyer and/or an adult of his choice before the commencement of the interrogation and, second, that he had the right to have both of those persons present during the interrogation. In *Fitzgerald* Thorp J said that once there had been substantial non-compliance with the provisions of s 215 it would usually be difficult or impossible to prevent it from prejudicing any subsequent interview. In that case the statement was ruled inadmissible. The judgment of Thorp J in *Fitzgerald* was delivered on 30th October 1990. Considerable publicity was given to it and it must be assumed that the police were aware of the decision. It is (as Fisher J remarked in his judgment in the *Irwin* case) surprising and regrettable that over a year after the Act came into force and after the publicity given to decisions such as *Fitzgerald*, the officer concerned in the *Irwin* case should have fallen so far short of the requirements of the Act in so many respects, in a matter which was so patently serious.

However, we do not really understand the police to say that they are unable to comprehend or comply with the provisions. Their real concern appears to be that complying with the requirements results in guilty youths avoiding conviction. In response we point out that our law recognises certain fundamental rights of any person (including young persons) suspected of crime, including the right to remain silent.

It is useful to compare the provisions dealing with the admissibility of statements from children with the provisions for admissibility of a statement when it is an adult who is the suspect. There are the Judges Rules, applicable in this country, which lay down certain guidelines – which fall short of being binding rules of law – for the questioning of all suspects, adult and children alike. Those guidelines include the giving of a formal caution once the police officer concerned has made up his mind to charge a suspect, and a prohibition against cross-examination of suspects in custody.

The recent New Zealand Bill of Rights Act 1990 provides an affirmation of the basic rights of people in New Zealand. The Court of Appeal has held that the correct judicial response can only be, generally, to give the Bill of Rights Act primacy, subject to the clear provisions of other legislation.

Section 23 of the Bill of Rights Act provides:

23 **Rights of Persons Arrested or Detained** —

1 Everyone who is arrested or who is detained under any enactment –
   (a) Shall be informed at the time of the arrest or detention of the reason for it; and
   (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
   (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

2 Everyone who is arrested for an offence has the right to be charged promptly or to be released.
3 Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a Court or competent Tribunal.
4 Everyone who is—
(a) Arrested; or
(b) Detained under any enactment — for an offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
5 Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

As stated, prior to the Bill of Rights Act 1990 the question of admissibility of a statement was determined according to the Judge's discretion having regard to questions of fairness. The Judges Rules may at least to some extent have been superseded by the New Zealand Bill of Rights Act which Act provides wider and simpler measures.

Recent cases from the Court of Appeal (*R v Kirifi* CA 252/91 and *Crime Appeals* 227/91 and 228/91) deal with the question of the admissibility of a statement by the accused in circumstances in which the provisions of s 23 of the Bill of Rights Act were not complied with. In *Crime Appeal* 227/91 the accused had been confronted by a detective who ran into his home, immediately told him he was to be charged with aggravated robbery and administered the standard caution. The detective acknowledged that formal arrest was delayed by the detective to avoid telling the accused of his rights under the Bill of Rights Act because the detective wanted to get a confession. The Court of Appeal found that to admit the statement subsequently taken from the accused would be to countenance unacceptable conduct and disregard the accused's rights under the Act. The statement was ruled inadmissible.

In *Crime Appeal* 228/91 the accused had indicated that he wished to have a lawyer present when he was interviewed on a second occasion. When this was mentioned in the police car the questioning was correctly discontinued however at the police station it could not be excluded that the accused was subjected to unfair pressure by reference that in the event he did not give a statement he would "go over to the other side" (to the cell). The accused had been told that he was going to be charged with aggravated robbery and was clearly to be held at the police station after being taken there at 4 am. The Court of Appeal held that in the absence of formal arrest, there was a risk that the accused's wish to have a solicitor present was overridden, and under the Act the evidence in the statement subsequently made was excluded.

It follows from consideration of s 23 of the Bill of Rights Act that if Jason Irwin had been an adult there would have been substantial grounds for argument that his rights had been violated in that he had not been informed of the right to consult and instruct a solicitor without delay.

Conclusions

1 The provisions of the CYPF Act provide statutory safeguards for a child or young person suspected of crime. Those safeguards are necessary because any investigation or interview situation is frightening and inherently coercive. Children or young persons, because of their age, are vulnerable to suggestion, pressure and intimidation, cannot be expected to be aware of their rights and cannot necessarily be expected to respond competently or even truthfully to questions from a police officer.

2 As to the allegation that Jason Irwin walked away as a result of "technicialities" or "legal niceties", we trust that the full exposition of the facts and judgment shows that the breaches were not minor or immaterial but in fact were overwhelming. Jason Irwin was not told of basic rights available to both adult and child suspects. Those rights include the right to consult with a lawyer without delay and to be informed of that right. Even had Jason Irwin been an adult, on the basis of non-compliance with requirements under the Bill of Rights Act 1990, there would have been a respectable argument that the statement should have been ruled inadmissible.

3 The public should not lose sight of the fact that the person who pulled the trigger of the gun that shot Steven Slavich has been convicted of murder. We consider that, in the press response to the dismissal of the charge against Jason Irwin, many may have lost sight of the fact that the police case against Irwin was not strong and in fact, in the absence of a statement taken without compliance with statutory safeguards for the protection of a young person, there was insufficient evidence to put the charge of murder to the jury.

4 Aside from inducing some delay, the provisions are not in the least unworkable. It is a fundamental right of a person suspected of crime to remain silent. Furthermore, if in a particular case the evidence of commission of a crime by a suspect is so meagre that the police have to rely on a confession of guilt as the only means of securing a conviction, that is precisely the situation where there is the greatest risk of a child or young person being pressured or intimidated into a false or inaccurate admission of guilt and precisely the situation where one would expect compliance with statutory safeguards.

5 It is unsatisfactory that the interviewing officer was not able readily to locate a checklist which would have set out steps for investigation of young persons. It is perhaps surprising that the checklist appears to be held at police stations and is not both accessible and transportable. After all, many interviews of young persons would take place outside the police station. There are, we suggest, simple steps open to the police which would readily avoid these problems in the future. For example, the police could reduce the checklist to a simple card format that could be carried about by individual officers and be readily available for use when a young person is being investigated. □

Turnovers and road blocks

A report of the Public Issues Committee of the Auckland District Law Society.

A police turnover is the stopping and searching of a vehicle to seek evidence of a crime. Road blocks occur when police arbitrarily stop all cars at a particular place. Sir Peter Quilliam, as Police Complaints Authority, has pointed out that there is no lawful authority for the police to do either of these things so as to interfere with the public right to use the Queen's highway, the right to travel freely from place to place. Indeed it could be argued that the police obligation is to ensure that this right is observed. The Public Issues Committee expresses concern over the issue, and notes that having inherited certain rights and freedoms, we should treasure them, and not treat them lightly. Rights in a free society are, and are intended to be, restrictions on the executive arm of government, whether in uniform or sitting behind a bureaucrat's desk. A balance of freedom and of law and order has to be maintained. This report is concerned with preserving that balance. The report, like the preceding one, reflects the opinions of the Public Issues Committee members only.

In his annual report to the Minister of Justice, the Police Complaints Authority, Sir Peter Quilliam, referred to the legality of police practice in respect of "turnovers" and road blocks.

The term "turnover" refers to the situation where a motor vehicle is stopped when a member of the police suspects it may contain evidence of a crime. The procedure is apparently a common one and usually involves a search of the vehicle.

In his report, Sir Peter Quilliam (a retired High Court Judge) concluded that:

1 Members of the police are both trained and encouraged to carry out turnovers.
2 The practice is "undoubtedly good policing" because it frequently produces evidence of criminal activity and results in arrests being made.
3 Unless it is carried out under the authority of specific (and very limited) statutory provisions, the practice is unlawful.
4 The police should seek a statutory amendment to enable them to resume the practice, at least in the case of suspected stolen property.
5 For much the same reasons as apply to turnovers, road blocks are also unlawful.
6 Because of the obvious need, in certain circumstances, to have road blocks, the police should seek statutory authority for this purpose also.

The *New Zealand Herald* subsequently printed a report (January 28, 1992) under the headline "Views differ on searches" in which two senior police officers expressed their views. The Hutt Police District Commander was reported as saying that his officers would seek drivers' permission to spot check vehicles and although turnovers were not lawful, where the consent of the motorist was apparent there was no problem. The Herald report said that it would be "business as usual" for his officers, with the proviso that they could search vehicles only after obtaining the drivers' consent.

The other Wellington officer was reported as saying that it was important to look at the need for the police to do their job when considering limits to their rights and if the circumstances were such that an offence had been committed then he was not going to stand on the side of the road with his hands in his pockets and let a suspect go because of legislation. He allegedly said "if it gets thrown out in Court it gets thrown out in Court, but at least we have done our job".

In a later *Herald* report (January 29, 1992) under the heading "Anger at police attitude", Sir Peter Quilliam was reported as saying that he was disappointed by police comments about his findings on police powers to stop cars and that disciplinary action should be taken against the police officer who said he would not allow criminal suspects to escape because of limits on police powers.

Sir Peter was further reported as saying that there had been a misunderstanding about recommendations he made to Parliament in the annual report. He pointed out that under present laws police could stop drivers using legislation such as the Misuse of Drugs Act and the Firearms Act, but only if they had reason to believe that the occupants were believed to be involved in crimes relating to those statutes. Police could not stop vehicles if they suspected the occupants were involved in general criminal activity, which was the case with "turnovers".

Police practices in respect of turnovers and road blocks, and the remarks reportedly made by senior police officers, raise legal issues of public importance. Section 18 of the New Zealand Bill of Rights Act 1990 provides that everyone lawfully in New Zealand has the right to

freedom of movement in New Zealand. Section 21 of the same Act provides that everyone has the right to be secure against unreasonable search or seizure whether of the person, property, or correspondence or otherwise. Section 22 provides that everyone has the right not to be arbitrarily arrested or detained. Section 23 provides that everyone who is arrested or detained under any enactment is entitled to be informed at the time of the arrest or detention of the reason for it, to consult and instruct a lawyer without delay, to be informed of that right, to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

It will be immediately apparent that turnovers and road blocks impinge upon the fundamental democratic rights of every citizen which are recognised and affirmed in the New Zealand Bill of Rights Act 1990. Section 5 of the Bill of Rights Act provides that the rights and freedoms contained in the Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In the present social climate, with epidemic levels of violent crime, it is all too easy to veer in the direction of concluding that the preservation of democratic rights serves only to protect criminals, that the police need all the support they can get in the fight against crime and, therefore, that the police should be given whatever powers they feel they need to carry out their job effectively.

While acknowledging that the police have a difficult task, and that the escalation in violent crime is a matter of grave social concern, it is appropriate nevertheless to sound a warning. For the most part, the rights recognised in the Bill of Rights Act are not recent inventions. They are fundamental rights which have been recognised gradually by the law over several centuries. Recent events in Europe bear witness to the struggles out of which democratic rights have almost always been won. The great irony of our society is that, having inherited those rights from those who fought to secure them, we tend to treat them very lightly and do not treasure them as we should. Thus, even in the report by Sir Peter Quilliam, the impression could be gained that the passage of legislation to authorise turnovers and road blocks might occur almost as a matter of course.

Under the headline "Quick closure for loophole" the *New Zealand Herald* of 27 January 1992 reported that the Government was likely to seek an early change in the law to close the "legal loophole". The Minister of Justice was reported as saying that the situation would "have to be tidied up very smartly indeed" and that "although the law could not be changed until Parliament resumed after its summer break on March 3, he would be surprised if any MPs objected to formalising powers which the police had long been assumed to have".

That this should not happen is illustrated by s 7 of the New Zealand Bill of Rights Act which provides that where any Bill is introduced into the House of Representatives, the Attorney-General is required to bring to the attention of the House any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights Act.

No doubt there are certain circumstances in which road blocks are appropriate, for example, where the police are searching for an escaper and have good reason to believe that the escaper is in the area or where a bank robbery has recently taken place.

There is in fact, already a statutory provision which enables the police to close roads temporarily. That provision is s 342A of the Local Government Act 1974[1] which reads as follows:

> **342A. Temporary closing of roads by Police** – (1) Where the senior member of the Police for the time being in charge at any place has reasonable cause to believe that –
>
> (a) Public disorder exists or is imminent at or adjacent to that place; or
> (b) Danger to any member of the public exists or may reasonably be expected at or adjacent to that place; or
> (c) An indictable offence not triable summarily under section 6 of the Summary Proceedings Act 1957 has been committed or discovered at or adjacent to that place, –
>
> he may temporarily close, for such period as is reasonably necessary, any road at or leading to or from or in the vicinity of that place, or any part of that road, to all traffic or to any specified type of traffic [(including pedestrian traffic)].
>
> (2) In this section the term "road" includes a motorway, within the meaning of [the Public Works Act 1981], a private road, and a private way.

This section appears to cover the situation where a dangerous escaper is believed to be in a particular area and where a serious offence such as bank robbery ocurs in or near a particular place. It does not confer a power to search vehicles.

It may well be that there is justification, in a narrow range of carefully defined situations, for the police to have additional powers to stop and search motor vehicles. But it would be a grave mistake, and a serious derogation from basic democratic rights, to conclude that the police should be empowered to carry out turnovers as a matter of course.

It is wrong and very misleading for the situation to be described as a legal loophole. It is also wrong to say that the police have long been assumed to have the powers in question. Although the police may have assumed that they had such powers, constitutional lawyers have always been alert to the limitations on official power in the area of detention, search and seizure. Recent papers in which this Committee has expressed concerns on similar issues include a paper entitled "Entry of Traffic Officers Onto Private Property" (September 26, 1989) and a paper entitled "Schools and Searching for Drugs" (July 18, 1991).

The idea that this issue will be treated by Parliament as a mere legal loophole which needs to be closed as quickly as possible is alarming. The issue is an important one which affects and impinges upon basic constitutional rights and freedoms. If the law is to be changed, that

should be done only after full opportunity for public debate and in accordance with the close scrutiny of Parliament envisaged by s 7 of the Bill of Rights Act. If the law is to be amended then any such amendment should be limited so as to interfere as little as possible with the rights and freedoms recognised in the Bill of Rights Act.

In respect of the comments by the two police officers we make the following observations:

1 The Hutt Police District Commander appears to have missed a critical point made by Sir Peter Quilliam. It is certainly true that if the driver of a motor vehicle consents to the vehicle being searched, *the search* will be lawful. But usually, before such consent may be obtained, it will be necessary for the police to stop the vehicle. The point made by Sir Peter Quilliam is that the police do not possess the power *to stop the vehicle* unless they are acting within the scope of some specific statutory provision. Although the Transport Act 1962 contains a provision which enables police (and traffic officers) to stop vehicles, that provision can only be utilised for the purposes of the Transport Act.

2 With regard to the other Wellington officer's comments to the effect that he would not let the fact that turnovers are unlawful get in his way, we express extreme concern. The whole purpose of the police force is to enforce the law. Police officers swear to uphold the law. When police officers take the law into their own hands they lose their claim to legitimacy and forfeit the respect which ought normally to be shown towards them as law enforcement officers. Frustrating though it may be to be subject to limitations, particularly when facing what may sometimes seem like overwhelming odds in the fight against crime, no police officer can justify breaking the law in order to enforce it. To take an extreme example, the reputation of the British police has clearly been damaged as a result of misconduct resulting in dubious confessions in the cases concerning the Birmingham Six, the Guildford Four, the Maguire Seven, the Winchester Three and the Tottenham Three. (See the article by Nicholas Cowdery QC, "Not Just a Number" [1991] 10 *Australian Law News* 13.) Such cases also illustrate the point that police misconduct may backfire by causing charges to be dismissed in circumstances where a prosecution might otherwise have been successful.

Conclusions

It has been said that turnovers are good police practice because they frequently produce evidence of criminal activity and result in arrests being made. It is submitted that the logic behind this reasoning should be analysed carefully. By the same logic all rights of privacy and freedom from unreasonable search and seizure should be dispensed with, because by that means many more crimes would be detected. There can be no doubt that, if every household in New Zealand was subject to search at the whim of a police officer, or because (adapting the words of the Hutt Police District Commander) a householder was seen to be acting "fidgety", huge numbers of crimes would certainly be detected. But society would pay an unacceptable price because each one of us would be required to sacrifice our valuable personal freedom and privacy.

It is simply not right to say that the end justifies the means and thereby to sanction a departure from the fundamental constitutional principle of the rule of law. Neither is it right to treat an infraction of basic human rights as a legal loophole.

For these reasons we urge that the whole issue be subjected to intense scrutiny and debate before any attempt is made to change the law. □

1 The Committee acknowledges the assistance of Anthony Rogers, barrister, in drawing our attention to this provision.

Confessions and Australian judicial directions

The contest established by a challenge to police evidence of confessional statements allegedly made by an accused while in police custody is not one that is evenly balanced. A heavy practical burden is involved in raising a reasonable doubt as to the truthfulness of police evidence of confessional statements, for, in the circumstances which invariably attend that evidence, a reasonable doubt entails that there be a reasonable possibility that police witnesses perjured themselves and conspired to that end. And, as is made clear in *Wright* (at 317) and *Carr* (CLR at 337-8), the contest is one which may entail other forensic constraints or disadvantages. Thus, the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and, accordingly, it is necessary that they be instructed, as indicated by Deane J in *Carr* (CLR at 335), that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated. Within the context of this warning it will ordinarily be necessary to emphasise the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth. And, of course, the trial judge's duty to ensure that the defence case is fairly and accurately put will require that, within the same context, attention be drawn to those matters which bring the reliability of the confessional evidence into question. Equally, in the context of and as part of the warning, it will be proper for the trial judge to remind the jury, with appropriate comment, that persons who make confessions sometimes repudiate them.

Majority Decision
Mason CJ, Deane, Gaudron & McHugh JJ
McKinney v R (1990) 98 ALR 577, 581

Correspondence

Dear Sir

The Unit Titles Act 1972 — Airspace and common property

In an article in the December 1991 issue of the *New Zealand Law Journal,* David P Grinlinton discussed *Disher v Farnworth and Godfrey* (High Court, Tauranga, 3 October 1990, CP 72/89, Anderson J). I am surprised that no one drew to Mr Grinlinton's attention my article on this case published in the September 1991 issue of *Butterworths' Conveyancing Bulletin* and entitled "The Unit Titles Act 1972 — Airspace and Views".

The authors of both articles seriously questioned Anderson J's conclusion that airspace above a unit was not common property. Grinlinton concluded that ". . . any part of the land including substrata and air space in a unit title development that is not designated as a principal or accessory unit on a unit plan is necessarily common property whether or not labelled as such on the unit plan". With respect, this conclusion is not correct. In the *BCB* article it was said that:

> It is axiomatic that the property which was part of the original fee simple or leasehold estate before subdivision under the Unit Titles Act 1972 must, after that subdivision, either have become part of a unit or be part of the common property. The only exception is a future development unit (Unit Titles Amendment Act 1979, s 9). Only some parts of that common property are capable of measurement or will be shown on the unit plan. Nevertheless, it is obvious that the airspace above the units, which cannot be measured and is probably not shown on the plan, must be part of the common property. It was contained in the relevant title before the subdivision, which is now cancelled, and, if it is not to be real property still vested in the subdividing owner but for which there is no certificate of title, it must be common property within the supplementary record sheet which is filed in the same manner as a certificate of title and is numerically consecutive in the register after the certificates of title for the principal units.

Even after he had held that the airspace above unit B was not common property, Anderson J might well have come to the conclusion that the case turned on the principle of indefeasibility. One cannot take title to land transfer land by adverse possession. Irrespective of whether or not the airspace is common property, it is land transfer land (UTA 1972, s 3), and the defendants, by building into the airspace were encroaching upon land that was not theirs. By defending the action, the proprietors of unit B were in effect trying to take title to land transfer land by adverse possession. Section 64 of the Land Transfer Act 1952 protects the title of the registered proprietor of the airspace. With respect, the proper conclusion surely is that, as the airspace is common property, and as any right of action with respect to the common property is vested in the body corporate (UTA 1972, s 13(2)), the encroachment was a trespass into property controlled by the body corporate, which should have been joined as a party to the proceedings.

The problem then arising is, how does one justify an alteration to the title boundaries in the circumstances of the case? It is suggested that the following was a possible solution. Section 129 of the Property Law Act 1952 empowers the Court to grant relief in cases of encroachment, including an order vesting in the encroaching owner any estate or interest in the land encroached upon. Pursuant to that, the Court could order that the body corporate lodge a plan of redevelopment under s 44 of the Unit Titles Act 1972, whereby the upper limit of principal unit B is raised to accommodate all the roof and the "lookout", and that all the associated costs, such as the registered valuer's fees for a new schedule of unit entitlements, were to be paid by Mrs Disher.

Mr Grinlinton noted that the upper limit of the relevant unit "purported to impose a height restriction" upon that unit. With respect, it did not "purport to impose", it statutorily gave a height limit to that unit.

Mr Grinlinton also erred when he stated that ". . . if all principal and accessory units are clearly identified, the common property is necessarily what is left due to the definition of common property in s 3(1)(b)." As mentioned above, this conclusion omits reference to any future development unit which is defined as land that is not common property or part of the body corporate (Unit Titles Amendment Act 1979, s 9).

Perhaps it is appropriate to conclude with an observation made in 1974 by Mr P Blanchard who said that:

> the only factors holding back the spread of unit titles for the moment are the existing systems . . . and the failure of the professions, principally the lawyers, to get to grips with the legislation and make it work. All too often I have heard from a lawyer who has given passing scrutiny to the Unit Titles Act the comment that it is too complicated and will not work. I suggest that, . . . the legislation is relatively simple in its application to freehold titles.

Michael Chapman-Smith
Body Corporate Administration Ltd
Auckland

Repudiated confessions

. . . I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession:— a desire which vanishes as soon as he appears in a court of justice.

Cave J
R v Thompson [1893]2 QB 12, 18

"Security" of gold: *R v Smith*

By Andrew Simmonds, Solicitor of Wellington

The author is a staff solicitor at Rudd Watts and Stone in Wellington and is currently on secondment to the Securities Commission. *In this article he discusses the recent decision of Wylie J in* R v Smith & Ors, *considering, amongst other things, the application of the Securities Act 1978 to Goldcorp's non-allocated bullion business. For the sake of clarity it is emphasised that his views do not necessarily represent the views of the Commission or any of its members.*

The recent decision of Wylie J in *R v Smith & Ors* [1991] 3 NZLR 740 is the first reported New Zealand decision involving a detailed consideration of the definition of "security" contained in the Securities Act 1978. Wylie J's judgment raises a number of interesting issues for consideration.

Background

The case arose from the defendants' involvement as directors of Goldcorp Exchange Limited ("Goldcorp"). Charges were brought against Mr Smith under s 250(c) of the Crimes Act 1961 and against Mr Smith, Mr Bosson and Mr Tunnicliffe under s 58(1) of the Securities Act 1978. The charges under the Securities Act were considered separately because the defendants applied under s 347 of the Crimes Act for an order that no indictment be presented and for discharge in respect of those charges.

Section 58(1) of the Securities Act provides:

> Where an advertisement that includes any untrue statement is distributed –
>
> (a) The issuer of the securities referred to in the advertisement, if an individual; or
> (b) If the issuer of the securities is a body, every director thereof at the time the advertisement is distributed –
>
> commits an offence.

The main argument raised by counsel for the defendants was that Goldcorp had not offered "securities" to the public.

The charges were founded on brochures and a pamphlet inviting members of the public to purchase bullion from Goldcorp. The advertising material described two purchase methods. Purchasers could simply buy bullion and take immediate delivery, or alternatively they could "purchase" what the company described as "non-allocated metal". The second method gave rise to the charges against the defendants.

Non-allocated bullion sales were described in Goldcorp's advertising material in terms such as these:

> Non-Allocated Metal
>
> This method is preferred by the majority of investors and is recognised as the most convenient and safe way of purchasing metal. Basically, you agree to buy metal at the prevailing market rate and a paper transaction takes place. [Goldcorp Exchange Limited] is responsible for storing and insuring your metal free of charge and you are given a "Non-Allocated Invoice" which verifies your ownership of the metal. In the case of gold or silver, physical delivery can be taken upon seven days notice and payment of nominal delivery charges . . .
>
> The advantages of non-allocated metal are many:
>
> * . . .
> * You have no storage or insurance problems.
> * You can take physical delivery of your metal if desired . . .

In earlier civil proceedings Thorp J gave extensive consideration to the legal nature of the transactions entered into by "purchasers" of non-allocated metal. (Proceedings brought by the receivers of various Goldcorp companies are reported as *Re Goldcorp Exchange Limited (in rec)* (1991) 5 NZCLC 66,872, while proceedings brought by various investors are reported under CP 498/89 (Christchurch Registry) and CP 21/88 (Auckland Registry), judgment 17 October 1990). Thorp J concluded that, regardless of what investors thought they were getting by buying bullion on an unallocated basis, the contracts entered into between investors and Goldcorp were agreements for the sale of unascertained goods for future delivery. (See Thorp J at p 95 and Wylie J at p 67, 123.) Sales of unascertained goods are governed by s 18 of the Sale of Goods Act 1908. Under that section no property in unascertained goods passes "unless and until" it is ascertained. A purchaser of non-allocated bullion therefore had no legal title to, or equitable interest in, bullion held in Goldcorp's vaults unless specific bullion had been identified and set aside. In practice, ascertainment rarely occurred.

Thorp J's findings of fact were accepted by Wylie J and counsel in the case under consideration. After discussing the provisions of the Securities Act and a number of Australian authorities, Wylie J concluded that because purchasers did not obtain any legal or equitable interest in Goldcorp's bullion, no "security" had been offered to the public. The charges under the Securities Act were therefore dismissed.

Wylie J's interpretation of the definition of "Security"

Section 2 of the Act states that "security" means:

> . . . any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person; and includes –
>
> (a) Any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by, any person (whether or not the interest or right is secured by a charge over any property); and
>
> (b) Any renewal or variation of the terms or conditions of any existing security.

The Act divides "securities" into three classes: "equity securities"; "debt securities"; and "participatory securities".

The question which arose was whether what was offered was an ". . . interest or right to participate in any capital, assets, earnings, royalities, or other property of any person".

Counsel for Mr Tunnicliffe (Dr Farmer, QC) submitted that the "nature of the transactions was such that they conferred on the purchasers mere contractual rights and gave them no proprietary interest in any property of the company and no right to participate in any property of the company in the sense in which that phrase is used in the Securities Act" (p 67, 124).

Counsel for the prosecution (Mr Panckhurst) invited Wylie J to adopt the "Australian approach" and give the terms "interest" and "right to participate" a broad interpretation according to "common parlance" (p 67, 127).

Two questions arose. Was there an *interest* in the "capital assets, earnings, royalties, or other property of any person"? If not, was there a *right to participate* in the "capital assets, earnings, royalties, or other property of any person"?

1 "Interest"

Dr Farmer's submission, paraphrased by Wylie J, was that:

> . . . there was no warrant for giving the term "interest" in the New Zealand Act any wider construction than its ordinary legal sense and that it would be wrong to import into it any wider sense which has been given by the Australian legislation and cases relying on meanings which this country's Legislature has not chosen to adopt. (p 67, 125)

Wylie J accepted that submission, stating that in contrast to the use of the term "interest" in the Australian legislation, in the Securities Act the term is used in a legal sense ". . . and should be given its legal meaning in the absence of any expanded definition" (p 67, 127). Accordingly, bare contractual rights, with nothing more, could not amount to an "interest" in the property of a person sufficient to amount to a "security" within the Act.

Wylie J based his conclusion on a comparison of the New Zealand definition of security with the corresponding Australian definition. His Honour considered that:

(a) the Australian legislation contained an expanded definition of the term "interest" which was not present in the New Zealand legislation and accordingly that term, as it is used in the Securities Act, should be interpreted according to its (strict) legal meaning; and
(b) the Australian cases on the (expanded) Australian definition indicated that contractual rights without more could not amount to an interest in property for the purposes of the Australian definition.

It is the writer's contention that neither of those factors justify the weight which Wylie J places on them. Contrary to Dr Farmer's submission, the Australian legislation does not contain an "expanded definition" of the term "interest"[1] and the comments cited by Wylie J from the Australian cases are largely dicta which are contradicted by dicta in other cases.

(a) Australian definition of "Interest"

Wylie J states (p 67, 124):

> The Securities Act does not contain any definition of "interest". This may be contrasted with the corresponding Australian legislation where, in a number of contexts, the term is given a wide meaning.

And (p 67, 127):

> I think Mr Farmer is right when he submits, in effect, that "interest" in the New Zealand definition of "security" is being used in a legal sense and should be given its legal meaning in the absence of any expanded definition.

However, the Australian legislation has never contained a definition of what amounts to an "interest" in the sense that the term is used in the New Zealand definition of "security". The definitions of "interest" and "prescribed interest", referred to by Wylie J, were only names for particular types of "security".

Wylie J quotes the definition of "participation interest" contained in both the Australian Securities Industry Act 1980 and the Companies Act 1981 (p 67, 124). Those Acts were in force in the Australian Capital Territories, and were uniformly adopted by the remaining States as a national code.

Prior to the adoption of the National Companies and Securities Code, each State administered its own companies and securities legislation (although in most respects State legislation in this area was fairly consistent). State legislation contained definitions of the term "interest", which (with some modification) became the definition of "participation interest" in the national code.

A number of cases arose concerning the definition of "interest" as it appeared in State legislation. A good example is *Wade v A Home Away Pty Limited and Ors* [1981] VR 475; (1980) CLC 40-649, a decision of the Supreme Court of Victoria, which was cited by Wylie J (p 67, 124). In this case, the Victorian Commissioner for Corporate Affairs had obtained a Court Order under the Victorian Securities Industry Act 1975 preventing the appellant from offering timeshare weeks to the public.

The basis for the order was that the company was carrying on the business of "dealing in securities" without a dealer's licence, which was a breach of the provisions of ss 32

and 125 of the Securities Industry Act 1975 (Vic). The term "securities" was defined in the Securities Industry Act to include any "interest" as defined in s 76(1) of the Companies Act 1961. The Companies Act defined an "interest" as:

> . . . any right to participate, or any *interest* –
>
> (a) *in any profits, assets or realisation* of any financial or business undertaking or scheme whether in the State or elsewhere . . . (emphasis added)

The term "interest", as it is used in that definition, is *undefined.*

When that part of the Australian definition is compared with the New Zealand definition of "security" a strong similarity is obvious, the relevant part of the latter being:

> . . . any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person.

Accordingly, the Australian cases which consider whether particular legal relationships give rise to an "interest" in any "profits, assets or realisation" will be very relevant when considering the scope of the New Zealand definition. When looking at those cases it is simply necessary to read references to "interests" and "participation interests" as references to the term "security".

(b) Can contractual rights alone give rise to an "interest" in the property of a person?

Wylie J cites three cases supporting his conclusion that contractual rights alone cannot give rise to an interest in the "capital, assets, earnings, royalties, or other property" of a person: *Bullion Sales International (Investments) Pty Ltd v Commissioner for Corporate Affairs* (1979) CLC 40-518; [1978] 3 ACLR at 719, a decision of Helsham CJ in Eq; *Australian Softwood Forest Pty v AG of New South Wales* (1981) 55 ALJR 659 (High Court); (1981) CLC 40-734, the leading judgment being delivered by Mason J; and *Butterworth & Anor v Lezemo Pty Limited & Anor* (1983) 1 ACLC 1306, a decision of Nicholson J in the Supreme Court of Victoria. Those cases are summarised by Wylie J at pages 67,124 to 67,127.

The cases referred to by Wylie J, in particular the *Bullion Sales* case, do contain dicta supporting the proposition that for the purposes of the definition of "security", "mere contractual rights" do not amount to an "interest" in property, assets or earnings. They do not, however, establish any general rule to that effect. In the *Bullion Sales* and *Australian Softwoods* cases, investors were clearly granted equitable rights in the assets of the respective schemes under consideration, so it was unnecessary to consider whether contractual rights could have given rise to a sufficient "interest" for the purposes of the definition. In the *Lezemo* case, the franchisee clearly did not have an interest in the profits, assets or the business of the franchisor – the franchisee was simply the purchaser of a business.

Dicta can be cited from a number of cases supporting the contrary proposition that contractual rights can (in some circumstances) give rise to an interest in a business undertaking or scheme for the purposes of the definition.[2]

In the *Australian Softwoods* case, Mason J, who delivered the leading judgment, gave an indication that the use of the word "interest" in the Australian definition extends beyond proprietary interests:

> If contrary to my own view, the grower has no interest in the land, he nevertheless has an interest in the timber on severance and that, having regard to the wider ambit of the scheme which I prefer, is sufficient to satisfy the requirements of par (a) of the statutory definition. Further, association of the word "interest" with the expression "right to participate" provides additional support for the view that it has a larger content than that of a proprietary interest. (p 663).

In *Waldron v Auer* (1977) VR 236; (1977) CLC 40-314, a decision of Anderson J in the Supreme Court of Victoria, the defendant was an accountant who carried on business as a moneylender, raising deposits from the public and on-lending them at a higher rate of interest. Anderson J considered that investors (who clearly had nothing more than contractual rights to be paid interest and to be repaid on the due date) had an interest (or a right to participate) in the profits of the defendant's business, because the defendant would pay interest owing to investors out of the profits that he made from on-lending their deposits.

In *Van Reesma v Flavell* (1987) SASR 472; (1987) ACLC 751, the Supreme Court of South Australia was called upon to consider whether a franchisor, who was offering business franchises to the public, had illegally offered a "prescribed interest" (ie a "security") to the public. Von Doussa J distinguished *Lezemo* on the basis that in that case, the franchisee operated its business completely independently from the business of the franchisor. On the facts of the franchising operation under consideration, the learned Judge found that franchisees obtained an interest (or right to participate) in the profits of the scheme because (amongst other things) they were entitled to 80% of the proceeds arising from goods sold by the franchisor on their behalf. Franchisees' respective interests in the franchisor's business were obviously only contractual.[3]

It is difficult to reconcile those cases with Wylie J's conclusion that contractual rights alone do not give rise to an interest in property sufficient to amount to a "security". The writer considers that, contrary to that conclusion, in some circumstances a contract conferring contractual rights alone may amount to a security.[4]

2 Right to participate

Wylie J considered that apart from rights to storage and insurance, the only right conferred on investors was the right to call for delivery (p 67, 128):

> I cannot regard the right to call for delivery, with that consequence, as "a right to participate" in property of the company. The call for delivery is merely the exercise of a contractual right . . . I agree with Mr Farmer the concept of "participation" involves some form of sharing with others even if only with the promoter of the scheme . . .

His Honour rejected the prosecution's submission that "the investor in Goldcorp had an eventual right or expectation of receiving bullion presently the property of the company" (p 67, 127) which amounted to a right to participate in Goldcorp's assets.

It is unclear whether Wylie J thought contractual rights alone could amount to a "right to participate" within the definition of "security", although the passage quoted above suggests he thought they could not. However, it is clear from the Australian cases that in some circumstances contractual rights can give rise to a right to participate.[5] For example, in *Van Reesma v Flavell* the franchisor undertook the promotion, marketing and management of a plant sales business. It was held that franchisees had a right to participate in the business in that they were entitled to sell their plants through the business and to participate in the proceeds of sale.

Von Doussa J states (pp 489-90):

> When it is recognised that Cl 13 provides, as one of the marketing options, for [the franchisor] at the request of the grower, to accept plants on consignment acting as the grower's agent for a 20 percent commission of the price achieved by [the franchisor], the right to participate or an interest in profits of the undertaking or scheme becomes obvious. (pp 489-90)

In the *Lezemo* case cited by Dr Farmer, Nicholson J states:

> I think that participation goes beyond a mere right of use and bears a connotation that the participant, even if he has no proprietary interest in the asset, has an eventual right or expectation of receiving something in respect of it. (p 1, 316).

The passage, however, is only authority for the proposition that a contractual *right to use* another person's assets does not on its own amount to a right to participate (ie share) in those assets. In fact, the statement that a right to participate may arise in the *absence* of any proprietary interest supports the proposition that in some circumstances, contractual rights alone may give rise to a right to participate.

In the writer's view, having regard to the Australian case law and the general scheme of the Act,[6] it would be incorrect to take an overly strict approach to the interpretation of the term "right to participate".

An alternative approach to the definition of "Security"

The writer considers that the narrow approach taken by Wylie J to the definition of "security" is not justified by reference to the Australian cases or by comparison with the Australian legislation. But if that is the case, what alternative approach should be taken to the definition?

In the writer's view, the following propositions provide useful guidance when applying the definition to any particular factual situation:

(a) the definition of "security" contained in the Act is, and was intended to be, very wide;

(b) the words of the definition should be given their ordinary meanings; and

(c) in applying the definition, regard should be had to the intention of the Act.

(i) Width of the definition of "security"

The breadth of the definition of "security" was referred to by Cooke J (as he then was) in *City Realties Limited v Securities Commission* [1982] 1 NZLR 74 (C.A.):

> . . . among the definitions in section 2 [of the Securities Act 1978] is an extremely wide definition of "security" well capable of covering company shares but going far beyond them . . . the width of this definition is complemented by various exemptions in section 5 . . .

Doogue J in *Re AIC Merchant Finance Limited* [1990] 2 NZLR 385 (CA) made a similar comment (p 399). As Wylie J notes, the Australian Courts have highlighted the width of the equivalent Australian definition – in *WA Pines Ltd v Hamilton* (1980) ACLR 101, Jones J in the Supreme Court of Western Australia went as far as to refer to the width of the definition as "barbarous". In *Australian Softwood Forests Pty Ltd and Ors v the Attorney General for NSW* (1981) 55 ACLR 659 at 665, Murphy J (quoted by Wylie J at p 67,124) states:

> The legislature has defined ["security"] extremely widely but to avoid any unintended effect, has included specific exemptions and made provision for other exemptions by regulation.

That, in the writer's view, is an accurate description not only of the scheme of the Australian legislation, but also of the scheme of the Securities Act: the width of the definition of "security" is counterbalanced by the exemptions contained in s 5 of the Act.

(ii) Ordinary not legal meanings

A dictionary is probably as good a place as any to find the "ordinary meaning" of the terms under discussion. The definition of "interest" contained in *The Shorter Oxford English Dictionary* (1978 edition) cites some thirteen different senses in which that term is used. The first two, however, appear most relevant in the present context:

> "1 The relation of being objectively concerned in something, by having a right or title to, a claim upon, or a share in . . .
> 2 The relation of being concerned or affected in respect of advantage or detriment."

The definitions of "participate" and "participation" in the *Shorter Oxford* dictionary refer to taking part or sharing in common with others. This is consistent with Wylie J's conclusion that ". . . the concept of "participation" involves some form of sharing with others even if only with the promoter of the scheme . . ." (p 67, 128).

The strongest support for giving the terms "interest" and "right to participate" their ordinary meanings comes not from consideration of overseas case law or legislation, but from the scheme of the Act itself.

The general definition of a "security" is "any interest or right to participate in any capital, assets, earnings or other property of any person". The Act subdivides

securities into three classes. Although debt securities and equity securities are separately defined those definitions are only relevant for the purposes of classification. As a consequence, in the writer's view, any particular right or interest must qualify as a "security" within the general words of the definition before any further investigation is warranted.

The waters in this regard are muddied somewhat by the fact that the general definition of "security" is expressed to *include* "any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing . . .". Those words are descriptive of debt securities, and it is arguable that this indicates that debt securities are not caught by the general words of the definition. This appears to be an assumption made by P G Watts in a recent case note concerning *R v Smith* (see P G Watts, "Company Law" [1991] *New Zealand Recent Law*, 227 at 238).

It is also arguable, however, that rather than being an extension of the general words of the definition, the inclusive limb of the definition is simply intended to achieve greater certainty. (Cooke P admits this possibility when interpreting the definition of "personal injury by accident" contained in the Accident Compensation Act 1982 – see *Green v Matheson* [1989] 3 NZLR 564 (CA) at 571).

The writer prefers the latter interpretation of the definition. Support can be found for this approach in the Australian decision of *Waldron v Auer*, discussed earlier. In that case, the Supreme Court of Victoria considered that an advertisement seeking unsecured deposits (debt securities within the New Zealand definitions) amounted to an offer of an "interest" within the general words of the Australian definition (the term "interest" being equivalent to the term "security" in the New Zealand Act). In this connection, see also Ford *Principles of Company Law* (Melbourne) 1990, Butterworths, at p 363 and the judgment of Mason J in the *Australian Softwoods* case at p 662.

If debt securities and equity securities are "securities" in their own right, what is the nature of the rights of shareholders and (for example) debenture holders that brings them within the definition? A shareholder has no legal or equitable interest in the assets of the company – *his or her rights are contractual.*

Similarly, the holder of unsecured debenture stock has no legal or equitable interest in the assets of the borrower – he or she is simply an unsecured creditor. "Interests" and "rights to participate" are only apparent if those terms are given their ordinary meanings.

Shareholders (generally) have a right to share in any surplus arising upon the winding up of a company in common with other shareholders. They also (generally) have a right to share in the earnings of the company by receipt of dividends. Those rights amount to an interest or a right to participate as those terms are defined in the *Shorter Oxford* dictionary. Shareholders could also be said to have an interest or a right to participate in the company itself: they have an objective concern in the company and its affairs by virtue of their investment or stake in the company.

Holders of unsecured debenture stock have a right to participate in the assets of the issuer on a winding up (or bankruptcy) – they share in those assets proportionately with other similarly ranked debenture-holders. They may also be said to have an interest or a right to participate in the issuer's business, in the form of their entitlement to interest which will be paid from the profits derived by the issuer from reinvesting the borrowed moneys. In that sense they are sharing in the profits of the issuer's business. (See *Waldron v Auer*).

It is therefore implicit in the structure of the Act that the terms "interest" and "right to participate" should be given their everyday meanings.

The Australian case law does in fact support the interpretation of the terms "interest" and "right to participate" according to their ordinary meanings.[7] For example, in *WA Pines v Hamilton*, Jones J states (pp 105-106):

> Each case differs on its facts, and what must be done is to apply the provisions of the section and definition, *according to the ordinary use of language*, to the facts as they appear in the instant case. (emphasis added).

(iii) Intention of the Securities Act

One of the primary objects of the Securities Act is the protection of investors. (See Richardson J in *Re AIC Merchant Finance Limited* at p 391 and Fisher J in *DFC Financial Services v Abel* [1991] 2 NZLR 619 at 629). Wherever possible, the Act should be interpreted in a manner which is consistent with that object.

The main means by which the Act seeks to protect investors is by requiring full disclosure of both the issuer's affairs and the nature of the security offered – the rationale being that:

> . . . the best protection of the public lies in full disclosure of the company's affairs and of the security it is offering. (Richardson J in *Re AIC Merchant Finance Limited* at 392).

Did Goldcorp offer "securities" to the public?

If the words of the definition of "security" are given their ordinary meanings, bearing in mind the width of the definition, the writer considers that Goldcorp's contractual relationship with its bullion investors may have amounted to a "security".

In particular, the writer considers that investors obtained an interest in Goldcorp's bullion stock, in the sense that they had invested money in Goldcorp's bullion operation giving them a stake or concern in that stock to the extent that it (at least in part) determined Goldcorp's ability to meet its contractual obligations to its investors.

Treating that contractual relationship as "security" is, in the writer's view, consistent with the intention of the Securities Act. While Goldcorp's customers were described as "purchasers" of unascertained bullion, in reality they were investing in Goldcorp's bullion operation – Goldcorp's abiity to settle its contracts with unallocated investors depended upon Goldcorp's prudent management of its bullion operation. Wylie J himself refers to "purchasers" as "investors" (pp 67,127 – 67, 128).

The writer also considers that there are good grounds for asserting that Goldcorp offered an interest in property that was greater than "mere contractual rights" and which amounted to a "security" within the Act. In this connection, P G Watts

persuasively argues that Goldcorp offered an interest in property sufficient to amount to a security, stating that:

> . . . the advertisements were offering either (or both) a current co-ownership interest in gold, contrary to the analysis of Thorp J in *Re Goldcorp Exchange Ltd*, or a contingent interest in property, the contingencies being a demand for delivery and appropriation by the company of gold (p 238).

The first alternative advanced by Mr Watts relies upon the rejection of Thorp J's findings in the civil case. However, this is not strictly necessary. The focus of the Securities Act is upon what was *offered* (as that term is defined in the Act) to the public *from the subscriber's viewpoint*, not on what was actually received once contracts had been completed[8]. On the other hand, Thorp J was (rightly) concerned with what investors actually received once a contract had been completed. It would have been legitimate, and indeed the correct approach, for Wylie J to re-examine the facts of the case to determine whether members of the public were *offered* an undivided co-ownership interest in the bullion.

In respect of the second alternative, Mr Watts argues that the application of the Act extends beyond offers of interests in future property, even contingently. This seems to be a matter of common sense. As Mr Watts notes, if this was not the case, the Act would have a limited application since issuers sometimes promote their securities in advance of the purchase (or creation) of the relevant asset.

A third possibility arises from the fact that it is possible to re-interpret Goldcorp's non-allocated bullion transactions as investment contracts involving the payment of money to (or possibly the depositing of money with) Goldcorp creating an obligation on the latter to *either* settle the contract on demand by delivering an agreed amount of gold, or to settle the contract by paying to the investor on demand a sum of money calculated according to the current price of gold. An investor's right to call for settlement in cash, on this intepretation, may have represented a debt amounting to a "right to be paid money that is . . . otherwise owing" within the definition of "security".

In this regard, the judgment of Thorp J in the civil proceedings is particularly relevant. At p 2, His Honour sets out the text of an early brochure published by Goldcorp's predecessor, Auckland Coin and Bullion Exchange. That brochure stated:

> Once you have opened a Non-Allocated Metal Account, you can add to it by personal cheque. You can sell your metal instantly with a telephone call . . .

In the writer's view, that brochure portrays Goldcorp's transactions somewhat differently to the brochure quoted by Wylie J.

Conclusions

Many of Goldcorp's unallocated bullion investors were unaware of the true nature of the contracts that they entered into. It is quite possible that full disclosure of the nature of those contracts, as required by the Securities Act, may have prevented that misunderstanding from arising.

Thorp J's findings that investors in unallocated bullion did not receive any legal or equitable interest in the bullion stored in Goldcorp's vaults should not preclude the assertion that Goldcorp offered "securities" to the public. It is the writer's view that there is at least a good argument, on a number of grounds not fully considered in *R v Smith*, that "securities" were offered to the public by Goldcorp and that prima facie at least the Securities Act applied.

The intention of the Securities Act is to protect investors by requiring accurate and timely disclosure of (amongst other things) the nature of securities offered to the public. The prosecution of companies and company directors who breach the provisions of the Act is an important mechanism for encouraging compliance with the provisions of the Act and for promoting confidence in New Zealand's financial markets. It is questionable whether the application of the reasoning of the Court in the Goldcorp case is likely to achieve those objectives. Whether or not Goldcorp did in fact offer "securities" to the public, the writer considers that Wylie J's interpretation of the definition of "security" is unduly narrow and should be treated with caution by practitioners advising their clients on the application of the Securities Act. □

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1 For a general discussion of the New Zealand definition of "security" and the Australian definition of "interest" see M N Dunning, "The Definition of 'Security' for the purposes of a Securities Act" [1984] NZLJ 71. The author of that article contends that "[i]f anything, the New Zealand definition is broader than the Australian" (p 72).

2 Eg – in addition to the cases discussed, some support can also be found in the following cases: *Corporate Affairs Commission (NSW) v MG Securities (Australasia) Ltd* [1974] ASLR 85,218; *Wade v A Home Away Pty Ltd* (pp 478-479). See also the judgment of Gray J at first instance reported under *Commissioner for Corporate Affairs v A Home Away Pty Ltd & Ors* (1980) CLC 40-649 at p 34, 321-322, which was affirmed by the Supreme Court of Victoria (although Jenkinson J expressed reservations regarding Gray J's conclusion that some element of financial gain was necessary before the definition of "interest" could apply).

3 Note, however, that a contractual right to be paid moneys from a specific fund may give rise to an equitable interest in that fund in favour of the creditor (see, for example, *Swiss Bank Corporation v Lloyds Bank* (1981) 2 All ER 449 (HL)). In *Wade v A Home Away Pty Ltd* McInerney J and Jenkinson J in the Supreme Court of Victoria considered that a purchaser's (contractual) right to call for a conveyance under an executed but unperformed sale and purchase agreement amounted to an interest in an asset (the land) of the vendor for the purposes of the definition.

4 This is consistent with the general scheme of the Act – see infra.

5 See: *Waldron v Auer*, the judgment of Gray J in *Commissioner for Corporate Affairs v A Home Away Pty Ltd* (pp 34, 321-322); and *Commissioner for Corporate Affairs v Lake Eildon Country Club* [1980] ACLC 34,358 at 34,364 (where Gray J states that purchasers' advertised entitlement to use the facilities of timeshare resorts affiliated to the Lake Eildon Country Club at below normal cost was "a right to participate in an asset of the respondent's undertaking.")

6 See infra.

7 Mr Panckhurst, for the prosecution, advanced a similar argument. Wylie J rejected it on the basis that it overlooked the "greatly expanded" definition of "interest" contained in the Australian legislation (p 67, 127). However, as discussed above, the Australian legislation did not contain any such expanded definition. Mr Panckhurst's argument appears to have been based on a reference by Helsham CJ in Eq to interpreting the provisions according to "common parlance" in the *Australian Softwood Forests* case, reported at first instance under *Corporate Affairs Commission v Australian Softwood Forest Pty Ltd & Ors* [1978] 1 NSWLR 150 at 159.

8 See Fisher J in *DFC Financial Services Ltd v Abel* at 629.

Registration of wills

By Mark Coubrough, a Wellington practitioner

This article is based on a report prepared by the author with the assistance of a fellowship grant from the Winston Churchill Memorial Trust in 1990. The article looks at the question of whether a system for registering wills could be instituted throughout New Zealand. He argues that there are advantages in this but suggests that the system should be voluntary.

A study made by the author in 1990 on the question of the registration and custody of wills was prompted by a recent initiative by Auckland practitioner, Thomas R Piggin who set up National Central Wills Register (NZ) Limited.

Could a system for registering wills be instituted throughout New Zealand? This is the question that I explored last year with assistance from the Winston Churchill Memorial Trust.

The study was prompted by a recent initiative by Auckland practitioner Thomas R Piggin who set up National Central Wills Register (NZ) Limited. This company offers to issue (for $10.00 each) certificates of registration of completed wills. For a further fee of $20.00 application can be made to the company by solicitors as to whether a will has been registered. The company gives a written reply to the inquiries after checking the register. If the inquiry comes from anyone other than solicitors or the Public Trustee or trustee companies, then the company requires evidence of the death of the testator.

There are some disadvantages in such a form of registration:

(a) There is no obligation on the company to continue the register indefinitely.

(b) The public generally will not be aware of the existence of the company's will register. Advertising widely to publicise the register would be costly.

(c) Unless the register had a substantial number of registrations, its usefulness would be limited and solicitors, the Public Trustee and trustee companies would be reluctant to make inquiries of the register.

(d) Although the registration fee is small, it is a cost which testators might be reluctant to pay.

The Public Trust Office

The Public Trust Office has an alphabetical list (stored on computer) of all testators who have made a will at any branch of the Public Trust Office in New Zealand.

As at 31 March 1990 the Public Trustee held computer-listed records of 362,633 clients. With the number of client names entered on its computer records being close to 10% of the population, the Public Trustee has the beginnings of a useful national register of wills.

The English perspective

As with New Zealand, there is no official system in England recording or registering the existence of wills. There is however an official scheme for the deposit of wills at a Central Depository at Somerset House, London, and this system is described later in this article.

In England since the Second World War some individuals have promoted the setting up of a central registry of wills. The official response to a law practitioner who in 1945 suggested the establishment of a system of registration of wills was to point out the existence of legislation providing for an official central depository of wills and "after considering Section 172 of the Supreme Court of Judicature (Consolidation) Act 1925" (now Section 126(1) of the English Supreme Court Act 1981) which provides for an official wills depository, "and the fact that very little use has been made of the facilities provided under that section, the conclusion was reached that it was unnecessary to make provision such as you suggest for a central wills register".

The English Law Society in its *Gazette* (April 1958) stated:

> Clearly the setting up of a Wills Registry is not a matter which should be undertaken without the full realisation of its legal and professional implications.

At the English Law Society's annual conference at Brighton in 1961, a great deal of discussion took place upon the advantages of having some form of central office for the registration of wills. A suggestion was made and supported by those attending that the Law Society should establish such a registry where the testator could, if he or she so desired, register not a copy of his or her will but its pertinent details.

The October 1966 issue of the Law Society's *Gazette* reported that:

> For a variety of reasons connected with finance, and the incidence of more pressing projects, this plan (for a central will registry) has had temporarily to be laid aside.

In the same issue the Law Society responded briefly to a working paper prepared in the offices of the Law Commission dated 19 July 1966 and titled "Should English Wills be Registrable?"

Whilst the working paper expressed a view towards the establishment of a wills register, opinion following circulation of the report in Britain was not sufficient to see the establishment of such a system.

The working paper argued that if a system for registration of wills

was to be set up, then it would need to be compulsory. The paper envisaged that under such a system a will should be invalid unless its existence is registered within a prescribed time limit of (say) two months. The paper acknowledged that "special provision would have to be made by the law for wills made shortly before death".

The English Law Society's response was reported in the October 1966 issue of its *Gazette* as follows:

> To many such an innovation would be going too far. Apparently (so the paper tells us) nearly a quarter of the wills proved are home-made. The thought that, unless registered, all those home-made wills would (presumably unknown to the testator) be invalid would to many, be quite unacceptable. However, before dismissing the proposal it is worth remembering that in the Netherlands registration of wills has been compulsory since 1918 and the system has not only worked but won general approval.

An article in the Law Society's *Gazette* of 14 September 1988 revisited the arguments for and against the setting up of a national wills register.[1]

This article suggested that a compulsory scheme, in order to be effective, would involve a sanction or sanctions, one being that a will should not be valid unless deposited/registered within a certain time limit.

The Dutch system of registration of wills

In the Netherlands no will is valid unless it has been deposited with a notary in the presence of witnesses.

The completed will remains in the custody of the notary, but he is under a duty to inform the Custodian of the Central Register of Wills at the Hague of the fact that a will has been deposited at his office. Information which must be given to the central registry is:

(a) the name and address of the testator;
(b) the date of deposit of the will.

This information is entered in the central register which is open to inspection by any interested party.[2]

The British Columbian system

A registry of wills was set up by statute in 1945 where particulars about wills are recorded free of charge and on a voluntary basis. The current enabling legislation is the Wills Act 1979 (British Columbia), ss 33-40.

Notice of the Will is filed with the State's "Director of Vital Statistics". Failure to file any such notice does not affect the validity of the will.

A possible wills registration system for New Zealand

A system which recorded the existence of say, 90% of the wills made in New Zealand would have a number of benefits, the main ones of which would be:

(a) Readily accessible information about the existence of the will.
(b) The last wills of testators would be more easily located, and at less cost.
(c) The element of uncertainty would be reduced.

No registration system would however, be effective unless it listed a large proportion of the wills completed in New Zealand.

It is not suggested that there should be any compulsory system of registration. The better course, it is suggested, would be a system of registration by incentive along the following lines:

1 When the will is completed, registration details could be completed at the same time. A card or form could show the details required for registration as indicated:

2 It is suggested that the Justice Department would be the appropriate body to provide the registration cards.

3 The testator or his/her solicitor, or the Public Trustee or trustee company (whoever is instructed by the testator), delivers the card to the nearest High Court for registration.

4 There need be no "registration fee". Rather the costs of such registration system could be built into the fee which is charged by the High Court on the filing of applications for a grant of administration in the estate. The current High Court fee of $75.00 could be increased by (say) $10.00 per application to cover the costs incurred by the Justice Department in receiving and filing registration details.

5 The incentive to make testators register their wills would be to impose a penalty or surcharge on the High Court application fee for a grant of Probate of any will which is not registered within a reasonable period (say three months) from the date of completion of the will. The penalty or surcharge might be double that of an application for grant of probate where a registration card is filed within such three month period.

6 High Court staff would, as part of their check of applications for grant of probate, check to see that registration of the will was completed within three months of the date of the will.

WILL REGISTRATION CARD No.

Testator's Last Name: .....
First Names: .....
Address: .....
.....
Occupation: .....
Date of Will: .....
Will Located At: .....
(Postal Address): .....
.....

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7 For those testators who like to make their own wills on forms purchased from stationers' suppliers, the forms could give advice on how to register the will, and indicate the monetary penalty for failure to register. (The forms already give advice to testators on how to prepare their wills and sign them in accordance with the requirements of the Wills Act 1837).

8 It is envisaged that registration cards would be sent to and kept physically at a central registry (say at Wellington High Court).

9 Registration cards could be completed for existing wills as well. The cards themselves could serve as an adequate index in a similar way to the card index system used for many years to record instruments by way of security under the Chattels Transfer Act 1924.
Computerisation of the list would of course, enable inquirers from throughout New Zealand to have readily accessible information as to the registration of any testator's will.

10 The index of wills registered would be open to inquiry and search by any person interested. A minimal search fee could be charged. This would deter those who are merely curious, but there appears to be no strong reason for restricting access to a wills registry should such a registry be set up. The Dutch system, described above, which is open to inspection by any interested party, has, it seems, worked satisfactorily for over 70 years.

11 If the system gained full acceptance throughout New Zealand, then it could replace the current haphazard practice of advertising to ascertain whether recently deceased people ever made a will.

Britain's official system for depositing wills

In England there exists an official system for storing testators' wills. This system is not new; it has been in existence since 1857.

The system is now maintained pursuant to the English Supreme Court Act 1981, s 126(1), which states:

> There shall be provided, under the control and direction of the High Court, safe and convenient depositories for the custody of the wills of living persons, and any person may deposit his will in such a depository on payment of the prescribed fee and subject to such conditions as may be prescribed by regulations made by the President of the Family Division with the concurrence of the Lord Chancellor.

The Wills (Deposit for Safe Custody) Regulations 1978 set out the procedure for depositing wills of living persons.

The principal merits of an official system for providing safe custody for wills of living testators are as follows:

1 Custody of wills is an official function of the State, and wills are kept safe under a scrupulously administered system.

2 The system provides for custody of wills at a modest fee (currently £1.00 payable on deposit of each will).

3 The system provides testators with a document-holding facility of long standing and it seems that the State will continue to provide such facility in the foreseeable future.

The Administration of Justice Act 1982 (UK) ss 23-26, makes new statutory provisions for the deposit and registration of wills so as to enable the United Kingdom to ratify the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills (Basle 16 May 1972). These provisions will come into operation on such date as shall be appointed. No commencement date has yet been specified (as at July 1991). Under the new provisions, regulation-making power for England and Wales is vested in the President of the Family Division with the concurrence of the Lord Chancellor. The 1982 Act further provides that wills deposited under s 126 of the Supreme Court Act 1981 or under earlier legislation shall be treated as deposited for the purposes of the 1982 Act.

The principal shortcoming of the scheme would appear to be that it is used only occasionally.

During 1989, 312 wills were deposited for safekeeping at the Principal Registry of the Family Division. This is a tiny percentage of all the wills completed in England and Wales in 1989. The number is, nevertheless, a sizeable increase on the number of wills deposited for safe custody in some earlier years.

Recent figures for wills deposited at the Principal Registry at Somerset House, London, are as follows:

1988	271
1989	312
1990 (first 4 months)	104

Notwithstanding the small number of wills lodged for deposit, the system does provide an extremely well run, efficient, safe and secure means of custody of wills of those testators who for one reasons or another, have no wish or need to keep their wills at home or in safes of solicitors, banks or trustee companies.

In England, testators are more ready to prepare their own wills without resorting to advice or assistance from solicitors or trust companies. This do-it-yourself approach follows through to the application for probate. In 1989, out of a total of 175,600 applications filed in England and Wales for formal grants of representation to administer deceased estates, 35,197 (16.7%) were personal applications (filed by the executors or applicants themselves without assistance from lawyers or trustee companies).[3]

It follows that in England, there is a greater need than in New Zealand for an official system for depositing wills. Those English testators who are sufficiently confident and motivated to prepare their own wills, have a greater likelihood of having found out about the official English safe deposit system for storing wills.

Nevertheless, in a population of approximately 50 million, the official system for depositing wills is used extremely infrequently. The number of users would rise if the system were more widely publicised. But publicity for the scheme would involve expense.

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Claims Made Policies : Perils of professional indemnity insurance

By T C Weston a Christchurch practitioner

Professional indemnity is an essential element of legal practice. In this article the author considers two recent judgments which highlight the importance of notification of a claim, or of a possible claim, under what is called a Claims Made Policy. He points out that in terms of these policies notification should be given of circumstances even when there is only a remote possibility of a claim arising some time in the future.

Professional Indemnity ("PI") insurance premiums cost an ever increasing proportion of a solicitor's overheads. Notwithstanding this direct cost, and the importance of having any insurance cover at all, surprisingly few solicitors are aware of the terms of their policies. Two recent decisions of the High Court highlight the dangers of any complacency in this area.

Before considering these decisions, it may be helpful to note some key propositions. Although PI policies differ from underwriter to underwriter, the essential terms of the contracts remain much the same.

Claims Made Policy

In most cases, the relevant policy will be what is called a claims made policy. This means that the policy responds to the notification of a claim rather than to the event that gives rise to the claimed loss. Contrast this with a material damage policy which responds to the actual event.

The significance of this can be illustrated as follows. The negligent act may have occurred in June 1986. Let us suppose that the solicitor had no reason to believe that a claim would eventuate until May 1989 and then notified promptly. Let us also assume that the solicitor was insured throughout the period 1986 through until 1989.

In that example, the policy that would respond to the claim would be that in place in 1989. However, to add a touch of confusion to that simple proposition, the deductible (excess) would be payable by those solicitors who were partners of the insured firm in June 1986. This, of course, is a result of the common law (and statute law) which makes partners liable for a negligent act of the partnership at the time it occurred.

Notification

Notification is the trigger for a claims made policy. In most cases, there is a dual obligation. First, the solicitor must notify of any *circumstances* that may give rise to a claim some time in the future. This notification may precede an actual *claim* by a considerable period. However, because the claim has been notified in this way, the relevant policy will be that in place at the time of the notification (there will usually be an express term to this effect in the policy).

Secondly, a solicitor must notify any actual claim made. If the solicitor has not notified any previous circumstances (and there may be good reasons for not doing so) then it will be the policy in force at the time of notification of the claim that responds.

In most cases, these sort of issues do not present a problem for the solicitor. A solicitor may insure with the same underwriters year after year. So long as the solicitor notifies promptly (whether circumstances or claims) then it is unlikely that there will be any difficulties.

No continuing cover

Such comfort cannot be assumed, however, where there is no continuing cover. In the first case considered here (*Sinclair Horder O'Malley & Co v National Insurance* (unreported, CP 30/90 (Dunedin Registry); Tipping J; 30 October 1991) the relevant policy had expired a month prior to notification of an actual claim. There was no replacement cover taken. At first sight, this would have seemed to be fatal to any insurance claim.

However, the plaintiff solicitors

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Having regard to the expense that would be involved in setting up such a scheme, and the likelihood that in New Zealand it would be availed of less frequently (in all probability) than it is in England and Wales, an official system for the depositing of testator's wills in New Zealand is not warranted.

At the same time, it is clear that the English system for depositing and holding wills in safe custody at the Principal Registry in Somerset House, London, is administered most efficiently, and provides an excellent facility for those few testators who make use of it. □

1 David Storey, English Law Society *Gazette* No 33 (14.9.88) p 36.

2 In "Introduction to Dutch Law for Foreign Lawyers" (Kluwer-Deventer – The Netherlands 1978) Edited by D C Fokkema, J M J Chorus, E H Hondius and E Ch Lisser, is stated at page 168: "The advantage of this system is threefold. Firstly, if no entry is found, it is certain that the decedent has died intestate. Secondly, if there is an entry, it is certain that the testament is genuine, since otherwise there would not have been a notarial notification. Thirdly, if there are more entries than one, it is certain which testament is the latest."

3 Figures supplied by the Principal Registry of the Family Division, Somerset House, London.

sued their indemnifiers, calling in aid s 9 of the Law Reform Act 1977. That section deals with (inter alia) time limits in respect of insurance claims. It provides that an insured is only bound by a time restriction if the insurer has been so prejudiced by the failure of the insured to comply with that provision that it would be inequitable if such provision were not to bind the insured. Or, to use the words of Tipping J, s 9 prevents an insurer from avoiding, on a time point, a liability which it would otherwise have.

The plaintiff solicitor argued that notification of the claim was such a time point, thus triggering s 9. Tipping J disagreed. At p 18 of the unreported judgment he said:

> However for the reasons earlier given I am of the view that Sinclair Horder cannot rely on section 9 to avoid the consequence that at the time when the claim was made against them by Mr Williams they were not covered. There was in my judgment no contract of insurance in force at the time when the claim was made. It is clear and indeed common ground that such cover must be in force at that time. That is the effect of the way the policy is expressed. Section 9 does not breathe new life into a contract of insurance which has already died. Rather it prevents a fatal knife being struck at a claim under a living contract.

On the particular facts of this case, the plaintiff solicitors argued that there were no *circumstances* such that they should have notified any earlier. They argued that it was not until the claim was actually made that the terms of the policy required them to notify. Notwithstanding this, Tipping J considered whether a delay in notification of *circumstances* that were likely to give rise to claim might bring s 9 into play. Tipping J said that such an argument was:

> A curious proposition which must introduce considerable doubt as to whether section 9 was ever intended to cover the point dealt with in the second part of condition 3 of this policy [ie notification of circumstances likely to give rise to a claim which crystallises coverage].

In the result, the plaintiff's claim in respect of s 9 of the 1977 Act failed. The Court went on to consider other issues which are not relevant to this article.

In the *Sinclair Horder* case, the insurance company argued that s 9, overall, is directed at material damage policies rather than to the claims made policy that was featured in that case. Tipping J disagreed. At p 18 of the unreported decision he noted that the general words of s 9(1) should not be limited if they would otherwise apply. He was not inclined to accept a bald proposition limiting the effect of this section.

A similarly broad argument was raised (and also rejected) in *Registered Securities Limited v Brockett* (unreported, CP 293/87. (Christchurch Registry); Barker J; 17 October 1991). Interestingly, the two cases appear to have been decided quite independently of the other. The *Sinclair Horder* case was heard on 14, 15 and 16 October 1991 and judgment was delivered on 30 October. The second of the two cases was heard on 17 October 1991 at which time Barker J delivered an oral judgment.

Section 9 of the 1977 Act came before Barker J by way of an interlocutory application by the plaintiff to join the defendant solicitor's underwriters to the proceeding pursuant to s 9 of the Law Reform Act 1936. The defendant solicitor had died after the issue of proceedings. This section provides that on the happening of the event giving rise to any claim under an insurance policy there is then a charge on all insurance moneys. The consequence of this charge is that the plaintiff, in specified circumstances, is able to sue the insurers directly.

In the *RSL* case the defendant solicitor had advised the underwriters by telephone of a possible claim. This had occurred several days before the policy expired. The solicitor was told that he must complete a written notification (a policy requirement) and a form was posted to him for this purpose. It was never returned. The solicitor did not renew his cover. The underwriters, in resisting the plaintiff's application to join them to the proceeding, argued that the defendant solicitor would not have succeeded in a claim against his underwriters if he had brought one (which he had not, having since died). Barker J had some residual concerns about the verbal notification but overall he seems to have accepted that the defendant solicitor would not have had cover.

The Court was then required to consider s 9 of the 1977 Act. Obviously, if the plaintiff could argue that the failure to give written notification and/or a failure otherwise to notify in terms of the policy was not prejudicial to the underwriters then the application for joinder under the 1936 Act was likely to be successful.

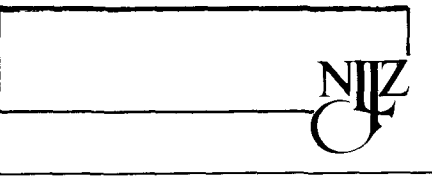
As did Tipping J, Barker J was unwilling to accept a bald proposition that s 9 of the 1977 Act did not apply to a claims made policy. He noted that such an argument had a superficial attraction but that the issue should not be decided on an interlocutory application.

Barker J noted that normally a plea to invoke s 9 of the Act would await the actual trial. However, he concluded that the prejudice to the insurers in the case before him was significant. Notwithstanding the fact that the Judge then disclaimed reliance on the issue of prejudice, his conclusions would suggest that this issue carried considerable weight. The Judge went on to look at a number of factors which he said made it unfair to the underwriters for them to be joined. He refused the plaintiff's application.

Moral for solicitors

The outcome of both decisions will be cold comfort to solicitors. The moral is clear. Solicitors should make sure they know the terms of their policy and ensure that any notification is made strictly in its terms.

These problems can arise not only where a policy expires and no replacement cover is taken but also where a solicitor changes from one insurance company to the other. The particular difficulty will be notification of *circumstances* that may give rise to a claim. A prudent view would dictate that notification should be made if there is even a remote possibility of a claim arising in the future. □



Mens rea as elements of offences and defences

By Elisabeth Garrett of Lincoln University

This article is the final one that will be published for some time on the vexed question of the doctrine of mens rea. The categorisation of offences in respect of mens rea causes problems and in this article the author analyses some of these by considering questions of burdens of proof and the relationship between categories of offences.

Janet November in "Mens Rea – *Millar, Morgan, Metuariki* – and Mistakes" [1991] NZLJ 142 raises issues relating to the purported distinction between elements of the offence and elements of the defence; proof of mens rea; the distinction between offences of basic intent and specific intent; the distinction between the persuasive and evidentiary burden and the relationship between the distinctions. The purpose of this article is to demonstrate that the relationship between the distinctions can be resolved in an analysis of the burden of proof. A precise distinction exists between the burden and the mens rea necessary of proof in each category of offence.

In her articles, "Mistaken Mistakes" [1989] NZLJ 355 and "Mens rea and unreasonable mistakes – a reply" [1990] NZLJ 200 the present writer deplored the blurring of the distinction between Categories I and II which permitted Cooke P in *Millar v MOT* [1986] NZLR 660 to apply *DPP v Morgan* [1976] AC 182 to the offence of driving while disqualified. The merged category became *Strawbridge* without reasonable grounds. (*R v Strawbridge* [1970] NZLR 900. Refer to *Millar v MOT* [1986] NZLR 660, 668.)

Implicit in the categorisation delineated in the first, and affirmed in the second of those two articles, is the interrelationship between categories I and II. ([1989] NZLJ 355, 357 and [1990] NZLJ 202). Rather, however, than signal the merging advocated in *Millar*, supra, and endorsed by November, above, the identification of the interrelationship facilitates the exposition of the relationship between the stated distinctions.

Category One

The first category, while comprising all offences where the mens rea necessary of proof is expressly stated, is exemplified in *Morgan*, supra. The burden of proving both the physical and mental elements of the offence is on the Crown. The Crown must prove that the offender either has or has not formed the mental element necessary to constitute the offence with which she is charged. The concept of excuse or defence is therefore redundant in this category. Redundant, likewise, is any notion of the presumption.

Category Two

If the concept of excuse or defence is tautologous in Category One, the purported distinction between elements of the offence and elements of the defence evaporates. The offender either has or has not formed the necessary mental element.

The offender who has not formed the mental element necessary to constitute the offence with which she is charged, will either be found not guilty or raise an excuse. If she raises an excuse or defence she might nonetheless be found guilty if her behaviour does not conform to the dictates of reasonableness prescribed by law.[1] In this sense, the actor might be presumed to have acted with a guilty mind.[2] The actor who might be presumed to have acted with a guilty mind bears either an evidentiary burden to adduce evidence of the reasonableness of her behaviour[3] or must rebut the presumption that she acted with mens rea. (*R v Strawbridge*, supra.)

A clear distinction emerges between Categories I and II. It can be measured in terms of the difference in the burden of proof: if the burden in respect of both the physical and mental elements of the offence is on the Crown in Category I, there is either a presumption of mens rea or the accused must bear an evidentiary burden in Category II.

Category Three

If the distinction between Categories I and II is clear, it is not as clear between Categories II and III. Traditionally, the mens rea necessary of proof in strict liability offences, is expressed in the requirement that the Crown prove that the offender had the intent to do the act prohibited by statute. (*Allard v Selfridge* [1925] 1 KB 129.)

If *CAD v MacKenzie* [1983] NZLR 76 blurs the distinction between Categories II and III by providing a defence or excuse in strict liability offences, albeit that the legal or persuasive burden is on the defendant, Richardson J's preferring in that case the word fault to the term mens rea, at one and the same time helps identify the degree of mens rea necessary of proof in strict liability offences. If MacKenzie was not at fault because the wires were difficult to see and he did not know that the telephone poles had been removed, Prince would not have been convicted had he not known that the girl whom he

abducted was in the possession of her parents. (*R v Prince* (1875) LR 2. Prince's honest belief that the girl was over the age of eighteen was irrelevant.)

Proof of the offender's intention to do the act prohibited by the statute requires proof of the offender's knowledge of that which renders his act an offence. (*R v Collier* [1960] Crim L Rev 204. Collier's reasonable belief that the girl was over the age of sixteen was necessary of proof.)

Category Four

If proof of the offender's intention to do the act prohibited by statute permits no distinction to be drawn in the United Kingdom between strict and absolute liability offences (*Lim Chin Aik v R* [1965] AC 160), the concept of fault expressed either as knowledge or the ability to know,[4] underscores the narrowness of that distinction.

Crimes of basic and specific intent

The rationale of the dialectic lies in its utility to effect a compromise verdict where the defendant pleads intoxication as an excuse or defence. (*R v Lipman* [1970] 1 QB 152, *DPP v Majewski* [1977] AC 443; *R v Kamipeli* [1975] 2 NZLR 610.)

The effect of the application of the dialectic is a limited blurring of the distinction between Categories I and II. The offender who does not have the specific intent for the crime with which he is charged is presumed to have acted with basic intent.

Summary

If the distinction between Categories I and II is affected in a limited way by the application of the basic specific intent dialectic which effects a compromise verdict, the distinction between Categories I and II is not otherwise affected.

The burden on the Crown in Category I is to prove the mental and physical elements of the offence as it is stated in the indictment. Whether the mental element is stated as intention or knowledge, recklessness, negligence[5] or unlawfulness, the concept of excuse or defence is redundant. The Crown either proves that mental element or it does not.

Category II comprises those offenders who have acted with a lesser degree of mens rea than those in Category I. Such an offender is presumed to have acted with a guilty mind. If she wishes to be excused or raise a defence, she must bear either an evidentiary burden to adduce evidence of the reasonableness of her behaviour or must rebut the presumption she has acted with mens rea.

If *MacKenzie,* supra expresses the mental element necessary of proof in Category Three in terms of an absence of fault where the burden is on the defendant, the absence of a clear distinction between Categories III and IV in the United Kingdom expresses itself in the requirement that the offender intended to do the act prohibited by the statute. Whether expressed in terms of an absence of fault or the intention to do the act prohibited by the relevant statute, the mental element necessary of proof can be expressed in terms of the offender's knowledge or ability to know that which renders her act an offence.

Conclusion

The foregoing analysis which includes within Category I those offences where the mental element is expressed in terms of intention, recklessness, negligence, knowledge of unlawfulness includes crimes of basic intent whether defined as Lord Simon in *Morgan,* supra, defines them or as defined by Smith and Hogan, *Criminal Law* (6th ed, 1988) 71 as basic mens rea. The classification of *Morgan* rape as a crime of basic[6] or specific intent is therefore redundant.

The distinction between *Morgan* mens rea and the remaining mental elements unassailable, the blurring of the distinction between those remaining mental elements is nonetheless clear. If *Cunningham* [1957] 2 QB 396 recklessness required the Crown to prove the offender's knowledge or foresight of the relevant pertaining circumstances, the effect of *Caldwell* [1981] 2 WLR 509 recklessness which renders such knowledge or foresight tautologous, is virtually to render *Caldwell* recklessness a crime of strict liability. A Category I offence becomes a Category III or IV offence.

Whether the distinction between strict and absolute offences in the United Kingdom is expressed in terms of the the Crown's bearing the burden of proof in respect of the offender's intention to do the act prohibited by statute or the distinction between these offences and offences in the first and second category in New Zealand is expressed in the defendant's bearing the burden of proof in the third and fourth categories the mental element necessary of proof in both jurisdictions in Categories III and IV can be expressed in terms of fault. If fault, measured in terms of the reasonableness of the offender's behaviour can deny an offender an excuse or defence, neither fault nor excuse (or defence) is relevant to *Morgan* mens rea. □

1 If *Beckford v R* [1988] AC 130 affirms *Morgan*, supra, in as much as the reasonableness of the offender's belief that he is being attacked is not necessary of proof, the reasonableness of the force used in retaliation is none the less necessary of proof. The reasonableness of the offender's behaviour, whether it operates to excuse or as a defence, being necessary of proof, any mooted distinction appears unwarranted. Refer to the blurring of the distinction of the juristic basis as between duress and necessity in *R v Howe* [1987] 1 AC 417, 482.

2 Cf Lord Hailsham LC in *R v Howe*, supra 485 who stated: "The decision of the threatened man whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and is therefore that of a man with perhaps to some exceptionally limited extent, a '*guilty mind*' but he is at the same time a man whose mind is less guilty than is he who acts as he does but under no such constraint." [Emphasis added]

3 Refer to fn 1 above and to the evidence of the "credible narrative" necessary to adduce where provocation, is pleaded: *R v McGregor* [1962] NZLR 1069 and of the "proper foundation" where automatism is pleaded: *R v Cottle* [1958] NZLR 999.

4 Cf *Gammon (Hong Kong Ltd) v AG* [1984] 2 All ER 1 and *AHI v Minister of Labour* [1986] 1 NZLR 645, and *Lim Chin Aik*, supra.

5 Williams, *The Criminal Law — The General Part* (1961), 122-123; Hall, *General Principles of Criminal Law* (1960), 366-367 and Turner. *The Modern Approach to Criminal Law* (1945), 195 considers the punishment of negligent behaviour unjustifiable. For Hart, "Negligence, Mens Rea and Criminal Responsibility" in *Punishment and Responsibility* (1968), 140 the issue is not whether negligence should be called mens rea but whether the admission of "negligence as a basis of criminal responsibility is . . . to eliminate from the conditions of criminal responsibility the subjective element which . . . the law should require." The subjective requirement is fulfilled when the question is asked whether the accused had at the time of driving the normal capacity of control. Ibid, 156.

6 November J, "Mens rea — *Millar, Morgan, Metuariki* — and Mistakes" [1991] NZLJ 142, 143.

Competition policy after the Porter Report

By Peter B Hinton and David G Moorman, Auckland practitioners

That New Zealand now has to operate in a highly competitive world is a commonplace of economic journalism. Some people see it as ironic that we have regulatory agencies established to ensure competition in the marketplace. Enforced competition as compared with the earlier model of regulatory agencies to ensure orderly and restrictive business practices represents a major shift. In this article the authors discuss changing policies overseas as well as in New Zealand. The establishment of an Enterprise Council would indicate that the general thrust of the Porter Report is acceptable to the Government and it is therefore important for lawyers in the commercial area to be aware of the legal implications.

New Zealand's economic position is the result of a complex system of attitudes, institutions and policies that developed when our economic challenges were different and much simpler .... The world has changed, but New Zealand has not changed enough to keep pace. Restoring our prosperity demands that New Zealand industry upgrade and broaden its competitive advantages. This is a complex challenge that will require sustained and systematic changes in our education system, attitudes towards competition and prevailing management philosophies to name but a few. Piecemeal solutions will simply not work. Crocombe G T, Enright M J and Porter M E, *Upgrading New Zealand's Competitive Advantage* ("Porter Report") at 156.)

A Introduction

The report which followed the visit by Michael Porter of the Harvard Business School earlier this year to review New Zealand's economy effectively concluded that New Zealand's current malaise results from an environment which fosters a fundamentally static view of the world: a view which is reactive to world events rather than pro-active. Economic evidence from a detailed analysis of over 100 different industries in both large and small nations is set out in the Report to show that domestic competition is vital to sustained international success. Japan and Switzerland are singled out to show the close association between vigorous domestic rivalry and the creation and persistence of competitive advantage. In Japan, the Report states, most internationally successful industries characteristically face fierce competition in their domestic and foreign markets.

The Report pulled no punches in concluding that the Government had failed to stimulate domestic rivalry and that it should desist from its interventionist and expedient practices. The central role of government economic policy, it is said, should be to set the stage so that New Zealand firms can achieve high and rising levels of productivity.

In the Report's view, the ownership of many of New Zealand's most successful private businesses is highly concentrated in a small number of groups which control a substantial and increasing share of New Zealand's economy. "The net effect is that the incidence of sustained, direct, and active competition between the major New Zealand companies is limited." (Porter Report at 134).

The Report states that real national competitiveness will only be achieved if the Government disallows mergers, acquisitions and alliances that involve industry leaders. The Report notes that the Government appears to have accepted that New Zealand is too small to support multiple rivals in an industry (ie, that economic efficiency arguments justify market concentration).[1] This has not changed yet, despite the Report. A recent example of this aspect of Government policy is the statement of economic policy in relation to the dairy industry conveyed to the Commerce Commission pursuant to s 26 of the Commerce Act 1986. The final part of the statement read as follows:

> The prices received by farmers for New Zealand dairy produce are determined in the international marketplace and frequently result from the subsidised production of our competitors. New Zealand has to take every opportunity to be competitive on the cost of production. Government's policies on inflation and the labour market have a prime objective of ensuring input costs are competitively priced. The Government supports structural rationalisation in the dairy processing industry that will lead to greater efficiencies in resource utilisation and enhanced competitive advantage.[2]

We do not intend here to determine whether the globalisation view which has prevailed to date is valid[3] or, more precisely, whether it has such validity that it takes priority over the Report's views and recommendations. Nor is it intended to second-guess the wisdom of the transfer of monopoly status from state-owned enterprises to the private sector (presumably receiving a premium for "dominance") rather than splitting

such state-owned enterprises into competitive units. We do however suspect that the Report's view must be correct unless it is accepted that export market success is more significant than domestic market competition (such that domestic consumption should subsidise export endeavours) *and* that size is critical to export market success.[4]

If the Report's views are valid, then the Commerce Act is in need of major review. The principal objective could no longer be the simple prohibition of abuses of dominance or of the acquisition or strengthening of dominance (not being justified by the public interest). Rather, the law would have to be extended to provide for the establishment and retention of a totally pro-active competitive market-place.

In this regard, the essential aspects of such a policy would include the establishment of "trust-busting" machinery and the imposition of a tighter merger threshold from the present "acquisition or strengthening of a dominant position in a market". Before discussing these matters, it is appropriate briefly to analyse the regulation of mergers in New Zealand and the most relevant overseas jurisdictions.

B Regulation

(1) New Zealand

The regulation of mergers in New Zealand is dealt with in Part III of the Commerce Act. Section 47 of the Commerce Act provides as follows:

> No person shall acquire assets of a business or shares if, as a result of the acquisition:
>
> (a) That person or another person would be, or would be likely to be, in a dominant position in a market; or
> (b) That person's or another person's dominant position in a market would be, or would be likely to be strengthened.

Clearly the most important term in s 47 is "dominant position in a market". Section 3(9) of the Act gives an extensive, but somewhat circular and therefore unhelpful definition of the term. Essentially, a person is said to have a dominant position in a market if that person as a supplier or an acquirer of goods and services is in a position to exercise a dominant influence over the production, acquisition, supply or price of goods or services in that market. A number of factors are to be taken into account in any particular case including the market share, technical knowledge and access to materials and capital of that person, the extent to which the relevant person is constrained by the conduct of competitors and potential competitors, and the extent to which the relevant person is constrained by the conduct of suppliers and acquirers of goods and services in the particular market. What all this effectively means is that a person is in a dominant position in a market where that person is in a position of economic strength which enables it to hinder the maintenance of effective competition in the relevant market by allowing it to behave to an appreciable extent independently of its customers and ultimately of consumers.

Section 48 provides that nothing in s 47 of the Act is deemed to apply to the acquisition of assets of a business or shares if:

(a) before the acquisition, either the person acquiring the assets or shares, or the business the assets of which are acquired or the body corporate in which the shares are acquired (as the case may be), already had a dominant position in a market; and

(b) the acquisition has not resulted or will not result in the strengthening of that dominant position.

The effect of s 48 is to exclude from the application s 47 bare transfers of market dominance (in other words, situations where dominance will be acquired by reason only of a bare transfer of monopoly power from an incumbent operator to the acquiring party). Section 48 is modelled on s 50(2C) of the Australian Trade Practices Act 1974.

Any person who proposes to acquire assets of a business or shares may make application for clearance or authorisation. Since 1 January 1991, there are no longer any minimum share or asset value thresholds above which parties to an acquisition must give prior notification to the Commission. The Commission will grant a clearance if it is satisfied that the acquisition will not result in any person acquiring or strengthening a dominant position in a market. The Commission will grant an authorisation if it is satisfied that the acquisition will result in such a benefit to the public that it should be permitted. If clearance or authorisation is not obtained and the completed acquisition is found to create or strengthen a dominant position in a market, the acquisition may be struck down by the High Court on the application of the Commerce Commission. The Commission may also apply to the High Court for penalties of up to $5,000,000 in the case of a company and $500,000 in the case of an individual. The Commission, together with third parties, may apply for injunctions and/or damages. The Commission may accept undertakings to divest shares or assets, but may not accept undertakings relating to conduct after completion of the acquisition. The Commission may also apply to the High Court for an order that specified shares or assets be disposed of. Any such application must be made within two years from the date the alleged contravention of s 47 occurred.

It should be noted that s 27 of the Act may also apply to asset or share acquisitions where clearance or authorisation has not been obtained. In such cases, the Commission has indicated that it will only use the substantial lessening of competition provisions of the Act to strike down acquisitions where there are dominance implications. The Commission's power to use s 27 in this way has yet to be tested . We understand that the application of s 27 to business acquisitions arose from a legislative error, but it may be that no change to the law is the best short term answer.

(2) Merger regulation overseas

(a) United States: Section 1 of the Sherman Act, which prohibits combinations in restraint of trade, and s 2 of that Act, which prohibits combinations to monopolise whether "in the form of trust or otherwise" have both been used to

control horizontal mergers. However, s 7 of the Clayton Act, which was enacted in 1914, was intended specifically to catch mergers. It was amended in 1950 by the Celler-Kefauver Act to remedy a major defect in its operation (namely that it did not cover asset acquisitions) and now provides as follows:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or the share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country, *the effect of such acquisition may be substantially to lessen competition* or to tend to create a monopoly. (Emphasis added.)

A new section 7A was added to the Clayton Act by the Hart-Scott Rodino Antitrust Improvements Act 1976, the effect of which was to establish a system of notification for proposed mergers involving combined assets or annual net sales in excess of $110 million. The notification system requires the filing of certain information and imposes a waiting period of 30 days (which may be extended) before the merger may be consummated. Section 7A does not give antitrust officials any increased power to block a merger, only the ability to go to Court to seek an injunction before completion. The decision whether or not the Department of Justice will challenge a merger under s 7 is made on the basis of the 1984 merger guidelines which set out a process for determining whether or not there may be a susbstantial lessening of competition or tendency to create a monopoly. The steps include delineation of the relevant product and geographic market, identification of firms included as participants in the relevant market, calculation of market shares and concentration, assessing ease of entry, consideration of other factors and assessing efficiencies. While it is usually the case that the Justice Department or Federal Trade Commission is the party seeking injunctive relief, private plaintiffs who are likely to be harmed may equally seek an injunction or damages under the Sherman and Clayton Acts. The prospect of treble damages and compensation for legal costs can make an action an attractive proposition.

(b) *Canada*: Mergers in Canada are regulated by the Competition Act 1986. Section 91 of that Act defines a merger as "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person". Section 92 goes on to provide that where, on the application of the Director of Investigation and Research, the Competition Tribunal finds that a merger or proposed merger *prevents or lessens, or is likely to prevent or lessen competition substantially* in a trade, industry or profession (by whatever means), the Tribunal, may (subject to limited exceptions), in the case of a completed merger, order dissolution of the merger or disposition of assets and shares and, in the case of a proposed merger, order that the merger not proceed. One of the important exceptions is that the Competition Tribunal is not to make an order if the merger or proposed merger has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made. Although the Act in New Zealand involves an assessment of "public benefit", the injunction in s 3A of the New Zealand Act that the Commission, when considering whether conduct will result or be likely to result in a benefit to the public, is to have regard to any efficiencies resulting or likely to result from the conduct. This effectively renders the tests the same.

As far as procedure is concerned, Canada adopts essentially the same system as that which applied in New Zealand prior to 1 January 1991. Pre-notification is required if various voting control, asset value or revenue thresholds are exceeded. As would be expected, there are a number of statutory exemptions, such as where the transaction in question does not involve an operating business (defined as a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report) and where the parties (together with their affiliates) have assets in Canada or gross revenues from sales in, from or into Canada of less than $400 million in aggregate value.

Specific provision is made under the Canadian legislation for action to be taken before a merger is consummated. The Director of Investigation and Research is empowered under s 100 to bring before the Competition Tribunal applications for interim orders to restrain the implementation of mergers. Such orders, either on notice or, in limited circumstances, on an ex parte basis, are available to prevent mergers that would later be difficult to undo after a lengthy proceeding or where there has been a failure to comply with the pre-notification requirements. Interim orders have effect for 10 days in respect of ex parte orders and 21 days in respect of orders obtained on notice. Where such an order is granted, the Director is required to proceed as expeditiously as possible with the main application (s 102(6)).[5]

(c) *Australia*: In Australia, acquisitions and mergers are regulated by s 50(1) of the Trade Practices Act 1974 which provides as follows:

50(1) A corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate if –

(a) as a result of the acquisition, the corporation would be, or be likely to be, in a position to control or dominate a market for goods or services; or

(b) in a case where the corporation is in a position to control or dominate a market for goods or services –

(i) the body corporate or other body corporate that is related to that body corporate is, or is likely to be, a competitor

of the corporation or of a body corporate that is related to that corporation; and

(ii) the acquisition would, or would be likely to, substantially strengthen the power of the corporation to control or dominate that market.

As is the case in New Zealand under s 47 of the Commerce Act, the fundamental issue in s 50 is the meaning of "dominate". The words in s 50(1)(a) are "in a position to dominate", not "a position of dominance". Hence, the dominance need not be actual, so long as it would be possible for the corporation in question to move from its present position to one of dominance. The word "dominate" is not defined in the Act, but has been held to mean something less than control, having, rather, a commanding influence on.

Prior to 1977, mergers and acquisitions were caught by the Act when the result would have been "substantially to lessen competition in the markets of the acquirer or of the target corporation". As a result of the amendment, fewer mergers are caught by the Act because of the greater difficulty of establishing market "dominance".

The Australian Trade Practices Commission, in its recent submissions to the Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee), has recommended a tougher merger test which would prohibit mergers that were likely to lead to a substantial lessening of competition in a significant market (effectively the same test which, as noted above, applied in Australia from 1974 to 1977). The Commission said in its submission that there was a growing body of evidence that the current market dominance test had not resulted in greater efficiencies expected from mergers. The Commission Chairman, Professor Alan Fels, noted that the main reason cited for the present relatively weak merger test was the need for mergers in order to improve Australia's international competitiveness. He went on to note that the weak dominance test had been used as a shield enabling anti-competitive mergers in those large parts of the Australian economy not exposed to international competition ((1991) 7 ANZTPLB 43).

Moves by the Commission to seek a tougher merger test appear to have arisen, at least in part, from the Commission's inability to examine a substantial number of important mergers in recent years despite their substantial effects on competition. The Commission has cited several examples including News Ltd/Herald and Weekly Times, Coles/Myer and Ansett/East West Airlines. The Commission believes, as might be expected, that it would also be appropriate to apply the substantial lessening of competition test to mergers in industries covered by other specific legislation, such as banking and the media. (supra, (1991) 7 ANZTPLB 43).

The Trade Practices Commission has also recommended the adoption of a limited system of compulsory merger notification to provide early warning of significant mergers. The proposed pre-notification system would be limited to:

(a) horizontal mergers where both parties to the merger operate in the same market; and
(b) mergers where either the combined assets or sales of both parties exceed $150 million and where the transaction is in excess of $25 million.

Mandatory authorisation would be required for mergers where the transaction value is more than $500 million to provide the opportunity for public scrutiny and ensure that such mergers do not result in public detriment.

The results of the Cooney Committee's inquiry will be of major significance. There are certainly many indications that the Committee will not favour the Trade Practices Commission's submission. The implications either way for New Zealand are clearly critical.

C Restructuring of market participants

If the Report is accepted, then it is pointless to consider regulating only future mergers. The Report condemns the existing market structures and leaves little doubt that, if there is no change in those structures, there is no likelihood of improvement in New Zealand's international competitiveness.

There are three obvious "targets" if restructuring were to be permitted along the lines suggested in the Report, namely:

(a) monopoly producer boards,
(b) monopoly traders, and
(c) concentrated industries.

With regard to monopoly producer boards, these can be examined independently of a review of the Commerce Act. It is likely that some producer boards, as with some industries (eg, media, airlines, electricity and telecommunications), will be identified as "sensitive" and in the public interest and therefore afforded special protection. Whether the authors of the Report would favour this is debatable. Certainly some producer boards (notably the Meat Board and the Dairy Board) have recently been criticised in respects which, if justified, would validate the Report. (See eg *National Business Review* October 25, 1991 and November 1, 1991.)

With regard to monopoly traders, new ground will need to be broken if the true goal is to be innovation and dynamism. All overseas precedents permit divestiture only where there is a degree of "moral culpability". This test would not satisfy those adhering to the Porter theory. The Porter idealist would split the trader into sufficient parts not just to prevent dominance, but also to foster dynamic innovation. The pragmatist might take things in smaller steps.

Finally, with regard to concentrated industries, any attempt to legislate with a view to decreasing the levels of concentration would represent a world first (absent any evidence of actual collusion). The questions and obstacles are many, such as: (1) who determines which industries are concentrated? (2) who determines which industries are unduly concentrated? (3) who determines what should happen in these industries? (4) who determines whatever is to happen? and (5) who pays?

The Commerce Act 1975 in fact permitted "trust busting" in New Zealand (albeit only under certain circumstances). The relevant provisions were not however carried forward into the 1986 Act. Section 70(7) of the 1975 Act provided that where the Commerce Commission,

following an inquiry, found that a merger or takeover had taken place that was or was likely to be contrary to the public interest, the Minister of Trade and Industry could, irrespective of whether the merger or takeover had resulted in or was likely to result in any monopoly, partial monopoly, oligopoly or other circumstances as described in s 61(1)(a), recommend the making of an Order in Council under section 62(3) of the Act. That section empowered the Governor-General, by Order in Council and on recommendation of the Minister, to make one or more of the following orders:

(a) requiring any person to dispose of his business or any part of it, or to restrict or limit the area within which he carries on business or the extent to which he carries on business;

(b) requiring any person to terminate or cease to be a party to any agreement, arrangement or undertaking or to refrain from applying any business practice or method of trading; or

(c) declaring any such complete or partial monopoly, or oligopoly or circumstances to be unlawful and requiring any person concerned in the existence of the complete or partial monopoly or oligopoly or circumstances to take such action including steps for the dissolution of any body corporate or unincorporate or the severance of any connection or of any form of association between two or more persons, including any such bodies as the Governor-General in Council considers necessary.

Such an order could apply to all persons, to persons belonging to any class or group of persons or to one or more specified persons. The Commission could also prescribe such requirements as were necessary to achieve the objects of the order (s 65(3)(b)) and could specify the persons by whom, the times within which and the conditions subject to which the terms of that requirement should be complied with (s 65(3)(b)).

The Commerce Act 1986 does, as noted above, give the High Court the power, upon an application by the Commerce Commission and upon being satisfied that there has been a contravention of s 47, to give directions for the disposal of assets and shares. This power is, however, not nearly as wide as that under the 1975 Act in that it is limited to those situations where there is effective dominance; nor does it have the same ramifications that traditional "trust busting" entails.

It is notable, however, that the current chairman of the Commerce Commission, Dr Susan Lojkine, recently stated that:

> . . . in logic, the Commerce Act should provide for the compulsory disaggregation of market power where entities under the same ownership and control are dominant in a market. This should apply whether the dominance has been acquired by aggregation, by successful competition or by the demise of competitor firms.[6]

While moves are afoot to review the business acquisition provisions of the Commerce Act, it is unknown if possible "trust busting" provisions are on the agenda for discussion. Indeed, there has to date been no indication that the substantive merger rules are being considered, despite the conclusion in the Report. The Commerce Commission Chairman commented that she regarded any legislation along these lines as unlikely at the present stage. The Australian experience shows the difficulties which arise upon trying to implement and enforce a divestiture remedy.[7] If the Report is accepted, these difficulties may need to be overcome.

D Reduction of merger threshold

The ideal Porter model would prevent any mergers which might result in a reduction in market dynamism. The obvious question is when would a merger result in reduced dynamism? Here the line has to be drawn somewhere between two extremes. On the one hand, there is the market comprising two or three firms, none of which is dominant but each of which is complacent or, to use the Report's terminology, has a mindset characterised by a short term static perspective of competition and is in an environment where competition is largely "on price rather than on product or quality" (ie, there is a "live and let live" mentality with no firm willing to engage in truly competitive conduct). On the other hand, there is the market comprised of firms competing fiercely in all areas. The solution here would require a great deal of economic input, possibly beyond the presently accepted economic frontiers. However, one is tempted to suggest that the initial change need only be in the most general of terms – economic thought can then be grafted on to general legal principles over time. If there is merit in this, then perhaps the appropriate model is the "substantial lessening of competition" test already found in s 27 and elsewhere.[8] As noted above, the Trade Practices Commission in Australia has recently indicated that it favours a return to the substantial lessening of competition test, but the Australian Government has yet to be convinced.[9]

We believe that the term "substantial lessening of competition" is wide enough to embrace the innovation/dynamism theories outlined in the Report even though they have not as such been adopted expressly in the United States. There, where the legal test is, as noted above, the effect of an acquisition substantially to lessen competition or to tend to create a monopoly, the focus has been on the creation or enhancement of market power. The regulation of mergers (centred largely around the Herfindahl-Hirschman Index) has resulted in the protection of the competitive fabric in any event.

It is inappropriate here to delineate the precise methodology which would be appropriate if the new test were adopted. There is however copious literature and New Zealand would have to adapt this to its own environment. If the Report is correct, then experience has shown that New Zealand is no different (on grounds of population or any other factor) to the rest of the world and that despite our national characteristics and geographical position, the economic principles which apply in the United States and other major trading nations apply equally here. If, then, the Report is accepted, the time may well have arrived when our lawmakers will have to adopt legislation more clearly consistent with, say, the North American models than they have been

prepared to do in the past. Perhaps a true measure of a nation's maturity is its preparedness openly to adopt what has succeeded elsewhere without perceiving a political need to be seen to be doing its own thing or to adopt legislation on the basis of harmony regardless of the merits.

An interesting dilemma would exist if the Australian legislation remains unchanged, but the Report is accepted here. Should New Zealand favour harmony with Australia over the well-being of its own competitive environment?

A subsidiary issue is whether there should be any public benefit authorisation. (There is no indication in the Report that a public interest authorisation procedure should be permitted.) Although efficiency and other factors are taken into account in the United States, mergers are adjudged generally exclusively on the competitive consequences free of other more political considerations. Pragmatically speaking, however, whilst there may be considerable merit in this approach, there seems little doubt that there will be no change at all to the merger rules unless s 67 is retained. And, in that the Courts (property instructed) should be able to contain this exception adequately, there should be no great difficulty if it is retained. The retention of s 67 should provide participants with the ability to progress a merger believed to be in the public interest, whilst at the same time the modified threshold would prevent mergers which are contrary to the Porter model. It is submitted that globalisation arguments could be run under s 67 without impacting upon the doctrinal basis for the more stringent threshold test.

E Conclusion

For largely historical reasons, New Zealand has adopted antitrust rules which have arguably permitted a competitive and innovative market place to become reactive and complacent. Only mergers with dominance implications are scrutinised. Even worse, the rules have arguably permitted a reactive and complacent market place involving, say, three traders, to become even more reactive and complacent by permitting at least two of them to merge. The Report concludes that such market structures are fatal to our economic development.

Many say the Porter Report is wrong and this may be the case![10] Most in this camp appear however to have an interest in or a contentedness with the status quo. Equally, it may be (and has been) said that the supporters of the Report live in an ivory tower. Someone will need to decide: this is the absolutely critical area for debate and given the implications for New Zealand, it is to be hoped that a decision will be made and communicated as a matter of urgency![11]

If the authorities accept the Report, then we have suggested that New Zealand antitrust law may have to go beyond the boundaries set overseas in recognition of the fact that we are not simply seeking to maintain a competitive environment: rather, we are seeking to create one. For this reason, machinery will need to be set in place (1) to fragment existing market structures and (2) to prevent aggregations which may have anti-competitive effects. These two limbs are a necessary package. However, the first limb is clearly a political "hot-potato" and delays in this respect should not justify delays in amending the merger rules. Further, given the existence of a clear economic debate, it may be advisable for the legislative error which has resulted in double jeopardy for merger protagonists (ss 27 and 47) to remain on the books until the matter is resolved. □

1 This mentality has a number of parallels with the wave of mergers seen in Britain in the 1960s. The view of the British Government and many industrialists at that time appears to have been that it was only by the creation of much larger, domestic firms that Britain could hope to be an effective player in the then new international environment. In retrospect, it has been shown that this view was almost wholly mistaken. Corporations such as IBM, Matsushita, Boeing, General Motors, Toyota and Volkswagen were not successful because they were large; they were large because they were successful. As one commentator has stated: "The agglomeration of smaller companies which lacked the competitive advantage to support a global strategy created only larger companies which lacked that competitive advantage. The idea that if one created organisations which resembled internationally effective firms in size they would come to resemble them in other characteristics too, is one which was quickly falsified. The paradigm case was the British car industry, which illustrates this as so many others of Britain's industrial failures". J Kay, "Mergers: the Economic Arguments" in *International Anti-Trust Law Towards 1992 — The Development of International Anti-trust* edited by Julian Maitland Walker.

2 The issue of the statement of economic policy was a direct consequence of the Commission's decisions in *The New Zealand Co-Operative Dairy Co Limited/Waikato Valley Co-Operative Dairies Limited* (Decision Nos 264A and 264B) where the Commission refused clearance or authorisation to a merger proposal between the two dairy companies. The statement was a determining factor in the successful appeal to the High Court by the New Zealand Co-Operative Dairy Co Limited against those decisions (*The New Zealand Co-Operative Dairy Company Limited and Waikato Valley Co-Operative Dairies Limited v The Commerce Commission* CL 36 and 37/91).

3 The globalisation view was rejected by the Commerce Commission in its response to the Report.

4 It should be noted and will be shown that both of these concerns can apply within the framework of a more stringent threshold test and can be "applied" under authorisation criteria. There may of course be markets in which competition is not economically viable, but this should not affect the general nature of competition policy.

5 D A R Williams, "The Development of Merger and Takeover Regulation in New Zealand" in R J Ahdar, *Competition Law and Policy in New Zealand* (1991) at p 301-02.

6 An address delivered at the inaugural meeting of the Competition Law and Policy Institute of New Zealand, James Cook Hotel, Wellington, 3 September 1989, (reproduced in R J Ahdar, *Competition Law and Policy in New Zealand* (1991) at 104).

7 *Trade Practices Commission v Australian Meat Holdings Pty Limited & Ors (No 2)* (1988) ATPR 40-893.

8 It may be necessary to consider the appropriateness of the term "substantial", but, in the final analysis, it is likely that the desirability of adopting an approach which is generally adopted overseas will prevail.

9 News release by the Australian Attorney-General, 22 August 1991.

10 There are of course those that argue that economies such as Australia and New Zealand face their own unique problems, such as the distance from world markets and the often severe restrictions faced by those exporting to overseas markets. Porter's studies are criticised as being based on only a handful of studies whose results are inconclusive. The finger is also pointed at Japan which, even though cited as a prime example of a market characterised by "fierce rivalry", is renowed for its cartels and informal networks. See eg, Al Tonking, "Section 50 – Controlling Mergers in the Future?" Paper presented at Trade Practices and Consumer Law Conference, 26 October 1991.

11 The extent of the Government's response to the Report to date is the convening by the Prime Minister of a conference of industry leaders to examine the Report (held on 31 May 1991) and the creation of an Enterprise Council. A review of the Commerce Act is also said to be underway, but no concrete proposals for reform have yet been released.