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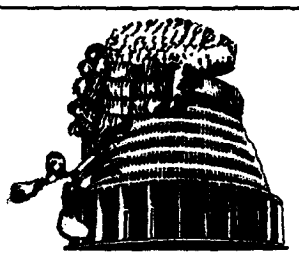

NEW ZEALAND LAW CONFERENCE
MARCH 1993

Australian legal developments

In *The Bulletin* of 19 January 1993 Mr Justice Michael Kirby, President of the Court of Appeal of New South Wales, wrote on legal developments in Australia during 1992. He noted the extraordinary action of the new government in the State of Victoria in "dismissing" 11 Judges of the Compensation Court by the simple expedient of abolishing their Court. The unprecedented attack, for the Anglo-Saxon world, on the independence of the judiciary is a frightening precedent that, until now, would have been considered by lawyers as so incredible as not even to be thought about. As Mr Justice Kirby says in his article, this action of the Victorian government is the most serious assault on the independence of Judges since Australia became a federal nation. Regrettably there are those in New Zealand with disturbingly similar unconstitutional, anti-judiciary attitudes.

In the opening paragraphs of his article the Judge notes the judicial activism of the High Court of Australia and remarks that barely a month passed in 1992 without a really important decision being handed down. He refers specifically to the *Mabo* case (1992) 107 ALR 1 concerning native title; the *Dietrich* case on right to counsel; the *David Securities* case (1992) 109 ALR 57 on mistake of law and recovery of moneys paid; the *Cleary* case (1992) 107 ALR 577 about elections; and the *Chu Kheng Lim* case regarding boat people. All these cases could have some significance for New Zealand jurisprudence.

He also refers to the *Capital Television* case (1992) 108 ALR 577 on electoral advertising in which the High Court struck down, that is held invalid, an Act of the Federal Parliament. The reason given was that Parliament could not make such a law, which was declared to be incompatible with *implied* constitutional protections for free speech. This was said to be of the very nature of a Parliamentary democracy even though not contained in the letter of the Australian constitution. Again this is of considerable significance in the New Zealand context. For instance those who, as part of the campaign for MMP talk so glibly of an Electoral Commission to control political parties, and the need for political parties to be "registered" under a statute, show a lack of appreciation of, and indeed a disdain for, a free and open political system. As the New Zealand Law Society is learning, having a statutory basis is not necessarily a guarantee of freedom, but rather an invitation to control. The same, of course, could be true of a possible Judicial Commission as discussed in an editorial at [1992] NZLJ 409.

Mr Justice Kirby then commented further on the High Court of Australia cases in words that are also applicable to our legal and constitutional systems.

> Pundits in and outside the legal profession expressed reservations about this burst of judicial creativity and the "discovery" of basic constitutional rights. Certainly, courts have to temper their development of new legal principles to the digestive capacity of society. Concern was also voiced about what other "implied rights" would be found lurking between the lines of the constitution to limit the law-making power of Australia's democratic parliaments.
>
> If 1992 taught our community anything, it should be that the law is often uncertain. Judges cannot simply pull a lever to find the correct answer. They must make choices . . . The year probably saw us reach the limit of the boundary of judge-made law. When the pipes begin to squeak and the Minister of Justice (Senator Michael Tate) angrily denounces common law rights in federal parliament, it is probably true to say we have had – judicially speaking – a very creative year . . .

Justice Kirby went on to write of the effect on Australian jurisprudence of the signing by the Australian Government of the Optional Protocol to the United Nations Covenant on Civil and Political Rights. The New Zealand Government has also signed this protocol and we can expect therefore that there will be similar developments here over the next few years. The Optional Protocol permits the citizens of the States that have accepted it, to petition the United Nations to consider a complaint against their own country in its treatment – as a matter of policy, of administrative action, or of law – of its own citizens. For Australia, Mr Justice Kirby described the situation as follows:

> Although appeal to the Privy Council has long since gone, 1992 opened with Australia voluntarily submitting its laws and practices to another body of foreign judges and lawyers – this time in Geneva. As a result, Australians who have exhausted their remedies in domestic courts can take a complaint to the United Nations Human Rights Committee, asserting that our law, as found, breaches obligations under international human rights rules . . .

The influence of international human rights law was another big feature of the High Court decisions of 1992. Several of the trailblazing decisions were influenced by the fact that what Australian courts decide can now be scrutinised (and criticised) by the UN body. Some people feel this constitutes unwarranted interference in our own laws – a self-inflicted wound. But others see it as farsighted recognition that human rights must be respected in every land if the next century is to bring lasting global peace.

Australian Court decisions are of growing importance as Australia and New Zealand are becoming economically closer. There is an inevitable likelihood therefore that our legal systems will also become closer. Indeed the New Zealand Court of Appeal has already indicated a willingness to develop our interpretation of the law in line with that of Australian Courts in legitimate commercial activities : see *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd* [1987] 2 NZLR 395, 407; *Vicom New Zealand Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600, 605; and *Wineworths v CIVC* [1992] 2 NZLR 327,331.

In a very different context the Planning Tribunal has interpreted a provision in the Resource Management Act 1991 in accordance with a judgment of Kirby P in the New South Wales Court of Appeal. The case is *Australian Mutual Provident Society v Gum Sarn Property Ltd* (1992) 2 NZRMA 119, 124 following *Warrington Shire Council v Sedevic* (1987) 10 NSWLR 335. This again illustrates the growing relationship between the two legal jurisdictions.

It needs to be noted however that differences of interpretation will continue to exist. For instance in the *Wineworths* case Cooke P noted that that the Court of Appeal was sympathetic to integrating the general market in the two countries and was willing therefore to develop our law to protect the legitimate interests of Australian traders. He added however that the protection of illegitimate interests was a different matter; and in fact the *Wineworths* case declared the law in New Zealand to be different from that in Australia regarding the trade use of the term "champagne".

P J Downey

Recent Admissions

Barristers and Solicitors

Armitstead P J	Wellington	17 December 1992	Luping D S	Wellington	17 December 1992
Austin G W	Wellington	17 December 1992	McLay G P	Wellington	17 December 1992
Bandaranayake O V	Wellington	17 December 1992	McKimm A G	Wellington	17 December 1992
Bennett T D	Wellington	17 December 1992	Mellsop J M	Wellington	17 December 1992
Bevan W D	Wellington	17 December 1992	Moore J C	Wellington	17 December 1992
Capper A R	Wellington	17 December 1992	O'Carroll L R J	Wellington	17 December 1992
Carroll J M	Wellington	17 December 1992	Olesen C M	Wellington	17 December 1992
Carter J	Wellington	17 December 1992	Palmer R M	Wellington	17 December 1992
Corcoran B J	Wellington	17 December 1992	Parbhu J R	Wellington	17 December 1992
Devine K F	Wellington	17 December 1992	Peden R A	Wellington	17 December 1992
Dobbie N J	Wellington	17 December 1992	Pope A Q	Wellington	17 December 1992
Ewing K M	Wellington	17 December 1992	Price S J	Wellington	17 December 1992
Fagan H J	Wellington	17 December 1992	Raynal H F	Wellington	17 December 1992
Fry S E	Wellington	17 December 1992	Rogers C T C	Wellington	17 December 1992
Goodlet D M	Wellington	17 December 1992	Scott L J	Wellington	17 December 1992
Hallum V L	Wellington	17 December 1992	Scott P C McK	Wellington	17 December 1992
Harrington R A	Wellington	17 December 1992	Scott S K	Wellington	17 December 1992
Hickey M J	Wellington	17 December 1992	Shirtcliffe J G	Wellington	17 December 1992
Hrstich L V	Wellington	17 December 1992	Stewart A J	Wellington	17 December 1992
Hunter P M	Wellington	17 December 1992	Sudell R C R W	Wellington	17 December 1992
Ireland P A J	Wellington	17 December 1992	Suri K	Wellington	17 December 1992
Jamison A C	Wellington	17 December 1992	Taylor P B	Wellington	17 December 1992
Kingsbury A F	Wellington	17 December 1992	Trevelyan L M	Wellington	17 December 1992
Lee J	Wellington	17 December 1992	Tustin P J	Wellington	17 December 1992
Letts G M	Wellington	17 December 1992	Valentine J B	Wellington	17 December 1992
Lewers B D	Wellington	17 December 1992	Whatman C D	Wellington	17 December 1992
London M A	Wellington	17 December 1992	Wong H S	Wellington	17 December 1992

Case and Comment

Disposition of insanity acquittees

R v Farrow (Court of Appeal of New Zealand, CA 238/92, 12 October 1992 Casey J (presiding) Holland and Thorp JJ)

This case involved appeals against conviction and sentence, following the appellant's conviction in the District Court on charges of causing grievous bodily harm with intent to injure and common assault.

The appeal against conviction was solely on the ground that the verdict should have been one of not guilty on the ground of insanity.

The case raises important questions of procedure concerning the disposition of the criminally insane.

The facts.

The appellant had gone to the offices of his solicitor. While he endeavoured to obtain a document by force, the solicitor's secretary intervened and was brutally assaulted by the appellant. The assault continued when the victim was lying on the ground. The solicitor was also assaulted. The evidence of two psychologists called by the defence at the trial was that the appellant suffered a delusional paranoid disorder to the extent that at the time of the assaults he would not be capable of knowing that what he was doing was morally wrong (see s 23 Crimes Act 1961). This evidence was unchallenged by the prosecution.

The appellant also gave evidence which was in direct conflict in many respects with the evidence of the prosecution witnesses, and may have led the jury to believe that he did know the difference between right and wrong. However, the Court took the view that the jury's beliefs on the medical evidence were unreasonable.

It was accepted that in light of the unchallenged psychiatric evidence, the Crown could not have advanced the case for conviction any further than to explain to the jury what was required before an insanity verdict could be found. Accordingly, the guilty verdict on both charges was a matter of surprise to counsel and the trial Judge.

The Court noted the similarity to *R v Clark* [1983] 1 CRNZ 132, where the Court of Appeal acting pursuant to s 386(4) of the Crimes Act 1961, had substituted a verdict of not guilty on account of insanity for a verdict of guilty. As in that case, the Court was satisfied that although the jury may have reached the view that the appellant did know what he was doing was wrong, it had failed to take into account the unchallenged psychiatric evidence of the paranoid disorder. The jury had also evidently failed to consider whether the accused had been able to know that the act was morally wrong.

Accordingly, the jury's verdict was set aside and one of not guilty on account of insanity substituted.

The question of disposition

In the light of the substituted verdict, counsel for the appellant, acting on instructions, sought to persuade the Court to commit the appellant to a mental hospital pursuant to s 118 of the Criminal Justice Act 1985. The Court, however, influenced by the history of the matter before it and the appellant's own history, particularly his possibly requiring medication for the rest of his life, considered that that would be a wrong exercise of its discretion. Citing the concern for the safety of the public the Court considered the appropriate sentence was an order pursuant to s 115(1)(b) of the Criminal Justice Act making the appellant a special patient subject to indeterminate detention in a hospital.

Discussion

The decision is undoubtedly correct. However, it illustrates a confusion that exists in this area of the law. Strictly speaking, s 118 of the Criminal Justice Act 1985 can have no application to a person acquitted on account of insanity. There are two reasons why s 118 is inappropriate in such a case. First, the section may only be invoked where a person is "convicted of an offence". It is a "benevolent alternative to a custodial sentence in a penal institution". (*R v Elliot* [1981] 1 NZLR 295, 302, per Richardson J.) By definition, a person "acquitted on account of insanity" is not convicted of any offence. Secondly, while a Court does have a discretionary power, instead of making an order under s 115(1)(b), to make an order that a person "be detained in a hospital as a committed patient", where it is satisfied that it would be "safe in the interests of the public to do so", (s 115(2)(a)), such an order is not the same as an order under s 118. The dispositional option in s 115(2)(a) appears to be seldom used. It represents a concession by the legislature to the fact that occasionally a person, though legally insane at the time of the offence, is no longer a danger to the community and may be safely placed under a regime of therapeutic care without a need for tight security. Section 118, on the other hand, it may be argued, presupposes a need for secure detention, provided that reasonable proportionality between the offending and "the severe curtailment of liberty inherent in an order for detention as a committed patient", is not lost (see *R v Elliot*, supra, 302).

In the present case it would seem that s 118 may have been invoked in error, counsel evidently having intended to persuade the Court to exercise its statutory option under s 115(2)(a).

In any event lawyers practising in this area of criminal law should be aware of the amendments to these provisions of the Criminal Justice Act 1985 effected by the Mental Health (Compulsory Assessment and Treatment) Act 1992. In particular, in any case where an order is made pursuant to either s 115(2)(a) or s 118, the order is deemed for the purposes of the

Mental Health (Compulsory Assessment and Treatment) Act 1992 to be a compulsory treatment order (see Mental Health (Compulsory Assessment and Treatment) Act 1992, Fourth Schedule). Every compulsory treatment order is presumptively a community treatment order, unless the Court making the order considers that the patient cannot be treated adequately as an outpatient (s 28(2)). It should be noted that reasons of security alone will not justify the making of an inpatient order. What must be established is that, in the Court's view, care and treatment as an outpatient is "inappropriate to the needs of the patient" and his or her social circumstances are inadequate for his or her care in the community (s 28(4)). Arguably criminal justice concerns for the detention of dangerously disturbed offenders, are no longer the responsibility of health administrators.

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Acquittal for the intoxicated automaton?

Burnskey v Police (Unreported, 1 May 1992, High Court, Wellington Registry, AP 102/91.)

In *Burnskey* the issue before Temm J was the dividing line between insanity (or insane automatism) and automatism. Unfortunately, the other recent decision in this area, *Police v Bannin* [1991] 2 NZLR 237, was not discussed by Temm J. As a result, the approach which should be taken by New Zealand Courts on the related matters of evidence, burden of proof and *mens rea* is still not clear. This note will address those issues raised by the decision in *Burnskey*.

Kevin Burnskey was convicted in the Upper Hutt District Court of indecent assault on a 13-year-old girl, pursuant to s 134 of the Crimes Act 1961. On 1 March 1991 the complainant had been waiting at the Trentham railway station for a train home after school. It was 3.50 pm. She saw a group of men, who appeared to be drunk, leave a nearby hotel. Burnskey detached himself from the group and joined the girl on the platform. He called out to her and tried to engage her in a conversation. Finding the prospect unpleasant, she moved away to sit in another part of the station. Burnskey nevertheless followed her and persisted with his attentions, eventually touching her indecently. When she stood up to leave, he grabbed her and, in the struggle, damaged her clothing. He also licked her face. She continued to struggle and tried to push him away. The train then arrived and she was able to board the first carriage, as did Burnskey. He continued to verbally harass her. A guard eventually helped her get home by allowing her to change trains.

Burnskey had been drinking at various hotels in the Hutt Valley since 9.20 that morning. When he was interviewed by the police the next day, he could remember little of his activities after 1 pm. He specifically said he could not remember speaking to anyone at the Trentham railway station or on the train, although he did remember getting off the train, buying some takeway food, and going home. This evidence, and the evidence given at his trial, established that Burnskey had not suffered from any accident, fall or physical injury at any stage during that day.

The sole medical evidence was that given for the appellant by Dr Marks. Dr Marks testified that Burnskey had probably suffered brain damage at birth which had led to "slowness in his intellectual functioning and in his learning throughout his development years" (at 4). In 1983 Burnskey's intellectual functioning had been assessed as "borderline sub-normal". It was also accepted that for the last 14 years alcohol had affected Burnskey adversely. When drinking he tended to become "very, very, intoxicated and what is perhaps best easily described as hopelessly drunk" (at 5). Burnskey's unacceptable behaviour in hotels in the Hutt Valley had led him to acquire the nickname of "Nuisance".

> [T]his [behaviour] would not often involve aggression, but it usually involved pestering when he would stay with people, talking on and on, his face to the ear so that they eventually got sick of his company, and where he was showing a gross lack of judgment about the behaviour, even amongst a crowd of people that were probably drinking very heavily (at 5).

Dr Marks also opined that it was possible that Burnskey was in a state "of what we would medically call automatism" (at 6) at the time of the acts complained of. This conclusion seems to have been based on the fact that the accused could not recall the events that took place (at 5-6), and that he was engaged in inappropriate behaviour (at 10), evidence of which was viewed as consistent with a finding of automatism. With respect, the conclusion that this conduct comes within the legal definition of automatism must be doubted.

Burnskey's behaviour certainly suggests he was very drunk. In such cases, it is not unusual that there would be inappropriate behaviour and some loss of memory after the event. There is simply not enough evidence, however, to suggest that he was in a disassociated state at the time. He was able to carry out a series of purposive activities, which involved pursuing the girl at various times, both on and off the train. Although this kind of purposive conduct may be done by someone in an automatic state, he was clearly not "unconscious" in the sense that is required by law. Although Dr Marks testified that Burnskey was "largely not conscious" (at 6), he went on to define what he meant by this statement in the following way:

> I would strongly question whether he had consciousness and awareness enough to govern using reason and judgment and his other intellectual functions [in relation to] what he was doing and its consequences (at 6).

This kind of lack of judgment due to intoxication should not be viewed as amounting to automatism. If it does, serious issue must be taken with the statement of the Criminal Law Reform Committee that "[i]t is rare for a defence based on intoxication to result in the defendant's acquittal on all charges, and in the few instances where there is the outcome, the degree of culpability on the part of the defendant will be at least debatable." (*Report on Intoxication as a Defence to a Criminal Charge*, 1984, at 2). Allowing the defence of automatism in such a case seems to take the step that the Committee indicated should be responded to by legislative change (at 54).

After hearing the evidence on automatism, the District Court Judge decided that the onus was on the accused to prove, on the balance of probabilities, that he was in a state of automatism at the time. In the High Court, both counsel agreed that this was an incorrect statement of the law. Although there is little further discussion of this issue in the judgment, it does potentially raise some difficult questions, given that the case was heard in summary proceedings. There is contrary authority on whether s 67(8) of the Summary Proceedings Act 1957 applies to the "defence" of automatism. The resolution of the issue will depend upon the characterisation of the defence.

In *MOT v Strong* [1987] 2 NZLR 295, 306 Fisher J held that "as a defence automatism is available and only available, in those cases in which intent is an ingredient"; thus, like intoxication, automatism denies the existence of *mens rea*. Similarly, Fisher J in *Bannin* held that evidence of automatism is relevant in deciding whether the accused had the "mental capacity to form the particular mental ingredients of the crime" (at 254). In *Adams on Criminal Law,* however, it is suggested that automatism is something more akin to a common law general defence and is available pursuant to s 20(1) of the Crimes Act 1961 (at CA 23.37). This passage in *Adams* is difficult as the commentator not only indicates that the defence may be limited by the "total absence of fault" requirement of public welfare offences, presumably relying on the passage of Richardson J in *Civil Aviation Department v MacKenzie* [1983] NZLR 78, 81, but also views it as being available to offences which impose absolute liability. Such a blanket availability of the defence suggests it should be treated as a denial of the *actus reus*. There are some semantic difficulties with this, however. The act has clearly been done. Alternatively, if the defence is relevant to the "voluntariness" inquiry, or the question of responsibility for the *actus reus*, this may lead back into the difficulties numerous practitioners and academics have had with the decision of Woodhouse J in *Kilbride v Lake* [1962] NZLR 590.

The rationale of the defence is clearly a point that needs to be resolved in New Zealand, as it has clear implications on the questions of availability and the burden of proof. Unfortunately, the Crimes Consultative Committee has avoided such a task, recommending that clause 19, which sought to define involuntariness, be set aside and that the Courts should "continue to apply the relatively well-settled common law principles." (*Report on the Crimes Bill 1989,* at 12).

The second statement of the law in the District Court that was found to be incorrect by Temm J was the decision that "self-induced intoxication was no excuse for the commission of a crime and that because indecent assault did not require 'proof of some specific intent as an essential element of the crime' the question of intoxication was irrelevant" (at 10). This appears to be an application of the approach that is followed in England as a result of the decision in *DPP v Majewski* [1977] AC 443. In that case, the House of Lords held that the effects of self-induced intoxication could provide a defence only if the offence charged required a "specific intent". This decision, and the arbitrary distinction between basic and specific intent, has been severely criticised. The rule in *Majewski* was rejected by the Criminal Law Reform Committee in 1984 in favour of the approach taken in *R v Kamipeli* [1975] 2 NZLR 610. In that case the Court of Appeal held that as the onus is always on the prosecution to prove all the elements of the offence, self-induced intoxication remains relevant to the *mens rea* inquiry. The statement in the District Court that intoxication was irrelevant was therefore clearly incorrect. What remained at issue for Temm J in the High Court, however, was whether the evidence of intoxication could result in an acquittal on the grounds of automatism, insanity or absence of *mens rea*.

After dealing initially with the burden of proof in cases of automatism, Temm J turned to the central issue: whether Burnskey's automatic state was caused by a disease of the mind. The decision was an important one, as evidence of a disease satisfies the threshold inquiry in s 23 of the Crimes Act 1961 and the appropriate defence of insanity. If the automatism was not caused by a disease of the mind, Burnskey would be acquitted.

Temm J considered the leading New Zealand case of *R v Cottle* [1958] NZLR 999 as well as most of the relevant English authorities on the point: *R v Kemp* [1957] 1 QB 399; *Hill v Baxter* [1958] 2 QB 277; *R v Quick* [1973] 3 All ER 347; *R v Sullivan* [1983] 3 WLR 123; *R v Hennessey* [1989] 2 All ER 9 and *R v Burgess* [1991] 2 WLR 47. No reference was made either to the decision in *Bannin*, where Fisher J held that the defendant was suffering from a disease of the mind (at 249), or to the leading Canadian cases of *Rabey v R* (1981) 54 CCC (2d) 1 or *R v Parks* (1990) 56 CCC (3d) 449.

After reviewing the authorities, Temm J held that they led him to conclude that:

> [I]f, *because of an external injury to the brain*, a person acts unintentionally in a state of automatism, he cannot be guilty of an offence that requires *mens rea*. The issue of insanity does not arise because there is no disease of the mind in the sense that the phrase is used in s 23 of the Crimes Act (at 23, emphasis added).

Temm J then held (at 23) that "[t]he psychiatric opinion is that the appellant had probably suffered a brain injury at birth, and that his brain functioned defectively as a result. *That dysfunction was not caused by a disease of the mind.*" (Emphasis added). With respect, this is asking the wrong question. What should have been asked was: what caused the automatic state? If brain dysfunction caused the automatism, the relevant question is whether the dysfunction *is* a disease of the mind for the purposes of s 23. The fact that the brain damage was not *caused* by a disease of the mind is of no consequence as far as the current legal test of insanity is concerned. If Temm J's test for insanity (disease of the mind), is whether the automatism is caused by an injury to the mind which is internally sourced, then brain damage must satisfy it. That is, brain damage is a disease of the mind. Certainly, brain damage may not be viewed as a "disease of the

mind" in normal usage, but then neither is diabetes (*Hennessey*) or arteriosclerosis (*Kemp*). Further, the inquiry in those cases was not whether the diabetes or arteriosclerosis was *caused* by a disease of the mind, but rather, whether such conditions *are* diseases of the mind.

There may be an argument that it was complications at childbirth that resulted in the brain damage and, as this was an external injury, it cannot amount to a disease of the mind. This argument exposes one of the problems of the test used by Temm J, which is that it does not provide direction as to which point in time it should be applied. Such an approach also allows the argument that a fatty diet resulted in a hardening of the arteries and that accordingly arteriosclerosis, contrary to existing law, cannot be a disease of the mind. The material question remains: what caused the automatic state? It was not fatty foods or childbirth, even though, arguably, without these events the automatism would not have occurred.

The alternative finding available was that intoxication alone caused the automatic state. Applying the straight external factor test would mean that Burnskey was not suffering from a disease of the mind and the defence of automatism would be available. This option was, however, excluded by Temm J. He found that "[t]he medical evidence clearly indiates that if the automatism existed it was caused by a *combination* of the defective working of the appellant's brain and the influence of alcohol" (at 24, emphasis added).

The possibility that the automatism was the result of *both* intoxication and a disease of the mind, requires consideration of *A-G for Northern Ireland v Gallagher* [1963] AC 349. This case also raised the difficulty of classification when both factors operate to cause the automatism. As stated in *Adams* (at CA23.60), it may well be impossible to know whether the impairment actually resulted from the alcohol or the brain damage, but clearly a decision needs to be made in order to determine whether s 23 applies. In *Burnskey*, it appears that neither factor alone would have caused the disassociated state. One approach to such a situation would be to allow the policy considerations raised in *Bratty v A-G for Northern Ireland* [1963] AC 386 to decide the issue.

The failure to refer to policy considerations in his judgment exposes one of the difficulties with Temm J's sole reliance on the internal/external distinction. Such considerations have almost without exception been stressed in these cases as influencing the decision one way or another. Although the statement by Lord Denning in *Bratty* (at 412), that "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind" has been qualified by later cases, the need for on-going supervision where the problem may occur again has often been mentioned (see *Quick* at 352: *Rabey* at 8; *Sullivan* at 128; *Burgess* at 53). These considerations seem particularly relevant in this case. Burnskey had a reputation for engaging in this kind of behaviour and although "it would not often involve aggression" (at 5), it would clearly often amount to the kind of activities complained of by this 13-year-old girl.

The internal/external distinction may well itself prove insupportable in some cases. One example is the decision in *Quick* as compared to that in *Hennessey*, where both defendants were diabetics, but, because they were in different stages of the disease, low blood sugar compared to low insulin, they were classified as a sane automaton and as insane respectively. The internal/external distinction also does not provide direction as to which point in time it should be applied nor to which "injury" it is relevant — the physical "external" event (being hit on the head with a rock or raped) or the "internal" reaction to it (concussion or Post Traumatic Stress Disorder).

The final point of interest in *Burnskey* is the adoption of a similar line taken by Fisher J in *Bannin*, namely, that evidence of automatism is relevant to both the question of the accused's mental capacity and to the actual fact of intent. In this way, automatism, like intoxication, is relevant to the question of whether the defendant had the requisite *mens rea*. Applying this approach to the facts of *Burnskey*, Temm J held that the prosecution, given the evidence of non-insane automatism, had not proved that Burnskey acted "with full knowledge and intent" (at 25). The appeal was therefore allowed and his conviction was quashed.

Despite the attraction of such a solution, in terms of clarity, the application of such an inquiry to cases like *Burnskey* may cause legitimate public concern. Although the Crimes Consultative Committee (at 20) has repeated the standard response that exculpation on the basis of intoxication is very rare, and therefore poses no threat to public safety, such statements must be hollow reassurance for the parents of 13-year-old girls. Cases like *Burnskey* should instead provide the reason for law reform in this area.

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New Zealand salvage awards: Short-changing our saviours?

Foster v The Yacht "Dolphin Queen" (High Court, Rotorua, AD 1/88, 8 February 1991); *Marine Services Ltd v Bolton* (High Court, Auckland, M 1179/90, 25 March 1992)

It is a trite maxim of maritime law that public policy demands liberal salvage awards, both to reward voluntary services successfully rendered in hazardous conditions, and to encourage future salvors to act promptly and efficiently. The principle of liberality has been reflected in English salvage cases since at least the seventeenth century, when the common form of action called on Admiralty Courts to grant "a verie good and sufficient reward". New Zealand authorities have also claimed to give expression to this principle of liberality, although, with respect, the awards have on occasion been so modest as to suggest mere lip-service to it. More recent decisions, however, seem to reject this principle altogether, calling into question the very basis of salvage awards.

In *Foster v The Yacht "Dolphin Queen"* (High Court, Rotorua, AD 1/88, 8 February 1991), the plaintiff sought an award for life and property salvage. In March 1988 the *Dolphin Queen* was on a pleasure cruise near Pauanui when Cyclone Bola hit New Zealand. After making what was

described as "a chapter of errors", her crew found themselves in considerable difficulty. On the coastguard's advice the yacht headed for Home Bay, where some of her crew were removed by helicopter. One of her owners asked the plaintiff to provide assistance. Over the next two days the plaintiff provided radio support for the crew on the yacht, giving general advice, reassurance and assistance which contributed to the yacht finally being lashed to a jetty at Home Bay. The gales continued, the jetty slowly deteriorated, the steering quadrant of the yacht rattled loose and the crew on board began to suffer privation. The plaintiff was called on again to remove the yacht from the jetty and sail her to Tauranga. This was accomplished in confused seas with occasional cyclonic wind gusts of up to 50 knots.

Anderson J rejected the plaintiff's claim for life salvage, which was essentially based on the allegation that he had dissuaded the skipper of the *Dolphin Queen* from making an "irrational and inevitably fatal bid" for a mainland haven. The Judge upheld the plaintiff's claim for property salvage, however, as his actions complied with the legal requirements for salvage (on which see P Davies "Salvage on the New Zealand coast" [1982] NZLJ 39). The Judge found that the plaintiff's services were voluntarily rendered, were successfully and competently executed in dangerous circumstances, were of a reasonably long duration, and had saved a valuable yacht from significant damage.

Section 357 of the Shipping and Seamen Act 1952 provides that the owners of any ship, aircraft, cargo or wreck in respect of which salvage services have been performed, shall pay "a reasonable amount of salvage" to the salvor. What is "a reasonable amount"? In this case the agreed salved value of the yacht was $237,000. The owners offered to pay $1,000 for the plaintiff's services. This paltry offer, a "rather supercilious attitude" displayed towards the plaintiff, and other incidents, created a bitterly adversarial situation in which the plaintiff demanded an award approaching half the salved value. Anderson J regarded this demand as utterly untenable. He adverted to the policy principle that salvage awards should be generous, but immediately qualified this by stating that the principle was based on the need to encourage salvors to act, "which may have been more relevant in earlier days of sailing, at times of sailing ships and wreckers, than in modern society". Returning to this theme later, the Judge remarked (at p 27):

> [W]e are a maritime nation with, I hope, a perceivable commitment to serving others . . . . It would, I think, be cynical to believe that this country, at this stage of its development, needs mercenary encouragement to save ships and mariners on the seas.

Anderson J emphasised (at pp 26-27) that what constitutes a reasonable salvage award:

> cannot be looked at in a social vacuum. The attitude of ordinary New Zealanders, the national ethos, must have some bearing on perceptions of what is reasonable. There is an indication to this effect in an unreported decision of Mr Justice Quilliam in the . . . *Westwind V.* This decision . . . determines that the general effect of the New Zealand cases must be taken as a more reliable guide than the English cases. The reason why, of course, is that perceptions of what is reasonable in our community will not necessarily reflect exactly the perceptions of a different society on the other side of the world.

The Judge listed the relevant New Zealand precedents, noting the quantum of each salvage award and the percentage of salved value it represented. On the basis of these precedents, he made an award of $23,700, representing 10% of the salved value of the vessel.

It is respectfully submitted that there are several difficulties with this approach to salvage awards. First, proponents of current economic theory would probably argue that an adequate monetary inducement for all salvors is more, rather than less, relevant in modern times, because it promotes efficiency in salvage services; and that it is unrealistic to suggest that salvage services are, or should be, the product of altruism. Further, it is the Court's interpretation of encouragement of future salvors as the sole or primary consideration underpinning salvage awards which allows a conclusion that such encouragement (and therefore a generous award) is venal and unnecessary. In fact, this is only one of several relevant policy considerations: a salvage award first and foremost rewards liberally brave, successful endeavours; and expresses the premium which maritime law places upon services that prevent disruption of trade, destruction of marine assets and loss of mariners' lives.

Secondly, the Court's interpretation of "a reasonable amount of salvage" in s 357 of the Shipping and Seamen Act 1952 seems not to take into account the legislative history of the Act. Apart from changes to maritime safety rules, the Act largely consolidated relevant statutes and common law principles (*New Zealand Parliamentary Debates,* 21 October 1952, p 2018). Section 357 should accordingly be interpreted by reference to common law principles, including the principle of liberality. In short, s 357 does not require Admiralty Courts to determine the price which a New Zealand lay person would place upon the salvage services in question; but that which an Admiralty Court, having due regard to the peculiar policy concerns of maritime law and the technicalities of salvage situations, would regard as reasonable. On the latter, correct approach, the Court's decision would be guided by the general practice of maritime nations, rather than by more parochial considerations.

Thirdly, it is respectfully submitted that downplaying the relevance of "the English cases" loses sight of basic rules of precedent: the Privy Council has on several occasions reaffirmed the principle that salvage awards ought to be estimated on "a more enlarged and liberal scale" (see eg *The Glenduror* (1871) 8 Moore PC (NS) 22, 17 ER 221). These precedents, in so far as they lay down general principles relating to all salvage awards, are binding on New Zealand Courts.

It is certainly true that New Zealand salvage awards are generally lower than their English counterparts. This may in part be explained by the relatively few major salvage incidents in New Zealand, and more importantly the lack of a permanent body of professional salvors, which means that New

Zealand awards are generally not enhanced to include professional salvors' overheads. With respect, however, it is unlikely that New Zealand awards are more conservative because of a different antipodean perception of what is reasonable. A cursory survey of reported Australian salvage awards suggests that Courts on the other side of the Tasman are normally more open-handed, despite the fact that several of the conditions which are taken to explain modest New Zealand awards are present there too. (On average, Australian Courts have awarded 13% of salved value, as opposed to 8% in New Zealand; the highest reported award was 35%, as opposed to 20%.) The New Zealand decisions simply seem to reflect an emphasis on owners' property rights, at the expense of salvors' legitimate interests.

The approach adopted in the *Dolphin Queen* was commented on more recently in *Marine Services Ltd v Bolton* (High Court, Auckland, M 1179/90, 25 March 1992), which concerned an application under s 6 of the Reciprocal Enforcement of Judgments Act 1934 to set aside registration of a judgment of the Supreme Court of the Solomon Islands. The judgment was for a debt in respect of salvage performed in the Solomon Islands under a Lloyd's Open Form (LOF). Barker J confessed that he was not entirely certain how the judgment sum was arrived at, as the question of payment had apparently not been agreed by the parties or referred to arbitration. For present purposes, it is of interest to note that the debtor's counsel argued that the quantum of the salvage award was unreasonable. The Judge referred to the approach adopted in the *Dolphin Queen*, of assessing salvage awards by calculating the percentage of salved value that they represent, and emphasised Anderson J's finding that 20% of salved value was the high-water mark of New Zealand awards. Barker J noted that the judgment sum in question represented 49% of the salved value, which, together with other factors, suggested to him that the award had been calculated on an incorrect basis. While the Judge refused to set aside registration, his qualms about the quantum of the award were such that final entry of the judgment was deferred for two months so that the debtor could seek a rehearing in the Solomon Islands.

The emphasis on percentage of salved value and the treatment of salvage precedents as formulae in the *Dolphin Queen* and *Marine Services* represents a shift away from the traditional approach – of using precedents as rough guides only, assessing each salvage claim on its own merits by reference to the well-known factors which influence the quantum of awards (on which, see *Kennedy's Law of Salvage,* 5 ed, 1985, pp 461 et seq) – towards a stricter approach whereby claims are number-crunched and pegged within mathematically neat boundaries established by the authorities. If taken to its logical conclusion the percentage approach, which has been rejected by English and United States Admiralty Courts, will ensure that more than 20% of salved value is rarely, if ever, awarded by a New Zealand Court. Another undesirable result of this approach is that New Zealand salvage awards will become increasingly out of step with more liberal awards in other maritime jurisdictions, detrimentally affecting the uniformity of maritime law.

Conservative salvage awards are inconsistent, not only with our common law principles and the practice in most other maritime nations, but also with current trends in international law. The 1989 Salvage Convention recognises and extends the principle of liberality. It requires (in arts 12-14) that all salvage operations which have a useful result be appropriately rewarded; provides for enhanced awards in certain cases where salvage services have averted environmental damage; and mitigates the severity of the traditional "no cure no pay" rule. In a recent discussion paper, Maritime Transport very sensibly recommended that the Shipping and Seamen Act be amended to incorporate the Convention provisions (*Review of the Shipping and Seamen Act 1952,* 1992, p 99). It is hoped that this recommendation will be acted upon, and that the salvage sections in the Act will be amended to provide the Courts with clear guidelines, requiring a generous reward and stipulating that there is no ceiling in terms of percentage of salved value. Otherwise, any amendments to the Act are unlikely to be effective and the spirit of the Convention will continue to be defeated by parsimonious awards.

Until the Act is amended, however, the message for salvors would seem to be that major salvage services should only be undertaken on the basis of LOF 90, which incorporates Convention provisions providing for a right to a reward; and that disputes over payment should, if feasible, be resolved through arbitration or an Admiralty action in rem in a more sympathetic jurisdiction.

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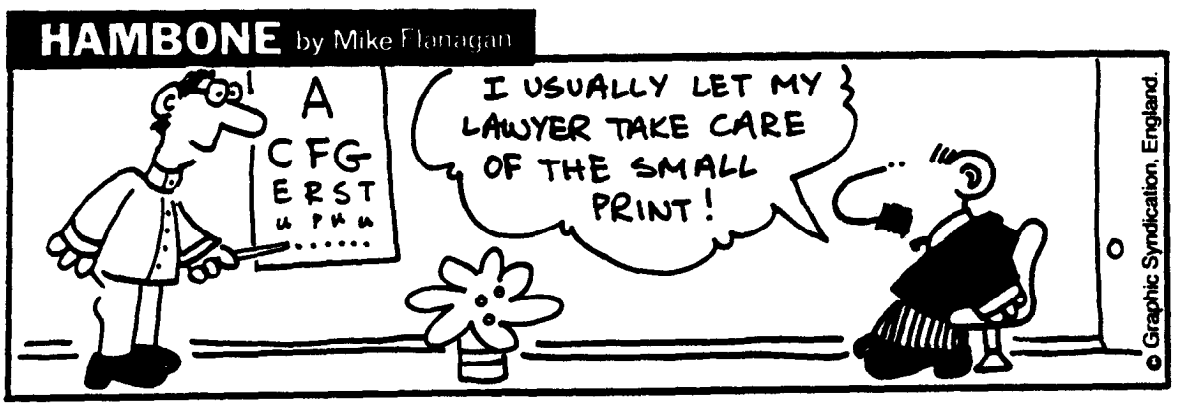


A principled approach to bail

By Steven Zindel, a Nelson practitioner

The Constitution of the United States of America forbids the imposition of excessive bail. Also, some three-quarters of the individual State constitutions provide for bail as of right, with certain reservations. These provisions date back to 1791. This illustrates the very significant constitutional importance of bail in any community that places a high value on individual liberty. In this article Steven Zindel considers the history of changing legal attitudes to bail in New Zealand, with particular regard to the New Zealand Bill of Rights Act 1990. The author argues that the present law is neither authoritative nor principled and suggests certain criteria that should be adopted.

Introduction

Bail is a tremendously practical subject with widespread implications as to the liberty of the individual. It is contended that the law relating to bail is applied in an inconsistent fashion and too frequently subjective attitudes and irrelevant material are determinative. In light of the New Zealand Bill of Rights Act 1990 ("Bill of Rights") it is submitted that there should be regarded a presumption as to bail with bail only being denied if certain criteria are proved to be satisfied by the prosecution. What is needed is a consistent and principled approach to bail, in line with the case law and the trends which may be discerned in what is to follow.

Bail principles

The classical statement on bail is that of Coleridge J in *In re Robinson* [1854] 23 LJQV 286:

> The test, in my opinion, of whether a party ought to be bailed is, whether it is probable the party will appear to take his trial . . . but . . . though I lay down that test, I think it ought to be limited by the three following considerations. When you want to know whether a party is likely to take his trial, you cannot go into the question of his character or of his behaviour at a particular time, but must be governed by the answers to three general questions. The first is, What is the nature of the crime? Is it grave or trifling? The second question is, What is the probability of a conviction? What is the nature of the evidence to be offered by the prosecution? . . . the third question is, Is the man liable to a severe punishment?

That case was considered by Sir Robert Stout, CJ in *R v Valli* (1903) 23 NZLR 27. The Chief Justice there adopted the three tests laid down by Coleridge J and said that unless he was to lay down some new rule for the exercise of discretion as to bail he was bound by that decision. The Chief Justice did not consider that Coleridge J allowed any other question, such as that the accused would impede the course of justice or tamper with the witnesses, to affect him. Applications of bail in *Robinson* and *Valli* were both refused. In *Robinson* the applicant was a bankrupt concealing part of his estate, an offence liable to transportation for life. In *Valli* the charge was arson, punishable by imprisonment for life and the Crown evidence was very strong. Admissions had been made and depositions had concluded.

Fair J in *In re Hewer* [1935] NZLR 883 and later Myers CJ on behalf of the Full Court rejected an argument that with the development of New Zealand and technological developments such as the introduction of wireless, there was a greater degree of difficulty in absconding and the test for bail should be liberalised. Bail was also refused on the basis of the *Robinson* tests. The two offences of procuring an abortion were punishable by imprisonment with hard labour for life. A strong prima facie case in support of the charge was shown by the evidence disclosed at the depositions.

A different approach seems to have been taken by Smith J in *In re R* [1944] NZLR 19 where His Honour placed the emphasis on the absence of evidence from the prosecution as to the charge. His Honour indicated that in such a situation a person should be admitted to bail unless there is something in the circumstances to show he is unlikely to appear when the evidence is offered. His Honour indicated (at p 20):

> If no evidence is offered on the charge, and if no direct evidence is given upon the question of probability of appearance, the presumption of innocence entails an accused person to be released on bail . . .

A wider view as to what evidence could be drawn upon by a Court was expressed by Barrowclough CJ in *In re D* [1956] NZLR 752, and in *Hubbard v Police* [1986] 2 NZLR 738, Chilwell J went so far as to express his reliance upon the outline of facts given verbally by Counsel for the Crown. The authors of Adams at CA 319.15 make the point that direct evidence as to the probability of appearance can seldom be available and verbal assertions are often proffered as to the charge, at least in the lower Courts.

The English case of *R v Phillips* (1947) 111 JP 333 marks the high tide of judicial conservatism regarding bail. It was indicated by the English Court of Criminal Appeal that some crimes such as housebreaking are crimes which will very probably be repeated if a prisoner is released on bail as such an offence may be committed "with a considerable measure of safety" to the person committing it. The Court of Criminal Appeal viewed with

evident disfavour the fact that the accused was given bail twice in respect of the three charges. There was apparently no defence of one and the accused was seemingly arrested in the act for one of the other charges. The Court indicated that it wished:

> . . . magistrates who release on bail young housebreakers, such as this applicant, to know that in 19 cases out of 20 it is a mistake.

The case was followed by the Supreme Court in *R v Vincent* [1950] NZLR 653 in the context of burglary. Another case in a similiar line is that of the Court of Criminal Appeal in *R v Armstrong* [1951] 2 All ER 219 where a duty was stated on the part of the Court inquiring as to bail to investigate the antecedents of a man who is applying for bail and, if he has a bad record, particularly a record which suggests that he is likely to commit similar offences while on bail, then that is a matter which it must consider before granting bail.

Modern trend?

It is contended that in recent times New Zealand Courts have taken a more liberal approach and that this is desirable, particularly bearing in mind s 24(b) of the Bill of Rights that everyone who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention, and s 25(c) recognising the right to be presumed innocent until proved guilty according to the law. The sections effectively place the onus of proof on the Crown as to why bail should not be granted.

Canadian law

This is consistent with the Canadian position. Under s 11(e) of the Canadian Charter of Rights and Freedoms ("Charter"), the accused has the right "not to be denied reasonable bail without just cause". A Bail Reform Act was enacted in 1971 which places an onus on the Crown and under the Act, detention in custody can only be justified at a "show cause hearing" upon either a specified primary or secondary ground. Section 515(10) of the Criminal Code now reads as follows:

> (10) For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds:
>
> (a) on the primary ground that his detention is necessary to ensure his attendance in Court in order to be dealt with according to law; and
>
> (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a)) that his detention is necessary in the public interest or for the protection or safety of the public, having regarding to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or an interference with the administration of justice.

Don Stuart in his book *Charter Justice in Canadian Criminal Law*, 1991 makes the comment that until recently Courts have held that "just cause" under s 11(e) of the Charter is "synonymous" with the Bail Reform Act grounds for detention. In connection with the secondary ground, that of the public interest, dicta have ranged from the passage of Lerner J in the Ontario High Court in *Powers* (1972) 20 CRNS 23:

> "Public Interest" involves many considerations, not the least of which is the "public image" of the Criminal Code, the Bail Reform Act amendments, the apprehension and conviction of criminals, the attempts at deterrence of crime, and ultimately the protection of that overwhelming percentage of citizens of Canada who are not only socially conscious but law abiding. This cannot be emphasised too strongly. Much has been written in the public press about the attitudes of citizens, juries, law enforcement officers (who some seem to forget are also citizens in our society) concerning accused persons being released and subsequently arrested on allegations of commission of further offences. When weighing the *rights* of the accused in the context that he should not be improperly detained or discriminated against, one is also mindful of the *rights* of the accused in the context that he should not be improperly detained or discriminated against, one is also mindful of the *rights* of the community and remember that in the "public interest" the scales not be tipped in the other direction to the extent that the citizen may, in wonderment and bewilderment, feel that the application of our criminal laws (bail provisions) is a mockery or at least not being administered realistically or in the public interest.

A more recent view was that of Mr Justice Baudouin for the Quebec Court of Appeal in *Lamothe* (1990) 58 CCC (3d) 530 where His Honour relied both on the presumption of innocence and s 11(e) to assert a quite different view of the public interest.

> With respect to the perception of the public, as we know, a large part of the Canadian public often adopts a negative and even emotional attitude towards criminals or powerful criminals. The public wants to see itself protected, see criminals in prison and see them punished severely. To get rid of a criminal is to get rid of crime. It perceives the judicial system harshly and the administration of justice in general as too indulgent, too soft, too good to the criminal. This perception, almost visceral in respect of crime, is surely not the perception which a Judge must have in deciding the issue of interim release . . . [The] perception of the public must be situated at another level, that of a public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion that the application of the presumption of innocence, even with respect to interim release, has the effect that people, who may later be found guilty of even

> [more] serious crimes, will be released for the period between the time of their arrest and the time of their trial. In other words, the criterion of the public perception must not be that of the lowest common denominator. An informed public understands that there exists in Canada a constitutionally guaranteed presumption of innocence [section 11(d) of the Charter] and the right not to be denied reasonable bail without just cause [section 11(e) of the Charter].

Don Stuart's view is that the latter statement seems far more in keeping with Charter values and he makes the comment that: "It is doubtful that the framers of the Bail Reform Act ever intended 'police interest' to be an independent ground for detention" [at p 275].

In that context, the Quebec Court of Appeal held in *Pearson* (1990) 79 CR (3d) 90 (written in French, but still of Commonwealth interest) that a reverse onus on the accused placed for trafficking in narcotics under the Canadian Narcotics Control Act was in breach of the Charter. It was stated to be arbitrary and unjust to require, without further consideration, that every person accused of trafficking in narcotics establish that detention in custody was not necessary. It was seen as strange that drugs had a harsher regime for bail than alleged offences of violent theft, sexual aggression, domestic violence or extortion. The law was seen as not taking account of the nature of the drug, its quantity, the proof, degree of responsibility of the accused or the presence or absence of previous convictions. It was also regarded as discriminatory and unduly limiting the accused's right to a fair trial. Difficulties for the accused were seen in the upset of family life, the difficulties of preparing the defence and stigmatisation by reason of contact of the accused with hardened criminals. It was stated in that decision that although the objective of protecting society from the grave ills associated with drug trafficking was of sufficient importance to warrant overriding constitutionally protected rights, the proportionality test had not been met. There was no rational connection between the objective and the presumed dangerousness of every person accused of trafficking in narcotics, nor had it been established that the preventive detention in custody of those accused had a positive impact on curbing drug trafficking. The means did not impair as little as possible.

Recent New Zealand cases

In New Zealand in *Hubbard v Police* [1986] 2 NZLR 738 Chilwell J indicated that the two main tests involving factual questions which have to be considered by the Court in determining whether to grant or refuse bail are first the probability or otherwise of the defendant answering to his bail and attending at his trial, and secondly, the public interest. His Honour's inclusive criteria are set out as they appear at p 739 of his judgment:

> So far as the first factor is concerned, the criteria to be considered include:
>
> (i) The nature of the offence with which the person is charged, and whether it is a grave or less serious one of its kind.
> (ii) The strength of the evidence: that is, the probability of conviction or otherwise;
> (iii) The seriousness of the punishment to which the person is liable; and the severity of the punishment that is likely to be imposed.
> (iv) The character and past conduct or behaviour of the defendant.
> (v) Any other special matter that is relevant in the particular circumstances to the question of the likelihood of the accused appearing or not appearing.
>
> Public interest criteria include:
>
> (i) How speedy or how delayed is the trial of the defendant likely to be?
> (ii) Whether there is a risk of the defendant tampering with witnesses;
> (iii) Whether there is a risk that the defendant may reoffend while on bail;
> (iv) The possibility of prejudice to the defence in the preparation of the defence; and
> (v) Any other special matter that is relevant in the particular circumstances to the public interest.

Chronologically, the next bail decision of relevance is that of Mr Justice Robertson in *Simeon v Police* [1990] 2 NZLR 116. In that case, His Honour noted that the Court of Appeal had yet to rule on the general principles applicable in all cases of crime to the granting or withholding of bail. The Court held that the classical probanda as elaborated in *Hubbard* should be considered in the general context of public interest and not on a narrow base which His Honour believed could create an artificial approach. The Court indicated the presumption of innocence was a crucial element in our criminal justice system but that it should be applied together with a "realistic assessment" of the allegation made and the strength of the case to support it. If *In re R* had stood for anything else, then it is likely that His Honour would have disapproved of it.

His Honour declined bail for offences of aggravated burglary and aggravated wounding where a bread delivery man was allegedly stabbed in the abdomen. His Honour noted that there could be a lengthy period before trial and that it was not appropriate "when offending of this sort occurs" for persons to be at large. The Court observed that the statistics indicating longer sentences for serious offending had not been as effective as hoped for in reducing crime and that "swift deprivation of liberty may do more to curb the tide of violence". The Court did, however, indicate that when it was to act with "robust realism" it could not let itself experience a "knee jerk reaction".

This might be seen as a conservative decision on bail but it is important to note that the police evidence was very strong. There was a confession, no apparent challenge to it, admissions implicating the accused made by two co-accused, fingerprint evidence and no issue as to identity. Property had also been recovered, in a manner implicating the accused. It was seen to be a virtual inevitability that convictions

would result along with the consequent imposition of a full-time custodial sentence. There was no substantial likelihood that the accused would not answer bail but the public interest outweighed this consideration.

The decision of Greig J in *Police v Hanigan* (1990) 6 CRNZ 497 contains rather more liberal pronouncements as to bail. His Honour stated that the past "very restrictive" principles had been overtaken by more recent cases. The principles were stated as being much wider and the Court was to give consideration to a number of matters which relate to the question of bail. His Honour obviously took on board the youth and home support of the offenders and indicated (at p 498):

> In my opinion, the position is reached now where there is, in effect, a presumption in favour of bail and it is no longer just the question of the gravity of the offence and likelihood of a conviction that decides that matter. The overriding principle must be the likelihood or otherwise of the applicant answering to bail. The rationale is that, on a serious charge where the penalty is likely to be heavy, there may be a disinclination to face up to trial. In my experience that seems to be unlikely as a general rule. Other matters which have to be taken into account are the possibility of further offending and that can be an important feature in some cases.

Seriousness of the offending

In *R v Barker* (1987) 3 CRNZ 83, Heron J while indicating that the power to insist on a bond or both or either a surety remains in respect of offences pursuant to s 30 Misuse of Drugs Amendment Act 1978, stated that (at p 88):

> a substantial financial commitment is the best means of ensuring appearances before the Court . . . The fact that failure to answer bail is now an offence will have little significance for a person who is contemplating not appearing before the Court on drug dealing offences. I think the Misuse of Drugs Amendment Act 1978 had regard to some of these special considerations which apply to offending of this kind.

In *Barker*, Heron J was considering drug dealing offences in connection with LSD, a Class A Controlled Drug, for which the maximum penalty is life imprisonment. The offences were undoubtedly serious but so was the offence of rape considered in *Cole v Police* (1986) 2 CRNZ 52. In that case Holland J allowed bail despite the conclusion of depositions on the grounds that the accused was entitled to his presumption of innocence until he was found guilty. His Honour indicated that simply because a charge is serious, that is not by itself a ground to refuse bail.

The statutory injunctions contained in s 7 of the Criminal Justice Act must also be borne in mind. These principles should be taken into account along with other circumstances of the charge: *Brown v Police* (1986) 2 CRNZ 50. Amendments were made in 1991 to the Crimes Act to make it harder for persons accused of violent and sexual offences to receive bail. It has been indicated by the Courts that if an offence is one of serious violence that alone may properly be a dominant consideration in the appropriate circumstances: *R v Chapman* [1992] 2 NZLR 380. See also *Saifiti v Commissioner of Police* (1992) 7 CRNZ 695.

Drugs, not a special case

Discussion of the 1978 Amendment to the Drugs legislation was made by the Court of Appeal in *Clark v R* (1985) 1 CRNZ 449 where it was stated:

> The Misuse of Drugs Act provisions for appeal to this Court emphasise that the ordinary constraints on appellate review of a discretionary decision apply. They have only occasionally resulted in a reversal or modification of a bail decision made in the High Court. We recognise that they were introduced partly as a consequence of the limitation in that legislation that only a High Court Judge can grant bail in drug dealing offence cases. Nevertheless they are a safeguard both of the liberty of the subject and of the public interest (in that the Crown can appeal). It has to be remembered that, in cases where the prosecution requires considerable time to prepare for trial, and in other cases too, pre-trial custody may last for months. Although a change of circumstances may warrant a fresh application to the High Court, it is doubtful whether without any such change there can be a review in the High Court of a decision to refuse bail. See *In Re Hewer.*

The decisions of the Court of Appeal in *Lunn v Police* (CA 165/78, 26/10/78) and *R v Benfield* [1980] 2 NZLR 754 are notable for a rejection of the proposition that the effect of s 30 of the Misuse of Drugs Amendment Act 1978 was in some way to alter unfavourably to accused persons in drug dealing offences the ordinary principles upon which the Courts have granted or withheld bail in criminal cases generally. In *Benfield,* the Court indicated that it had not heard detailed submissions regarding the general principles applicable in all cases of crime to the granting or withholding of bail, because of time factors and that it had never been called upon to consider the degree to which the tests in *Robinson* et al were adequate at the present time. A general principle was accepted as stated in 11 *Halsburys Laws of England* (4th ed) para 167 that:

> In exercising their discretion with regard to bail the Justices must consider the nature of the offence, the strength of the evidence, the character or behaviour of the defendant, and seriousness of the punishment which may be awarded if he is found guilty.

On the cases before the Court in *Benfield*, the risk of absconding was the issue and the Court was not asked to consider, in relation to drug dealing offences, the risk of re-offending while on bail. The Court indicated that:

> We have no doubt, however, that there will be cases where this aspect is very important.

The decision of *Burton v The Queen* 3 ACTR 77 was referred to but not

discussed in *Benfield*. In *Burton*, the Supreme Court of the Australian Capital Territory refused bail to a man who had been granted bail for having eight and a half pounds of cannabis in his possession but was then arrested later, while on bail, for having possession of ten pounds of cannabis. Mr Justice Fox indicated that the principal consideration, and in many cases the sole consideration, should be simply whether, if granted bail, there is a reasonable likelihood that the accused will be present at the hearing of the charge. His Honour stated (at p 78):

> It is not normally a factor of any great weight adverse to the granting of bail that an accused person may possibly commit a crime while he is on bail. It should not readily be assumed that he might commit an offence, or further offence. If he does, he can be dealt with by the criminal law. There are, however, situations in which the consequences of any crime he commits while on bail may be so serious and have such wide spread effect that the possibility that he may commit a crime while on bail is an important consideration.

One factor that might have influenced His Honour in refusing bail was that the hearing for the charge could possibly occur within a week. Another factor must have been the flagrant nature of the offending of a similar type over the space of five months.

Bail will not be given simply because there is a hope of rehabilitation as in *Benson v R* (30/3/90, CA 49/90) where bail was continued for an accused who pleaded guilty and who wished to continue at an Odyssey House programme.

Delay to trial

A relevant factor as to bail is whether there will be a delay in the trial process. This provoked Mr Justice Holland in *James v Police* (1986) 2 CRNZ 54 to grant bail where there was to be a delay of three and a half months before a date for a depositions hearing could be fixed. Notwithstanding the accused's convictions for several previous assaults and other violent behaviour and his charge of assault with intent to cause grievous bodily harm, bail was granted. It was indicated that a delay of more than about six weeks between an indictment being laid and the depositions being taken on a relatively simple charge was intolerable. His Honour stated (at p 55):

> It is in my view quite unsatisfactory to accept a system that requires an accused person on a serious but also relatively simple charge to be kept in custody for a period of in excess of three months before any evidence is given in Court indicating his guilt. All that is required is assembling the Court and setting the matter down. It may well mean the cancellation of other fixtures that are made in the Court but if the liberty of the subject is to mean anything then such steps must be taken and the present arrangements must be changed. Where a person is to be held in custody and both the prosecution and the defence are ready to proceed, it is intolerable that in normal circumstances there should be a delay of more than six weeks or so, and to permit such delay is not even paying lip service to the presumption of innocence and the rights of liberty which the Courts profess to protect.

Dangers of a paternalistic attitude

It is submitted that what His Honour, Mr Justice Tipping, called a "paternalistic" attitude not be adopted to the considering of bail: *G v Police* (1989) 4 CRNZ 671. In that case, the applicant was a chronic drug addict suffering from Aids. He faced a large number of charges, the most serious of which was manufacturing morphine. His Honour had in mind the presumption of innocence. The Crown indicated that its information was that the man was a chronic drug addict and that if he were released there would be a risk of further crime in order for him to support his habit and that in turn might result in risk to the applicant himself should he get into difficulty during the course of committing crime. His Honour indicated that the Court was always anxious not to take a paternalistic attitude and to suggest that an applicant who wants bail would be better off in his own interests to remain in custody. Bail was not actually refused but was adjourned in case there was any substance shown to the applicant's fear that he would be kept in solitary confinement in the remand prison because of his disease. The applicant would have to satisfy the Judge that it was demonstrably in his own interest medically to be released on bail.

Conclusion

In the absence of a statute dealing particularly with bail, apart from ss 318 and 319 of the Crimes Act, it is submitted that the Courts have yet to adopt an authoritative and principled approach to bail. Such an approach would recognise a presumption that bail should be granted for all offences, in line with the Bill of Rights, subject only to proof of the following criteria (if bail is not available as of right):

(a) the risk of not answering bail (previous convictions for breach of bail or other Court orders being relevant – two or more in the previous three years might be determinative);
(b) the risk of interference with prosecution evidence;
(c) the seriousness of the charge and the strength of the prosecution's evidence as to it;
(d) the risk of further offending while on bail) again, the nature and frequency of previous convictions would be relevant).

It is submitted that the latter two criteria are not so important as the former two. Care needs to be taken to avoid an overly severe approach to bail which may lead to innocent persons being seen as having a propensity to commit crimes owing to what they have done in the past rather than what they are capable of doing in the future. Such an approach would be inconsistent with the presumption of innocence and the law as to similar fact evidence. The delays of the Court system should not be visited upon defendants who find themselves effectively sentenced on assertions, speculation and hearsay evidence in advance of trial. To treat accused persons otherwise, is to fall short of the ideals of the Bill of Rights and a civilised system of justice. □

R v Goodwin: The meaning of arrest, unlawful arrest and arbitrary detention

By Janet November, Judges' Research Counsel

The case of R v Goodwin *has been noted in earlier issues of* The New Zealand Law Journal; *(see [1992] NZLJ 409, [1993] NZLJ 6, and [1993] NZLJ 10). In this article Janet November looks particularly at the meaning of the term "arrest". It is argued that the "psychological detention", when an accused feels he or she is unable to leave a police station does not amount to "arrest", and consequently the protective provisions of the New Zealand Bill of Rights Act 1990 do not apply.*

Introduction

In a recent House of Lords decision on the meaning of "arrest" and the powers of the police (*Holgate-Mohammed v Duke* [1984] 1 AC 437, 445), Lord Diplock said:

> My Lords, there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual, and the public interest in the detection of crime and the bringing to justice of those who commit it.

The enforcement of the New Zealand Bill of Rights Act 1990, focusing on the rights and liberties of individuals, has become a testing ground for the resolution of this conflict, as the Court of Appeal judgments in *Goodwin* (1992) 9 CRNZ 1, well illustrate.

1 The facts as accepted by the trial Judge, taken from the judgment of the President

G and his wife were asked to attend Taumarunui Police Station to be interviewed in connection with the death of their baby daughter from brain injuries. G was interviewed first between 10.30 am and 4.30 pm by Detective Bass, who then escorted him to the watchhouse area. It is accepted that Constable Ratapu told him to stay there, unbeknown to Detective Bass.

Some while later Detective Bass found G still in the watchhouse, and at 5.16 pm began a second interview which lasted till 9.17 pm. Early in this interview G was cautioned and told "you realise you're not under arrest", and shortly afterwards made the incriminating statements.

He was finally arrested some two months later.

2 The main issue of law: the meaning of "arrest"

The main issue was whether the accused had been arrested at or before the time of the second interview. Hence it was necessary to decide whether the word "arrest" retained its pre-Bill of Rights Act meaning, or, for purposes of the Bill of Rights, had a wider meaning (as indicated by Cooke P in *R v Butcher and Burgess* [1992] 2 NZLR 257, 264).

If it was found that G had been arrested at or before the second interview, there was no compliance with s 23(1)(b) of the Bill of Rights Act, (whereby everyone who is arrested or detained under an enactment has the right to consult and instruct a lawyer without delay and to be informed of that right). So the question of remedy needed to be argued. This question was discussed in the judgments in order to clarify the law, even though it was held by a majority of four to one that G was not arrested.

However the issue of whether, if not arrested, G was unlawfully detained or arbitrarily detained, and whether any remedy was available for breach of s 22 of the Bill of Rights Act, whereby "[e]veryone has the right not to be arbitrarily arrested or detained", was not fully explored.

It is respectfully submitted that this may have been partly because of confusion surrounding the meaning of "unlawful arrest" and also because the models implicit in the judgments of the Court of Appeal of arrest and detention situations are incomplete. This note suggests a fuller model, drawing on academic and judicial writing on the general theme of "when is an arrest not an arrest?"

As the President says:

> Despite verbal refinements, in the end there seems to be quite a wide measure of agreement between the members of the Court . . . [as to the meaning of arrest.] (p 32).

His Honour says:

> I would be content for the purposes of this case not to go beyond the Crimes Act meaning of arrest, accepting that this may be summarised as a communicated intention on the part of police to hold the person concerned on suspicion of an offence or under other lawful authority. (p 23-24)

And later he adds:

> I agree with all members of the Court who take the view . . . that arrest may be defined as the communication or manifestation by the police of an intention to apprehend and to hold the person concerned in the exercise of authority to do so. (p 24)

However some dicta of Cooke P (and also Hardie Boys J) favour a rather wider definition than those of Gault, Richardson and Casey JJ.

The President cited a passage

from *Murray v Ministry of Defence* [1988] 2 All ER 521, 526 where Lord Griffiths quotes several definitions of "arrest", including that of Viscount Dilhorne in *Spicer v Holt* [1976] [1977] AC 987, 1000:

> "Arrest" is an ordinary English word . . . Whether or not a person has been arrested depends not on the legality of the arrest, but on whether he has been deprived of his liberty to go where he pleases. (cited at p 19)

As Hardie Boys J pointed out, not every deprivation of liberty is an arrest (p 53). Nor did *Spicer v Holt* so decide. But in *Murray's* case their Lordships adopted such a wide definition of arrest, and held that a deprivation of liberty or detention for half an hour prior to the communication of words of arrest amounted to an "arrest".

Cooke P, however, does not finally conclude that a deprivation of liberty per se is an arrest. He says:

> If a police officer makes it clear to a suspect that he is not free to go and is to be interrogated by the officer on suspicion of a crime, that person is arrested within the meaning of s 23(1)(b) of the New Zealand Bill of Rights Act. Under the present law of New Zealand the arrest is not lawful. (p 32)

This is a wider view than those espoused earlier in the judgment (p 23-24) in that it leaves out the necessity for an arrest to be pursuant to an enactment or an exercise of statutory authority. Presumably it is for this reason that Cooke P says "the arrest is now lawful". This phrase will be discussed later. The other problem with the above view is that his Honour ascribes it to Casey and Hardie Boys JJ as well. For reasons below, it is submitted that while Hardie Boys J may well concur, Casey J would not.

Casey J cites the definition of arrest from *Black's Law Dictionary* (5th ed) meaning "to deprive a person of his liberty by legal authority" (p 49), as does Richardson J (p 35).

For Casey J:

> So long as the words or conduct of the arrester, seen to be acting or purporting to act under legal authority, make it plain that the subject has been deprived of liberty to go where he or she pleases, then there is an arrest within the meaning of s 23. (p 49)

At first it does not seem that Hardie Boys J agrees entirely with Cooke P's wide view (supra, p 32) as he says:

> The word ["arrest"] is used with reference to an exercise or purported exercise of an authority to apprehend or restrain, generally with a view to laying a charge. (p 53)

However, he later considers what he calls the more general meaning of arrest which he says applies to s 23(1), arrest in its "less formal de facto sense". For a definition he adopts Cooke P's words in *R v Butcher and Burgess* (supra) at 264:

> [I]n my opinion de facto detention in police custody with intention or contemplation that the suspect will or may be formally charged is arrest within the meaning of the New Zealand Bill of Rights Act,

with one qualification:

> There must be a clear and deliberate act or statement by the officer whereby he exerts an authority to restrain.

But it now becomes clear that for Hardie Boys J (as for Cooke P) this does not have to be an exercise of *legal* authority or authority pursuant to statute. For he goes on to suggest that an officer might have to say he is holding a person for questioning (p 54), for which of course there is no statutory authority in New Zealand, as confirmed by the Court of Appeal in *Waaka* [1987] 1 NZLR 754, 757.

For Casey, Richardson and Gault JJ the meaning of arrest is narrower; there must be an exercise (or "purported" exercise) of legal authority which in a New Zealand context presumably means statutory authority. In other words an arrest must be a detention under an enactment, not simply a detention by an officer.

Gault J after reconsideration of his views in *Butcher and Burgess* (supra) was not persuaded to abandon them. "Arrest" continues to have its Crimes Act meaning:

> In my view the essence of arrest is in communicating and manifesting an assumed authority to detain in circumstances in which it is made known or is apparent that some legal process is contemplated, (p 58.)

By "assumed authority" it is clear from his judgment that his Honour means "assumed lawful or statutory authority".

Richardson J details the scheme of s 22, (the right not to be arbitrarily detained), and s 23, (rights on arrest, pp 36-40). He concludes that s 23(1)(a), (the right to be informed at the time of the arrest of the reason for it), contemplates that "to constitute an arrest the deprivation of liberty will have to be justified in law and . . . the officer . . . will give a reason [for the arrest]", as pursuant to s 316 of the Crimes Act (p 38). His Honour finds that it must have been intended that "arrest" in s 23 has its Crimes Act meaning (p 39).

Richardson J's definition at p 41 is:

> No-one is arrested within the meaning of s 23 unless he or she is deprived of liberty by the positive act of an official manifesting an intention to exert lawful authority to do so.

Thus the subjective unexpressed intention of the officer is immaterial. All the Judges agree that there must be expressed words or a positive act.

Richardson J suggests that

> all the Judges define "arrest" in terms of the communication or manifestation by the officer of an intention to apprehend and hold the person concerned in the exercise of a *purported* authority to do so.

But for Cooke P and Hardie Boys J a "purported authority" can mean no actual lawful authority, it seems, whereas for the majority it means a claimed specific statutory authority, (such as s 315 of the Crimes Act).

Thus there is a significant difference between the more traditional views of the majority on the meaning of arrest and the wider views of Cooke P and Hardie Boys J which encompass unlawful detention.

Four elements of an arrest are identified in the judgments. For the majority there must be:

1 A police officer or other officer,
2 making it clear by words or act to a person that s/he is not free to go,
3 on suspicion of the commission of a crime (or for other lawful/statutory reason), which must be communicated, (s 23(i)(a)),
4 pursuant to statutory authority.

For Cooke P the first two requisites suffice although he agrees to the need for suspicion of the commission of a crime, and for Hardie Boys J the first two suffice providing there is a contemplation that the person will or may be charged.

All five Judges say that the meaning of arrest includes "unlawful arrest". This is a problematic, indeed a contradictory, phrase, (an oxymoron) which I will discuss later. Although hallowed by use by persons of "exalted standing", as Lord Edmund-Davies put it in *Spicer v Holt* (supra) at 1005, (and used in the Bill of Rights Act s 23(1)(c)), it has caused and continues to cause confusion. In *Goodwin* it has a different meaning for the majority than it does for the minority.

3 Application of the law on meaning of "arrest" to the facts

Cooke P held that:

> on the most ordinary principles of interpretation . . . on the facts of this case, there was a purported detention under an enactment or an arrest (the terms being for present purposes interchangeable), and that s 23(1) applied. (p 20)

It is difficult to know under what enactment the detention was in this case.

If it was the Crimes Act, the constable would have needed to have good cause to suspect G of having committed an offence punishable by imprisonment (per s 315(2)(b)), to have communicated by word or act the fact that he was depriving G of his liberty (per all the Judges in *Goodwin*), and to have told him for what offence he was arresting him (per s 316 of the Crimes Act).

The only words of deprivation of liberty were those used in the watchhouse by Constable Ratapu who had no cause to suspect G of having committed any offence. Detective Bass then contradicted this instruction by telling G he was not under arrest. Even if the two officers can be considered collectively as "the constable" (or the police) there are problems with the communication.

According to the President:

> [i]t was the nature of the interrogation that in my view made what was done by the police in total a serious breach of the Act. (p 32)

But did that interrogation convert a detention for questioning into a detention under an enactment? Clearly it could not have done. Whilst one can have sympathy for the President's views, that looked at holistically if there was a detention, it was an abrogation of a citizen's rights, there was not an arrest or any other sort of detention *under an enactment* here. Arguably, however, there was an unlawful detention. I will return to this line of discussion shortly.

Hardie Boys J, whose definition of arrest includes unlawful detention, found this to be a borderline case. But he found the duty to communicate a deprivation of liberty lay on Detective Bass who made his own attitude clear, although His Honour does add the rider that simply saying "you are not under arrest" may not always be enough. However, Detective Bass "had no cause to think the appellant had not returned voluntarily . . . He did not indicate by act or word that the appellant was under restraint". So there was no arrest and thus no infringement of the s 23(1)(b) right, (p 55).

Richardson, Gault and Casey JJ all found there was no arrest. As Richardson J said, a detention for questioning without more cannot constitute an arrest (p 42). Gault J said there was no communication to the appellant that he was required to remain with a view to legal process. And Casey J said:

> It cannot be said that in simply detaining him so he could be interviewed the policeman in the foyer was acting or purporting to act in accordance with legal authority. (p 50)

4 Remedy for breach

Both Cooke P and Richardson J confirm the prima facie exclusion of evidence rule where there has been a breach of the Bill of Rights, to be displaced, per Richardson J, where it would be fair and right to admit the evidence. The onus should be on the prosecution, his Honour said, to satisfy the Court that there is good reason to admit the evidence (p 43). The President listed some exceptions to the prima facie exclusion rule – waiver of rights, inconsequentiality, a reasonably apprehended danger, the triviality of the breach. He would have been disposed to admit the evidence in the present case had it not been for the severe and overbearing nature of the questions.

Richardson J notes other remedies which may be appropriate: habeas corpus, damages for false imprisonment and judicial review. He says that the Bill of Rights favours a rights centred approach to assessment of the public interest (p 45) and questions such as those considered by Lamer J in *Collins* (1987) 56 CR 3d 193, (what kind of evidence was obtained, was the violation serious or technical, deliberate or inadvertent, would the evidence have been obtained in any event?) are relevant.

Casey J agreed with both the President and Richardson J as to the question of law, as did Hardie Boys J, who thought exclusion of evidence was the most effective way of vindicating the right at issue (p 554). Gault J expressed discomfort with a more or less automatic exclusion rule rather than the established New Zealand approach, to exclude in the interests of fairness, an approach which his Honour said has not been shown to be inadequate. It is submitted that the more or less automatic exclusion rule is stricter than the discretion to exclude unless it would be fair and right to admit the evidence, which is the established New Zealand

approach to admitting evidence unlawfully obtained (see *Convery* [1968] NZLR 426).

But Gault J agreed with all the Judges that a clear denial of rights which caused the provision of evidence should almost always lead to automatic exclusion.

5 What is an "unlawful arrest"? (s 23(1)(c))

As noted all the Judges assume there can be an "unlawful arrest". For Cooke P and Hardie Boys J this can include a detention by an official that is unlawful ab initio (ie not pursuant to an enactment), whereas for the majority an "unlawful arrest" is an arrest which has been determined to be invalid ex post facto by some defect in the procedure. This is the general meaning of "unlawful arrest" which is technically a false imprisonment! Richardson J says:

> A claim to have arrested for a particular offence may be rejected and the arrest held unlawful if the officer did not genuinely have cause to suspect or if the "good cause" requirement was not satisfied because the officer was honestly mistaken in believing that reasonable grounds for the arrest existed. (p 40)

Gault J says that "whether or not the officer had reasonable and probable grounds for belief or power to arrest in the circumstances goes to the unlawfulness of the arrest but will not affect the fact that the person is arrested".

As a matter of logic an "arrest" cannot be unlawful. The oxymoron "unlawful arrest" as Bernard Robertson says is shorthand for the "tort of assault or unlawful imprisonment committed by a police officer purporting to exercise a power of arrest"[2] or an arrest which has been invalidated ex post facto by some vitiating factor (procedural defect or mistake), and thus becomes a false imprisonment. As Glanville Williams says "an illegal arrest is no more an arrest than an illegal marriage is a marriage".[3]

J Marston has said that if police officers must point to a lawful exercise of power before they can rely on it then . . . the word "lawful" can be read into an arrest.[4]

High judicial authority agreeing that an "arrest" implies a lawful exercise of power is to be found in Lord Edmund-Davies' speech in *Spicer v Holt* (supra):

> . . . I remain unconvinced that "arrest" is stricto sensu an accurate term to use in respect of the wholly unlawful restraint of the person of another . . . despite the frequency of such use and the exalted standing of many who employ it . . . When ["being arrested" or "under arrest"] is used in a statute . . . in my judgment it can mean nothing other than a valid and lawful arrest. (1005).

Clarke and Feldman discuss the case of *Brown* [1977] Crim LR 291[5] where Shaw LJ differentiates arrest from detention, and conclude:

> An arrest is a valid and intentional exercise of an authority to arrest. The very word arrest imports the idea that the person making the arrest has lawful authority for what he is doing. To speak of a person making an arrest without authority is a contradiction in terms. It is strictly unnecessary to speak of an arrest as "valid" for a "false arrest" is no arrest at all.

Cooke P seems to agree that an "unlawful arrest" is a contradiction in terms (p 15), as is an "unlawful detention under an enactment". But despite this acceptance of the illogicality of the terms his definition of arrest includes both an "unlawful arrest" and an "unlawful detention under an enactment", meaning a detention for questioning for example, which is unlawful ab initio. His reason is that the rights will be most valuable in cases of unlawfulness, (p 17 and see also Hardie Boys J at p 53). Of course it would be desirable if a person was given a right to consult a lawyer if unlawfully detained. However, one could hardly expect a statute to impose a duty on an arrester to give such rights when "unlawfully arresting".

If at the time when the officer is arresting he or she believes s/he is arresting or detaining under an enactment (ie lawfully), then the duty to inform will arise (see Hardie Boys J at p 52 and Richardson J at p 39). If *ex post facto* it turns out that the "arrest" was invalid for some reason (it was found that the officer did not have a reasonable suspicion)[6] the "arrest" would become a false imprisonment. Had the arrester failed to give the s 23 rights at the time of the arrest, there would have been a breach of the Bill of Rights: see s 23(1)(c). But if on the other hand the detention was unlawful *ab initio* (because there was no statute authorising the detention), it is submitted this could not be an "unlawful arrest", as the meaning is generally understood, but could be an arbitrary detention giving rise to a s 22 breach.

The confusion arises from the use in s 23(1)(c) of the words "not lawful". Section 23(1)(c) provides that:

> Everyone who is arrested or detained under any enactment 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.

The concept of the validity of an arrest determined ex post facto is what is at issue in the subsection. Had the final words been "a false imprisonment" confusion would have been avoided. In some respects an arrest is like a patent – its validity will be assumed until tested at some later stage.

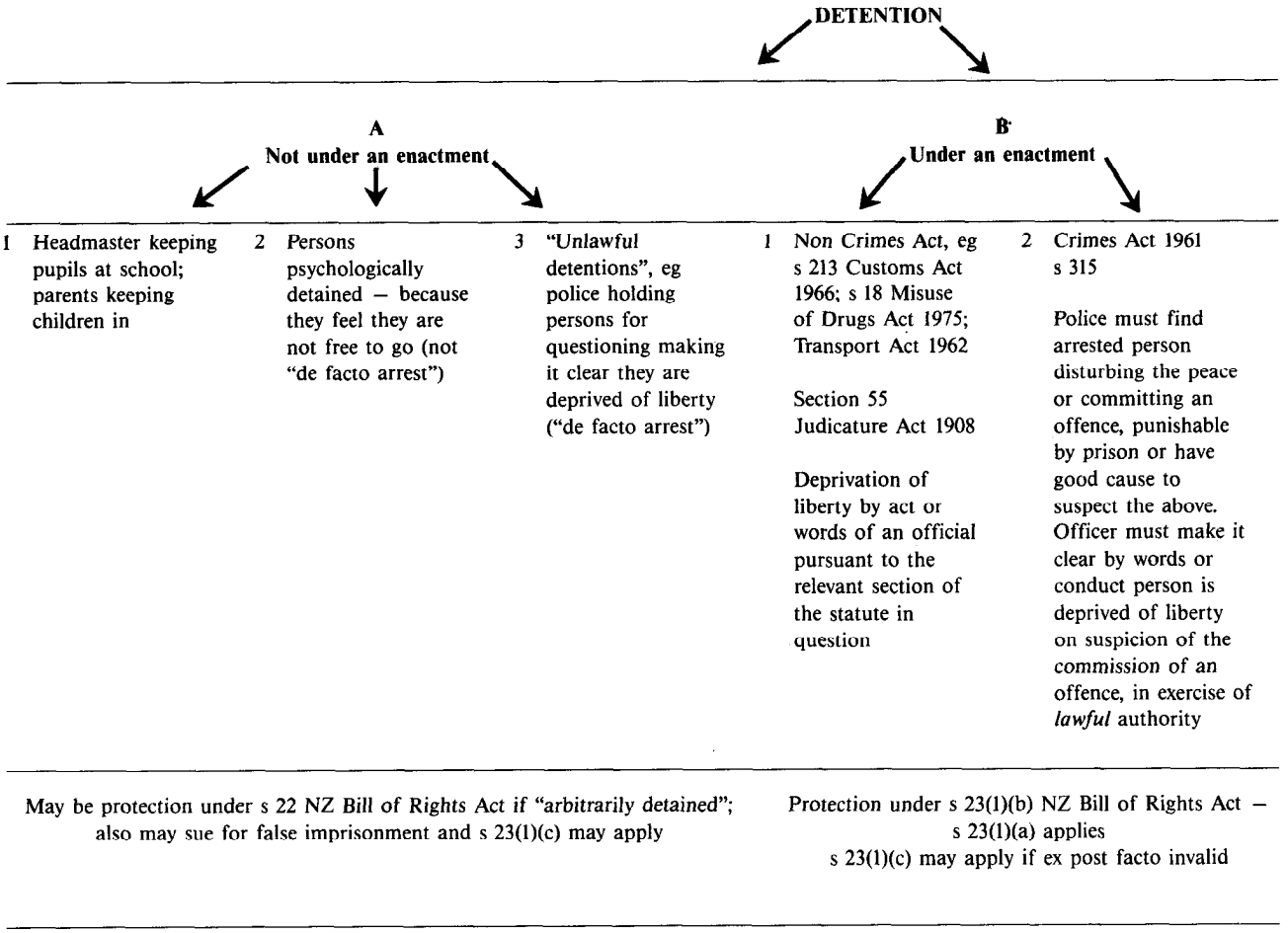
It is submitted therefore that the use of the words "not lawful" in s 23(1)(c) is confusing and that they should be interpreted to mean "invalidated" or preferably "a false imprisonment". This would entitle the person who was wrongfully detained to an action for damages, as well as to immediate release, for as Bentil[7] puts it:

> The improper or unlawful restraint of an individual's freedom of movement certainly constitutes a serious affront to civil liberty.

It is suggested that the phrase "unlawful arrest" should be discarded even by "persons of exalted standing" to prevent further confusion.

6 Was there an unlawful detention — not under any enactment? (s 22) This question was only briefly considered in the judgments. To answer it, it is probably necessary to construct a fuller model than the ones implicit in the judgments.[8]

For the purposes of this model a person is either free to go where s/he chooses, or else detained, ie deprived of his/her liberty. The chart below shows a model of the two types of detention relevant to this discussion and their subdivisions.



The basic concept common to all deprivations of liberty is "detention". This can be divided into two subsets: first, "detention under an enactment", and secondly "detention not under an enactment".

Under the first heading would be all statutory detentions, arrest under the Crimes Act 1961, arrest under other Acts (the Judicature Act 1908, s 55 for example,) and detentions under other Acts (for instance under s 18 of the Misuse of Drugs Act 1975, under s 213 of the Customs Act 1966, and under the Transport Act 1962 breath/blood alcohol testing provisions).

Under the second heading would be detentions by parents (of children in their rooms), by teachers (of pupils being punished, and also arbitrary detentions. This category could well include detentions by the police and other officials for interrogation or search where the officials are not acting pursuant to lawful authority, which may be an arbitrary detention in breach of s 22 of the Bill of Rights Act.

To ascertain whether there was a s 22 breach the first question would be: was there a detention? A person who is voluntarily attending a police station to answer questions (as G was initially) is not "detained". It will no doubt be a fine line between a voluntary attendance and a detention in many cases as Cooke P said in *Admore* (1988) 3 CRNZ 550, 552, noting the restricted legal use of the word "voluntarily". A person may well agree to attend as s/he thinks it is in his or her best interest to co-operate, but would really prefer not to do so. In *Convery* [1968] NZLR 426, 442, McCarthy J said the test is one of substance . . .

> if a suspect is under physical restraint or is led by police conduct reasonably to believe that he may not leave, then to my mind he is in custody.

In the present case it was accepted that G reasonably felt he was not free to go (see p 7 per Cooke P and p 61 per Gault J), so he was not voluntarily attending. Detective Bass may have thought G was voluntarily attending, but he was mistaken. Objectively speaking G was detained by the words of Constable Ratapu and probably confused by Detective Bass.[9]

Assuming he was detained, the second question is: was he detained under an enactment? As the police have no power to detain for questioning, he was detained unlawfully. Was he then arbitrarily detained in breach of s 22 of the Bill of Rights Act?

Cooke P says, obiter:

> Although it is not necessary to decide the point for the purposes of the present case, I think that anyone unlawfully detained by a police officer for questioning on suspicion of an offence is probably arbitrarily detained. This is because the detention is by the officer acting otherwise than in accordance with the rules of law at present in force in New Zealand. (p 23)

Then, as Richardson J says:

> The right not to be detained . . . is protected by s 22. Whether an arrest or detention is arbitrary does not turn on its lawfulness but on the nature and extent of any departure from the substantive and procedural standards involved, an arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures. (p 40)

Further:

> Any de facto detention which is arbitrary infringes the section and if as a result the authorities obtain a statement from that person, its admissibility may be challenged.

Not doubt the prima facie exclusion rule would apply as the statement would have been obtained in clear breach of s 22.

If G was detained, he was detained without following proper arrest procedures. According to the President the interrogation was "manifestly intended to be overbearing and manifestly succeeded in that aim", (p 12), in which case there was also a departure from standards of fairness. So G would have been arbitrarily detained and could have not only challenged the admissibility of evidence under s 22, but also presumably sued for damages for false imprisonment. Richardson J says if a person is neither arrested nor detained under statutory power, the deprivation of liberty will not be covered by s 23(1)(a) and (b) but may be challenged under s 22 or s 23(5) in habeas corpus, in proceedings for false imprisonment or by complaint to the Police Complaints Authority.

Gault J warns that there may be detentions by the police not covered by s 22 (presumably because not arbitrary) or by s 23 (because not under an enactment). This would include a "detention" for questioning where the detainee felt he or she was not free to go but the officer had not by words or conduct deprived him or her of liberty – a psychological "detention". Arguably this could have been the case here, if there had not been the complication introduced by Constable Ratapu. At present a psychological "detention" is not unlawful.

The question then becomes at what point in the interview should the officer remind the person being interrogated of the s 23(1)(b) right to consult a lawyer? This, as Robertson has pointed out, at [1991] NZLJ 398, 399, is the real question. Casey and Hardie Boys JJ (p 50 and p 54 respectively) thought that the right should be given on caution. At this stage Cooke P says (p 23) a strong suspicion would have been formed.

As Robertson says, however, it is unsatisfactory to leave the solution to the Courts. The police need a detailed regime to control interrogation in New Zealand. The Bill of Rights is no substitute, especially if it has to be worked out gradually by the Courts (per Cooke P, p 18), and *Goodwin* highlights this.

Conclusion

Goodwin is another important Court of Appeal decision affirming the rights and liberties of individuals as codified in the New Zealand Bill of Rights Act. In five separate judgments their Honours have grappled with the problem of how to give the police adequate powers of investigation without jeopardising the rights and freedoms of innocent citizens; how to "give citizens rights without unduly hampering the police in the investigation into crimes, which they are called upon to make in the public interest", per North P in *Convery* (supra).

The majority's solution has been to reaffirm the Crimes Act meaning of "arrest", and confirm that the police have no power to detain citizens other than under an enactment. If it is thought as a consequence of *Goodwin* that the police should give a person being interrogated voluntarily the right to obtain legal advice before answering any questions,[10] or that the police should be given statutory authority to detain for questioning, then this is a matter for the legislature, as Cooke P suggested in *Admore*, supra, 553 and again in *R v Butcher* [1992] 2 NZLR 257,268. It is respectfully submitted that this is a more satisfactory solution than redefining "arrest". In the meantime s 22 of the Bill of Rights Act is available if it can be shown that a suspect was not voluntarily answering preliminary questions, but was "arbitrarily detained". □

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1 See Glanville Williams "Requisites of a Valid Arrest" [1954] Crim LR 6, 7.

2 B Robertson "Confessions and the Bill of Rights" [1991] NZLJ 398.

3 G Williams *Textbook of Criminal Law* 2nd ed (1983) 485, cited by Cooke P at p 15.

4 J Marston "The Reasons for an Arrest" *Justice of the Peace*, Vol 155, 2 March 1991, 131, 132; Compare G Williams, "When is an arrest?" [1991] 54 MLR 408, 409: "An arrest presupposes a lawful deprivation of liberty made for the purpose or possible purpose of bringing a person to Court."

5 D N Clarke & D Feldman "Arrest by any other Name" [1979] Crim LR 702, 703.

6 Richardson J, 40, supra. See R Clayton & H Tomlinson "Arrest & Reasonable Grounds for Suspicion" *Law Society Gazette* No 32, 7 September 1988, 24.

7 J W Bentil "False Imprisonment Procedure for Alleged Improper Arrest & Detention of a Suspect" Vol 153 JP Jan 7 1989 6, 10, a discussion of *Murray v Ministry of Defence* [1988] 2 All ER 521.

8 The Judges distinguish between arrest and detention – Casey J, p 48, Gault J, p 57, Hardie Boys J, p 53, and Richardson J, p 37. Casey and Hardie Boys JJ both note that while every arrest involves a detention the converse is not true. Casey J observes that there is no practical difference between arrest and detention under an enactment (p 49) and the President also finds the concepts overlap, p 16.

9 It seems unlikely that if G had asked to go after the second interview began he would have been allowed to; the chances are he would have been arrested – see Thomas J re the non-cooperative interviewee getting a better deal than the co-operative one. the Hon Mr Justice E W Thomas "Criminal Procedure and the Bill of Rights: a View from the Bench" in *The New Zealand Bill of Rights Act 1990*, Legal Research Foundation, 1992, 33, 47.

10 Compare the UK Police Code of Practice for the Detention and Questioning of Persons by the Police, which provides that before being questioned at a police station a suspect should be arrested or cautioned and told s/he is free to leave and to obtain legal advice.

Proprietary rights in insolvency — Equitable intervention in the New Zealand Court of Appeal

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The Goldcorp collapse has resulted in a considerable amount of recrimination and even some litigation. Professor Rickett analyses the judgments in the Court of Appeal in the Liggett *case which involved the question of equitable "ownership" of assets. He sees the decision as developing modern trends such as the remedial constructive trust and introducing considerable flexibility in the tracing doctrine.*

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1 Introduction

In its recent decision in *Liggett v Kensington* (1992) 4 NZBLC 102,574, the New Zealand Court of Appeal has made an important, even if in places a somewhat confused, contribution to the expanding Commonwealth jurisprudence on equitable intervention in an insolvency situation. Goldcorp Exchange Ltd (Exchange) collapsed leaving a serious shortfall in its stocks of gold bullion, presumed by a sizeable number of the company's clients, described in the case as "non-allocated claimants", to be held by Exchange in safekeeping for them. These clients had paid money to Exchange in the belief that they were purchasing physical bullion. Exchange represented (falsely) that the bullion would be held for the clients, as part of an unallocated mass, but with adequate stocks to meet all their obligations to the clients. Clients received certificates of ownership, and, with seven days notice, could uplift "their" bullion. On Exchange's collapse, its debts to its secured creditors exceeded its assets. The claimants would therefore only succeed if they could establish a proprietary interest in the remaining bullion, so as to "defeat" the interests of the secured creditors. Other unsecured creditors would get nothing.

By a majority (Cooke P and Gault J; McKay J dissenting) the Court found in favour of the claimants. Cooke P held, first, that the claimants were entitled to be recognised as beneficiaries of a constructive trust in restitution on the basis of their mistaken payments to Exchange. The claimants' consequential proprietary interests were "traceable" into the remaining gold bullion on the basis of an extended doctrine of tracing in equity. His Honour held, secondly, that Exchange was a fiduciary in respect of money received initially from the claimants, whose consequential proprietary interests were likewise "traceable". Thirdly, there are hints of both an express trust analysis and an estoppel analysis in Cooke P's judgment. Gault J adopted, as his primary ground, a fiduciary analysis similar to that of Cooke P. His Honour also indicated, secondly, his readiness to impose a "remedial" constructive trust over the remaining gold bullion, on the grounds of the inequitable and unconscionable conduct of Exchange. McKay J refused either to find a fiduciary relationship, leading to an "orthodox" constructive trust, or to impose a "remedial" constructive trust. The reasoning of all three Judges is worthy of more detailed analysis, which is perhaps most usefully undertaken against the background of a theoretical distinction recently drawn by Mr Vince Annetta (1992) 20 ABLR 311. Mr Annetta identifies two approaches currently adopted by Courts in delineating the circumstances in which a proprietary interest may be said to exist or arise in equity, and the doctrinal basis for that conclusion. *The traditional approach* requires a creditor "to show a continuing and identifiable proprietary right in order to gain an insolvency advantage" and the analysis "is undertaken within the confines of, in accordance with, traditional concepts of property and tracing" (at 312). *The modern approach* is concerned to prevent "unjust enrichment and unconscientious behaviour" and "advocates the active conferring of an insolvency advantage in deserving cases, by the active creation of proprietary rights purportedly with retrospective effect" (at 312). What is interesting about the New Zealand Court of Appeal judgments is that, in my view, they each represent an amalgamation of the two approaches which may suggest that the distinction drawn by Mr Annetta is overly simplistic. It may not be possible in the long run to avoid making the type of policy decisions said to be inherent in the modern approach, and simply to resort instead to traditional concepts of property rights and tracing remedies. After all, the traditional concepts do not exist in some kind of value-free and policy-neutral cocoon, but are themselves the result of and continue to be underpinned by a variety of policy decisions.

II Proprietary interest through an express trust

The clearest route under a traditional approach towards establishing a proprietary interest would be by virtue of an express trust. If T holds property as a trustee on an express trust for B, B has a proprietary right in equity to claim that property or its exchange product, or the fruits of the property or exchange property. These proprietary rights will prevail over the rights of T's own trustee in bankruptcy and any other person (except a bona fide purchaser of a legal interest for value without notice) deriving title from T. Under traditional equitable principles, B's right or interest can be lost if the property or its exchange product is no longer "identifiable" within the traditional rules of the law of tracing in equity. In *Liggett,* both Gault and McKay JJ held that there was no express trust of any particular gold bullion, since there was no evidence of any intention on the part of Exchange to hold such property on trust (*Liggett,* 102,594 (Gault J), 102,603 and 102,613-615 (McKay J)).

Cooke P, on the other hand, having held that Exchange was a fiduciary, vis-a-vis the claimants (see Part III herein), went on to apply a *type* of express trust analysis as an alternative ground for decision:

> . . . the fiduciary, Exchange, *received all the monies* of the unallocated claimants, from the moment of their payment, *upon trust. The purpose of the trust was to finance the setting aside and holding of sufficient bullion for all the claimants.* Exchange was free to allocate from its own existing stocks, or to buy in at such price as it saw fit, but its fiduciary obligation was to do one or the other. The monies were received on that basis only; it was *a breach of trust to utilise them for the general purposes of Exchange without allocating the bullion.* That seems to me a fair and realistic interpretation of the transactions with the unallocated clients. That being so, Exchange was in breach of trust. As Exchange well knew, there was never any intention [by the claimants] that it should have the funds unless it made the allocations [of the bullion, the purchase of which was the purpose of the funds being paid over]. Exchange, having failed to do so, the clients retained their beneficial interests in the monies. Those interests never passed to Exchange; on the contrary Exchange appropriated the monies in breach of trust (*Liggett,* 102,587 (emphasis added)).

One commentator has suggested that this view is akin to that analysis which is now widely known as the *Quistclose* principle, whereby

> it may be said that the customers supplied money under a primary trust to purchase bullion with the intention that the money be held under a secondary trust for those customers if the bullion was not so purchased. (Julie Maxton [1992] *NZ Recent Law Rev,* at 133-135.)

Some such analysis seems necessary when a fiduciary relationship is superimposed onto an otherwise contractual relationship, where the money is transferred for a purpose defined by the contract. There are considerable difficulties with such an analysis (see arguments in Maxton, above), not least the issue of intention to set up a trust – since the finding that Exchange was a fiduciary would not, of itself, establish an *express* trust – and the problem whether such a trust initially over the moneys paid (as Cooke P found) would automatically extend to bullion as and when purchased with that money (a trust of which, of course, as already seen, both Gault and McKay JJ found no evidence!). This latter point was not examined by Cooke P, since his finding that the moneys were trust moneys established in the claimants proprietary interests in equity (under a traditional analysis) and the next point for decision was thus whether such interests were now traceable, since the trust moneys received had been misapplied by Exchange. However, there is considerable ambiguity about the *Quistclose* principle itself. Is it a development using traditional concepts or is it a remedial device?[1] Australian Courts have declined to extend the principle to the point where a remedial approach is being applied – see *Re Miles* (1988) 20 FCR 194, and *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681 – but, as Maxton demonstrates (above), even the approach using traditional concepts still presents difficulties.

III Proprietary interest through fiduciary law

A second potential avenue under a traditional approach towards establishing a proprietary interest would be by virtue of fiduciary law. Where a fiduciary relationship exists or arises between T (the fiduciary) and B in the context of property in the possession or control of T, that relationship may prevent the passing of title *in equity* to the property to T. T will thus effectively hold the property on trust for B. B retains a proprietary interest in equity, which interest will prevail over the rights of T's trustee in bankruptcy and any other person (except a bona fide purchaser of a legal interest for value without notice) deriving title from T. B's interest might also be lost if it is no longer traceable within the established rules. The fiduciary approach was discussed by all three Judges, although McKay J reached a different conclusion from his brethren.

Cooke P and Gault J's examinations of the circumstances in which Exchange established its prima facie common law contractual relationship with each of the claimants led them to conclude that a fiduciary relationship also existed in equity. Cooke P's conclusion was clear:

> The Courts should be slow to inject fiduciary duties into arm's-length commercial transactions. The contracts between Exchange and its "non-allocated" clients, however, were much more than contracts of sale and purchase or ordinary commercial contracts. Essentially Exchange was holding itself out as vesting title to bullion in the purchasing member of the public, certifying that title, holding the bullion in safe custody as the client's agent, and providing easy dealing facilities for the client. It was a system in which the client was totally dependent on Exchange. The company solicited the client to repose trust in it. In my opinion Exchange was a fiduciary. it is well known that "fiduciary" is a somewhat imprecise term. It cannot be comprehensively defined and the obligations of persons found to be in some sense fiduciaries vary with the circumstances . . . But certainly the class of fiduciaries is not

> closed, and it seems to me that in holding itself out to clients as operating for them a secure system of "Non-allocated or Certificate Bullion" Exchange provided a classic example or paradigm of the assumption of a fiduciary status. (*Liggett*, 102,583-584).

Gault J's view was also unambiguous, and is worthy of citation:

> Generally it is appropriate to look for circumstances in which one person has undertaken to act in the interests of another or conversely one has communicated an expectation that another will act to protect or promote his or her interests. There are elements of reliance, confidence or trust between them often arising out of an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting their interests. Telling indications may be that persons having taken, or been entrusted with opportunity to protect or benefit others stand in a position also to prefer their own interests. Assistance is to be gained by way of analogy from relationships generally regarded as giving rise to fiduciary obligations such as those of trustees, partners, solicitors, investment advisers, stockbrokers and the like.
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> The relationship between each purchaser and the company necessarily was different to some extent but the evidence suggests strongly that the duties of a fiduciary were expected of the company by the purchasers and that expectation was encouraged. The company held itself out as a trusted and expert dealer in bullion and in a position to assist members of the public to engage in investments in precious metals. It was an unsophisticated clientele being attracted to an unregulated market by representations of assurance and trust. The nature of bullion is such that the company stood in a position akin to an investment broker or advisor rather than merely as a seller of goods. Once money was paid by purchasers they relied on the company to take the necessary steps to carry out its undertakings to hold the purchasers' own bullion in storage, to insure it, to arrange regular audits of stock to verify that gold or silver was held as arranged. Some purchasers no doubt were discouraged from taking any steps to protect their positions by receipt of requests for verification of their interests to the company's auditors.
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> While arm's length commercial transactions rarely will give rise to fiduciary obligations, that is not what this case involves. I consider that there was a good deal more than contracts creating rights of buyer and seller and I conclude that there were fiduciary relationships between the non-allocated purchasers and the company. (*Liggett*, 102,596-597).

McKay J disagreed (*Liggett*, 102,604 and 102,612-613). His Honour suggested that in inducing purchasers to place reliance, trust and confidence in it, Exchange was doing no more than all other traders selling goods to the public would do in their advertising. Neither the expectations raised in, nor the potential vulnerability of, the claimants justified a holding that the relationship was legally anything other than contractual.

The decision is a further example of an increasingly familiar problem in commercial law – that on the same facts Judges often differ on whether a fiduciary relationship exists. That potential for disagreement has burgeoned as the fiduciary principle has itself come to be applied well beyond the well-recognised core cases, to an expanding variety of circumstances. This is not the occasion to launch into a discussion of the rationale of the fiduciary principle, and of the types of situations in which a fiduciary relationship will be "discovered". What needs to be recognised, however, is that whilst the establishment of a proprietary interest by virtue of a fiduciary relationship may itself be characterised as an application of a traditional approach, the act of defining the fiduciary relationship in the first place may actually be an exercise from well within the confines of the remedial approach. Professor Finn highlights brilliantly the modern confusion between the "fiduciary principle", "good faith", and "unconscionability" as legal standards of behaviour for differing circumstances which should lead to differing levels of legal accountability.[2] Further, in *Lac Minerals v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, La Forest J stated judicially what had long been recognised, that often fiduciary relationships are said to exist *so that* remedies can be given in cases where remedies ought to be given (at 29-32). This remedial dimension to modern fiduciary law is well appreciated by commercial law practitioners in New Zealand, who in drafting pleadings in transactional commercial litigation will nowadays more often that not adopt a smorgasbord approach, including allegations of breach of fiduciary duty alongside unjust enrichment, duress, unconscionable bargain, and undue influence, and even breach of contract, using the same facts to argue on all heads. In the context of insolvency cases, it is therefore, in my view, difficult to sustain the apparently simple traditional/remedial distinction drawn by Mr Annetta when the focus is fiduciary law. It seems quite obvious that considerations of a policy nature exercised all three Judges in *Liggett* as they grappled with the fiduciary argument, as the quotations given above indicate.

Cooke P, on finding that Exchange was a fiduciary in respect of the moneys received from the claimants, then logically concluded that the moneys were held on trust. As already discussed above, his Honour resorted to a *Quistclose*-type explanation, since there was also a contract present which defined the terms of the receipt of the moneys as understood by both parties, and it would have been difficult to ignore this evidence of both parties' intentions. The moneys were misapplied, both in the context of the fiduciary obligation and in the context of the "express" trust, being paid into Exchange's *overdrawn bank account*. Tracing into any exchange product of the moneys (specific assets such as the remaining gold bullion) was thus impossible. As will be seen herein in Part VIII, Cooke P was nevertheless able to proceed on a significantly new basis with respect to tracing.

Gault J analysed several disparate case law authorities and reached a number of conclusions about the *effect* of upholding a fiduciary relationship:

> If the company stood in a fiduciary relationship to the non-allocated purchasers giving rise to a duty to protect their interest by holding bullion stocks on their behalf as represented to them, and to the extent necessary, to apply their moneys to acquire such stocks, then the customers could have an equitable proprietary interest in the moneys and any exchange products. Such interest would not be defeated by payment of the moneys into the company's overdrawn account with its bank if the bank had notice, actual or constructive, of that interest [this would give rise to a knowing receipt constructive trust – as his Honour's citation at this point of *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41 indicated]: . . . [T]he interest could be traced into any assets of the company acquired using moneys with which were mixed moneys received from purchasers and could be enforced by an equitable charge over such assets . . . (*Liggett*, 102,595-596).

It appears that his Honour was content, having thus stated the law, simply to adopt the conclusions reached by Cooke P on the fiduciary analysis (*Liggett*, 102,596).

McKay J also recognised that, if a fiduciary relationship existed, this would only make Exchange a trustee of the moneys, and that since there had been no purchase of identified specific property by Exchange referable to the particular moneys, the issue was, in essence, one of tracing (*Liggett*, 102,605).

IV Proprietary interest through a restitutionary analysis

The primary rationale offered by Cooke P for his finding in favour of the claimants was centred in the law of restitution, in particular in the law relating to restitutionary recovery of payments made under a mistake of fact and of payments made on the basis of a consideration which has totally failed.[3] Cooke P argued that the decision of Goulding J in *Chase Manhattan Bank SA v Israel-British Bank (London) Ltd* [1981] Ch 105 established that in the event of a mistaken payment the payer retained (per Goulding J) a "persistent equitable proprietary interest". In the *Chase Manhattan* case the mistaken payment received by the recipient Bank had been mixed with other assets owned by it, and Goulding J directed that an enquiry should be undertaken to determine whether any of the mistakenly paid funds in which the payer had an equitable proprietary interest remained traceable under conventional tracing principles. Furthermore, it is an established pre-requisite for an equitable tracing claim in English law that there be a fiduciary relationship between the parties *in addition to* the existence in the party tracing of an equitable proprietary interest. Goulding J was able to find that a fiduciary duty arose between the parties as a result of the mistaken payment.[4]

It is clear, however, that the property analysis is itself not dependent on the fiduciary relationship. As Cooke P stated:

> . . . it is clear that the unallocated claimants paid their monies by mistake, for they had been led to understand that the system operated by Exchange was such that bullion to which they would have title would be held for them. The matter may equally well be put by saying that it was a condition of each payment that bullion would be acquired by and held for the investor, and that the condition was not fulfilled. The consideration for the payment wholly failed. Exchange could not say that it gave a different consideration in the form of mere contractual rights, for these were not what was bargained for. The consideration stipulated for included a proprietary interest.
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> . . . [T]he payments here were undoubtedly made by mistake . . . , as recognised in *Chase Manhattan*, such a payment can result in a retained proprietary interest giving rise to a constructive trust. (*Liggett*, 102,586-587).

The restitutionary analysis, particularly one based on recovery of a mistaken payment, presents some difficulties which it is not proposed to discuss in detail in this paper. One particular problem should, however, be mentioned. In the context of the contractual relationship in *Liggett*, which Cooke P did not deny at all, was the operative mistake in reality a *contractual mistake*, being either a mistakenly undertaken contractual obligation or a mistake induced by a misrepresentation, rather than an operative mistake entitling the mistaken party to simple restitutionary recovery? That Cooke P was aware of this difficulty is evident from his reference to the exclusion of the case from the ambit of the New Zealand Contractual Mistakes Act 1977 because, as he had already held, it was a case of breach of fiduciary duty (and therefore excluded by s 5(2)(c) of the Act) (*Liggett*, 102,587). Had this approach not been possible, because, for instance, there was no fiduciary relationship superimposed upon the contractual relationship, the problem of categorisation of the operative mistake would clearly have arisen.[5].

It is, furthermore, a little difficult to see why, if the proprietary interest of the claimant is truly a retained one, it should then be necessary to speak of a constructive trust, even "a constructive trust on orthodox lines" (*Liggett*; 102,588 per Cooke P), unless it is in reality the declaration of a constructive trust which recognises the *existence* of the proprietary interest (although backdated, as it were, to the time of the mistaken payment: rather than arising as from the date of its imposition – which would create theoretical difficulties in insolvency cases).[6] If the proprietary interest is truly a *retained one*, then the analysis offered above in the context of both express trust and fiduciary law would follow here as well. The key issue in the case would be, as Cooke P himself recognised, whether tracing was possible; and that key issue would arise whichever of the three analyses discussed thus far was held to apply in determining the existence of the proprietary interest. References to constructive trust are thus, with respect, misleading.

Whilst Goulding J's judgment in *Chase Manhattan* provides good authority for holding that a proprietary interest is retained, the

question of principle is still open. Historically, the remedies for restitutionary claims based on mistake and total failure of consideration have been personal common law remedies. The idea that a property interest can be retained in equity needs further justification. As Cooke P recognised, that justification raises more general issues about the nature of equitable intervention, which is clearly remedial. Goulding J himself based his decison on a much broader statement of principle found in two well-used paragraphs of Story's *Commentaries on Equity Jurisprudence* (2nd ed, 1839):

> 1255. One of the most common cases in which a Court of Equity acts upon the grounds of implied trusts in invitum, is where a party has received money which he cannot conscientiously withhold from another party. It has been well remarked, that the receiving of money which consistently with conscience cannot be retained is, in Equity, sufficient to raise a trust in favour of the party for whom or on whose account it was received. This is the governing principle in all such cases. And therefore, wherever any controversy arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now, with a safe conscience, *ex aequo et bono* retain it. Illustrations of this doctrine are familiar in cases of money paid by accident, or mistake, or fraud. And the difference between the payment of money under a mistake of fact, and a payment under a mistake of law, in its operation upon the conscience of the party, presents the equitable qualifications of the doctrine in a striking manner.
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> 1256. It is true that Courts of Law now entertain jurisdiction in many cases of this sort where formerly the remedy was solely in Equity; as, for example, in an action of assumpsit for money had and received, where the money cannot conscientiously be withheld by the party; following out the rule of the Civil Law; Quod condictio indebiti non datur ultra, quam locupletior factus est, qui accepit. But this does not oust the general jurisdiction of Courts of Equity over the subject-matter, which had for many ages before been in full exercise, although it renders a resort to them for relief less common, as well as less necessary, than it formerly was. Still, however, there are many cases of this sort where it is indispensable to resort to Courts of Equity for adequate relief, and especially where the transactions are complicated, and a discovery from the defendant is requisite.

That this type of justification brings into play a remedial approach cannot be refuted. Thus, similar to the case of fiduciary law, although from that point in time when a "persistent equitable proprietary interest" is declared to exist, the issue is one of identification and tracing (traditional approach), that initial finding of the interest itself requires a remedial approach. Once again, in my view, Mr Annetta's simple traditional/remedial distinction is difficult to sustain.

Gault J referred very briefly to the *Chase Manhattan* case in his documentation of relevant case law, and made the following general comments:

> A remedial constructive trust may be imposed in the absence of a fiduciary duty. The cases to date have held that course justified in certain circumstances when it would be unconscionable for the party into whose hands the property came to retain it against the claimant, for example where the money has been appropriated for the use and benefit of the payee in breach of trust; where a payment was by mistake; where moneys were deposited pursuant to void contracts: where moneys were paid in circumstances in which it was inevitable that there would be a total failure of consideration. There have been cases also in which constructive trusts have been imposed where property would have come into the hands of the claimant but for the conduct of the other party. No general principle or principles yet have emerged of which these cases may be said to be particular examples. In some, the dominant factor appears to have been that an equitable interest in moneys was regarded as not having been relinquished and in others it appears to have been unconscionability in retaining moneys against claimants. In this developing field which is one in which the principles of law and equity are being melded in many jurisdictions, it would be unwise and conducive of inflexibility to attempt any general judicial formulation. (*Liggett*, 102,596).

The confusion between, on the one hand, the steps towards vindication of an existing proprietary right, and, on the other hand, the justification for recognising that right or for imposing a proprietary solution irrespective of any issues of existing property rights, is amply illustrated in his Honour's statements.[7]

V Proprietary interest through estoppel

All three Judges raised the question of proprietary rights acquired by estoppel. Cooke P suggested

> that by inviting the purchaser clients to look on and treat stocks vested in it as their own, the fiduciary Exchange created an equity against itself which could appropriately be recognised only by treating them as entitled to proprietary interests in the stock. (*Liggett*, 102,584).

He cited *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 as offering "the possibility of treating a proprietary estoppel inter partes as conferring an equitable interest against a third party" (*Liggett*, 102,584-585). It appears that this line of reasoning would require the imposition of a constructive trust, since the focus would not be a retention of an equitable interest in the money or its exchange product, but rather *the acquisition of an interest in gold bullion* because of the "fiduciary's" behaviour. In an insolvency case, would such a trust merely declare an interest to have arisen before the time of insolvency (when did the "fiduciary's" behaviour create an "estoppel"?), or would it arise only at the date of the judgment? This issue is

fundamental to remedial constructive trusts.[8]

Gault and McKay JJ were both aware of the possibility of this analysis, but, interestingly, both denied its applicability on the facts on the grounds of lack of identifiability of the particular property on which the estoppel could operate (*Liggett*, 102,594 (Gault J), 102,603-604 (McKay J)). Both Judges clearly thought, however, that "the trust" (per Gault J) or the "constructive trust" (per McKay J) would have arisen *before* the Court's judgment, so that the Court would merely be recognising an existing interest in identifiable property.

VI The "orthodox" constructive trust

Much was made, particularly by Cooke P and McKay J, of a distinction between so-called "orthodox" (per Cooke P) or "ordinary sense" (per McKay J) constructive trusts, and "remedial" constructive trusts.

In so far as a distinction can be drawn at all, it appears from their Honours' judgments to be based on the issue of *when* the trust actually comes into being. Constructive trusts are not relevant where an express trust exists. It has also been shown that constructive trusts are actually irrelevant to both the fiduciary and restitutionary analyses as presented in the *Liggett* decision. However, to the extent that constructive trusts are mentioned in those contexts (by Cooke P in his restitutionary analysis; and by McKay J in his rejection of a fiduciary analysis), they appear to be nothing more than a *logically unnecessary step* between an existing property interest and the mechanism of tracing that property interest into its identifiable proceeds or through mixed banking accounts. Once tracing is successfully completed, a constructive trust might be "imposed" on whatever assets are accordingly identified. That trust is clearly a "remedial" one, but is essentially designed to do no more than declare that the successful claimant has an equitable interest in the duly identified asset. There is nothing terribly profound or difficult about that.

The merely declaratory function of this type of "orthodox" constructive trust is adverted to in the following comment of McKay J:

> A constructive trust in the ordinary sense can only arise where there is particular property vested in the constructive trustee, and it would be inequitable or unconscionable for him to exercise his ownership for his own benefit. Here there was no such property at the time the transaction was entered into, unless it be the moneys paid over by [the claimant]. If the company was a constructive trustee of those funds, then it was in breach of its fiduciary relationship when it allowed them to be absorbed in its ordinary operations instead of applying them for the intended purpose. That cannot, however, make the company a trustee of particular gold [coins or bullion] acquired . . . later. [The claimant] has a good claim against the company, but the subsequent acquisition by the company of gold [coins or bullion] for stock and for trading purposes does not give him priority as against other claimants. (*Liggett*, 102,605).

The trust merely declares proprietary interests which exist on other legal bases. The trust does not create those interests. The same analysis would probably be true of the constructive trust arising from a successful estoppel. The trust is essentially "remedial", but *only* in the very weak sense that it declares to be so what the law of estoppel has created, an equitable proprietary interest in property in the (legal) ownership of another.

VII The "remedial" constructive trust

A quotation from the judgment of Gault J has already been provided above (*Liggett*, 102,596), where his Honour appeared to treat remedial constructive trusts as arising both in cases of retained equitable interests and in cases where the Court imposed a trust because of, for instance, unconscionability. As indicated in Part VI above, constructive trusts arising in the former situation are "remedial" only in a very weak sense, because they only declare. Those arising in the latter circumstances are, however, "remedial" in a strong sense, because they both create and declare.

Gault J expressly adopted, as a potential second ground of decision (in addition to a fiduciary law and tracing analysis), a remedial constructive trust in this strong sense. His Honour stated:

> . . . I would . . . *confer a proprietary interest on the purchasers by way of constructive trust* over the bullion stocks held by the company at the date of receivership subject to the question of the competing claim of the secured creditor . . . (*Liggett*, 102,596 emphasis added).

This analysis falls squarely within the remedial approach as articulated by Mr Annetta; since the proprietary interests of the claimants are actually being created by the imposition of the trust. They arise or are created at the time of the Court's declaration of the trust.

The foundation of the trust relief was stated by Gault J to be the "inequitable and unconscionable" conduct overall of the company (*Liggett*, 102,597), but his Honour was troubled, as the quotation above indicates, by the potential prejudice to Exchange's secured creditor were such a trust to be imposed. He suggested that, as a general principle, the circumstances of each case would require careful consideration, and that Courts should be reluctant to grant an effective priority by means of constructive trust to a claimant party over a charge of a secured creditor which "charge had been obtained for value and without notice of the circumstances giving rise to the [claimants' claim]" (*Liggett*, 102,598). His Honour, without deciding the point, suggested that the secured creditor in question, the Bank of New Zealand as debenture holder, had indeed received notice of the type relevant for a knowing receipt constructive trust to be imposed on a stranger (*Liggett*, 102,598).

The effect of Gault J's reasoning is twofold. First, it is an unambiguous judicial recognition of the possibility of creating proprietary interest in the property of an insolvent defendant, after the commencement of the insolvency

administration. There is no apparent awareness of the conceptual deficiency this analysis creates, as discussed by Mr Annetta (1992) 20 ABLR 311 at 315. The action is clearly remedial, being based on the conduct of the insolvent vis-a-vis its relationship with the claimant. Secondly, before a trust is imposed, however, account must be taken of the position of other creditors (both secured and unsecured). What Gault J seemed to envisage was a type of "balancing of the equities". In the present case, for instance, the Bank might itself have been susceptible to a knowing receipt constructive trust,[9] and therefore Gault J hinted that a remedial constructive trust might not be inappropriate.

McKay J also recognised the possibility of imposing a remedial constructive trust, but was more specific about its basis than Gault J. His Honour discussed an earlier Court of Appeal decision, *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, in which this trust appeared to have been given life in New Zealand, and concluded:

> This does not mean that a constructive trust is to be imposed on the basis of some vague idea of what might seem fair. It is used . . . to prevent a person from retaining a benefit in breach of his legal or equitable obligations. The circumstances must be such that it would be unconscionable for the benefit to be retained by the person who received it. Such was found to be the case in *Elders Pastoral Ltd v Bank of New Zealand* in the fact that Elders had received the moneys as agents for the farmer and with knowledge of his duty to account for them to the Bank. As Cooke P said [in *Elders Pastoral*] . . ., "reasonable persons in the shoes of all three protagonists — the farmer, the Bank, Elders — would naturally have thought that Elders must hold the net proceeds for the Bank to the extent of the farmer's indebtedness to the Bank." The constructive trust was not imposed by the Court as some new and unforeseeable hazard suddenly injected into a commercial relationship. *It was simply giving effect to what reasonable people would have expected to be the position.* (*Liggett*, 102,607, emphasis added).

His Honour declined to impose such a trust in the present case. First, his view was that although Exchange had acted unconscionably, that unconscionability was in the context of a breach of a common law contractual obligation, and should not give rise to a further analysis in equity (particularly since his Honour had already denied the existence of a fiduciary relationship from the outset between Exchange and the claimants). What his Honour appears to have been suggesting is that reasonable persons in the shoes of Exchange and the claimants *would not have expected anything beyond the contractual relationship.* Secondly, there was no causal connection between the claimants and the bullion they were claiming. This finding also followed on as a matter of course from the nature of the contract between the parties as described by McKay J (*Liggett*, 102,604 and 102,612-613). Thirdly, the insolvency of Exchange meant that the position of other creditors of Exchange became very relevant in any deliberation about creating and conferring a proprietary interest on the claimants. This is similar to Gault J's "balancing of the equities" approach, although whereas Gault J focused exclusively on the secured creditor's position (being the only other potential claimant, because of lack of assets) vis-a-vis the claimants, McKay J began with a thesis which focused on the position of all general unsecured creditors. This was the "acceptance of risk" thesis, discussed in an article by Professor D M Paciocco in (1989) 68 *Canadian Bar Review* 315. This thesis argues that general creditors must be taken to have accepted the risk of an insolvency by dealing with a party without taking a secured position, and should thus not be preferred as against secured creditors of that party by the imposition of a remedial constructive trust in their favour. This thesis is only a presumption, as both Professor Paciocco and McKay J recognised, since it might be provable that some general creditors did not in fact accept the risk of insolvency, and might justifiably thus be elevated to the status of constructive trust beneficiaries. McKay J did not, however, regard the "non-acceptance of risk" as definitive either, since he held that although the *Liggett* claimants had *not* accepted the risk of Exchange's insolvency, the breach by Exchange of its contractual obligation to store gold bullion as agreed with the claimants did not entitle the claimants to be given (by a remedial constructive trust) a preference over other creditors, whether secured *or* unsecured (*Liggett*, 102,608). The particular circumstances of each case must be examined carefully.

When the generally conservative approach of McKay J, and the obvious reluctance of Cooke P to use a remedial constructive trust approach when other approaches are reasonably available (*Liggett*, 102,587), are considered alongside Gault J's judgment, this development may not in fact be auguring in a qualitatively new age for the constructive trust.[10] Rather, it may be characterised as the articulation of the availability in the judicial armoury of a powerful proprietary remedy, but one which will be used sparingly, in particular in those cases where the legitimate interests of third party creditors are at issue alongside those of the particular claimants. In insolvency situations, however, the point made by Mr Annetta, that a remedial approach directly confronts, or at the very least outflanks, the accepted theoretical rationale of distribution of assets on an insolvency, [11] remains to be tackled by the judiciary.

VIII The doctrine of tracing

As previously indicated, the doctrine of tracing would be relevant where a persistent equitable proprietary interest was in issue. Hence, for both the fiduciary law (per Cooke P and Gault J) and restitutionary (per Cooke P) analyses, tracing needed to be sustained. It would not be an issue in remedial constructive trust claims, where, in particular, the causal connection between claimant and property claimed should not be confused with identifiability under the traditional tracing doctrine. Furthermore, tracing would only be relevant in orthodox constructive trust claims in the sense that such

a trust would in effect be the declaration by the Court of the result of the tracing process.

In traditional tracing theory, the existence of the property or its exchange product was essential. Equity supplemented this with special rules in the context of misappropriated money. Tracing was permitted into bank accounts containing mixed funds, subject, however, to the "lowest intermediate balance" rule which meant in effect that once an account balance fell to nil, the right to trace disappeared. Since the moneys of the claimants in *Liggett* was not exchanged into other products, and was paid into an account with an overdraft balance, it would appear that under this traditional theory, the right to trace was lost, thus leaving only a personal claim for breach of contract (per curiam), breach of fiduciary duty (per Cooke P and Gault J), or recovery of mistaken payments (per Cooke P and Gault J).

However, an alternative view has emerged, as succinctly stated by Associate Professor Maxton:

> In an attempt to remedy the apparent inequity caused by [the "lowest intermediate balance" rule], the "swollen assets" theory has been developed. To prevent a recipient of the plaintiff's funds being unjustly enriched at he [sic] plaintiff's expense and because the recipient's assets were swollen by the payment, it has been suggested by Goff and Jones [*The Law of Restitution*] (pp 80, 116) that a Court should grant the plaintiff an equitable charge over the recipient's unencumbered assets, even though none of those assets can be identified on traditional tracing principles. ([1992] *NZ Recent Law Review* at 140).

This view was applied by both Cooke P and Gault J (with some indication from McKay J of general agreement with the position taken (*Liggett,* 102,615-616)) citing as authority obiter statements of Lord Templeman in giving the advice of the Privy Council in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75. In *Space Investments* a bank trustee had gone into liquidation. It had, as the Privy Council found, lawfully deposited on loan with itself as a bank, the trust money of which it was the trustee. The trust beneficiaries' claim ranked therefore as an unsecured debt. Lord Templeman compared that circumstance with the case where the bank trustee unlawfully dissipated the trust money for its own purposes in circumstances where:

> . . . it is impossible for the beneficiaries . . . to trace their money to any particular asset belonging to the trustee bank. But equity allows the beneficiaries . . . to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank. Where an insolvent bank goes into liquidation that equitable charge secures for the beneficiaries and the trust priority over the claims of . . . all other unsecured creditors. This priority is conferred because the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full. On the other hand, the settlor of the trust and the beneficiaries interested under the trust never accept any risks involved in the possible insolvency of the trustee bank . . . It is therefore equitable that where the trustee bank has unlawfully misappropriated trust money by treating the trust money as though it belonged to the bank beneficially, merely acknowledging and recording the amount in a trust deposit account with the bank, then the claims of the beneficiary should be paid in full out of the assets of the trustee bank in priority to the claims of the customers and other unsecured creditors of the bank . . . (*Space Investments*, at 76-77).

Both Cooke P (*Liggett*, 102,591) and Gault J (*Liggett*, 102,596) asserted that tracing rights would be available under this analysis against Exchange's *entire assets.* Any identifiability criterion is thus irrelevant. Cooke P (*Liggett*, 102,590) reiterated Lord Templeman's view that the analysis required an awareness of the lack of risk of insolvency undertaken by the trust beneficiaries as opposed to the risk accepted by a lender of funds, such as a bank (or presumably any other normal type of creditor). Two comments are warranted by this rationalisation. First, this appears to be very close to the type of analysis discussed above in Part VII in relation to the imposition of a remedial constructive trust in an insolvency case. The only qualitative difference, of course, lies in the *pre-existing proprietary right* which is taken to justify referring to this as "tracing" rather than as the undiluted imposition of a remedial constructive trust. If that distinction is the relevant one, then why is it necessary, as Cooke P apparently believed (*Liggett*, 102,590), to go further and justify the granting of tracing not only on the basis of property rights, but also on the basis of its not being "inequitable" that the claimants should have priority over the secured creditor (the Bank of New Zealand) because the Bank was in a position to assess risks more easily than the claimants? This does look rather like a collapsing of the flexible *Space Investments* tracing doctrine into the remedial constructive trust doctrine. If *Space Investments* is to stand alone, it can only be on the basis that a proprietary equitable interest is simply transferred from specific property, or its exchange product, into a charge over the general assets of the "recipient" wherever that is the only method whereby the wealth of the owner of the equitable interest can be effectively returned to him prior to the sharing out of the assets of the "recipient" amongst the "recipient's" creditors. That position requires further analysis of the "swollen assets" theory, [12] but it does not, with respect, require any comparison with other "interested" parties on the basis of risk assumed or not assumed! Secondly, accepting that the *Space Investments* tracing doctrine extends to cases of pre-existing proprietary interests under *express trusts*, as in the decision itself, should it extend beyond that to cases where the proprietary interest arises other than under an express trust, for example, under fiduciary law or a restitutionary analysis? Is there not a *qualitative* difference between express trust

beneficiaries, who are, as in *Space Investments*, innocent non-contracting parties, and other types of beneficiaries, who are, as in *Liggett*, at base contracting parties, even if they do argue successfully for an equitable analysis to be superimposed onto the contractual relationship?

In spite of these reservations, however, it can be suggested that, coupled with the fact that equitable tracing in New Zealand no longer requires as a pre-requisite a fiduciary relationship between the parties,[13] Associate Professor Maxton's observation, that "[t]he benefits of demonstrating a persistent equitable proprietary interest have been made considerably more valuable than ever before" (in [1992] *NZ Recent Law Review*, at 141) by the *Liggett* approach to equitable tracing, is likely to be an accurate prediction that there will be increasing requests in New Zealand Courts for equitable intervention in the context of priority rights in insolvencies.

IX Conclusion

Liggett is a complex decision, and raises some issues of profound importance for the future role of equity in insolvencies, notwithstanding a later attempt by the New Zealand Court of Appeal itself to downplay the earlier decision's stature.[14] Of particular interest in *Liggett* are those developments which Mr Annetta would regard as modern and remedial, such as the remedial constructive trust and the new flexibility in the tracing doctrine. However, even in the context of those areas of the decision which Mr Annetta might regard as traditional, such as fiduciary law, the restitutionary analysis, and even the *Quistclose* analysis, the modern or remedial spectre raised its head. These developments may mean that the theory behind insolvency schemes is changing as judges face cases where the simplicity of statutorily defined insolvency schemes are productive of unjust decisions. After all, the simplicity of the policy and principles outlined in the Statute of Frauds produced injustices which were soon dealt with judicially by, amongst other doctrines, secret trusts and the original constructive trusts.[15] Perhaps modern Judges practising the equity jurisdiction are seeking, from a sense of wishing to promote justice and good conscience, which has long been the catchphrase of equity, no more than to follow in the paths of earlier tradition. □

1 See C E F Rickett (1991) 107 LQR 608.
2 P D Finn in *Equity, Fiduciaries and Trusts* (ed T G Youdan, 1989), Ch 1. See more recently P D Finn in *Commercial Aspects of Trusts and Fiduciary Obligations* (ed E McKendrick, 1992), Ch 1.
3 Some dispute exists in the law of restitution itself whether "mistake" and "total failure of consideration" can be regarded as two analyses, or whether the latter does not properly subsume the former: see P A Butler, *Essays in Restitution* (ed P D Finn, 1990), Ch 4. The ease with which Cooke P melded together both analyses in his comments (see especially text at *Liggett*, 102, 586-587, quoted herein) suggests his Honour might find this combination thesis attractive.
4 It was indeed this decision that La Forest J cited to support his view that sometimes fiduciary relationships are "discovered" in order to provide a remedy: see above, *Lac Minerals v International Resources Ltd*, cited above.
5 For further discussion, see D W McLauchlan and C E F Rickett [1989] *NZ Recent Law Rev* 277.
6 See further Mr Annetta's article, (1992) 20 ABLR 311.
7 See further in Part VII herein.
8 See further in Part VII herein.
9 See *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41, as cited by Gault J.
10 See, for example, R Fardell and K Fulton [1991] NZLJ 90.
11 (1992) 20 ABLR 311, 315. See also H Anderson in *Commercial Aspects of Trusts and Fiduciary Obligations* (ed E McKendrick, 1992), Ch 9.
12 The "swollen assets" theory is discussed or raised in several useful articles: K A Taft (1939) 39 Col L Rev 172; D A Oesterle (1983) 68 Cornell L Rev 172, at 189-190; D A Oesterle (1980) 79 Mich LR 336, at 357-363; R M Goode (1987) 103 LQR 433, at 445-447; G Jones (1987) King's Counsel 15; J Glover (1991) 14 UNSWLJ 247; and J Glover (1991) 19 ABLR 98.
13 As decided in *Elders Pastoral Ltd v Bank of New Zealand* supra, [1989] 2 NZLR 180.
14 See *Liggett v Kensington*, unreported, CA 296/90, 24 July 1992 (Cooke P, Casey and Gault JJ). This was an application for conditional leave to appeal to the Privy Council, which the Court of Appeal declined, Gault J (for the Court) saying, inter alia: "The extent to which further review of the legal issues in the rather special factual setting of this case can be said to be of general or public importance is questionable. The difficulties in this case really arise in the application of legal principles that are well established to the unusual circumstances disclosed. Though important to the many parties affected, the case cannot be said to raise matters of broad and great general public importance." In December 1992 leave to appeal was granted by the Privy Council, and the appeal will be heard in mid-1993.
15 See G E Palmer, *History of Restitution in Anglo-American Law* (International Encyclopedia of Comparative Law, Vol X, Ch 3 pp 17-30).

Access to justice for whom?

This leads into another subject often considered in the context of "access to justice", that is to say, legal costs. This is not a subject over which judges have much control, or even influence. It is, however, a matter of interest to anyone concerned to see that the Courts are reasonably accessible.

There are, from my point of view, two puzzling features of this problem. It is frequently said that lawyers' fees are so high that only the very rich or the very poor (legally aided) can afford to litigate. The figures quoted as to current levels of costs make this assertion seem reasonable. The first feature I mention is this. Assuming that the proposition just stated is correct, who are the people who presently want to litigate but who cannot do so? Assuming that there is amongst members of the community a substantial but frustrated desire to go to Court, what type of litigation is it that is currently being obstructed? Claims against Governments? Claims for judicial review of administrative decisions? Actions to recover debts? Claims for damages for personal injury? Defamation actions against newspapers? The answer, of course, may be all of the above, and more. This also raises a question as to what provision is going to be made for dealing with such claims if the present barriers of which complaint is made are lowered. Demands for reduced legal fees and consequently increased access to justice are rarely accompanied by plans to deal with the assumed flood of litigation which is currently dammed up behind walls created by the fees and practices of lawyers. As one who has a keen interest in what is going to happen when all these potential litigants find themselves at last able to sue, I would like to see some attention given to that problem. It is closely related to the matter of resources raised earlier.

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Bank collapse:
The legal status of funds subject to unexecuted payment orders

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The financial markets (and therefore banks) in New Zealand are still affected by the 1987 share market collapse with resulting legal questions having to be decided. In this article the author considers an aspect of the banker-customer relationship particularly in the light of two Australian cases arising out of the collapse of the City of Melbourne Bank in 1895.

Introduction

The recent New Zealand decision in *DFC v Goddard* [1992] 2 NZLR 445 has brought to light a legal issue in banking which seldom arises but is nevertheless important, particularly because of the present day crises in the financial sector. The issue was before the Victorian Courts in a series of cases consequent upon the dramatic collapse of the City of Melbourne Bank in 1895. The issue is: *If a bank goes into liquidation after a customer's order for payment/transmission is received but before the funds are paid/transmitted, would the bank hold such funds as the agent of the customer and therefore in a fiduciary capacity; or are they owed to the customer as a debt under the primary banker-customer relationship?*

The decision

In *Goddard*, the plaintiffs, Mr and Mrs Goddard, were the trustees of a family trust. They deposited with the National Bank, the bankers of the trust, money realised from the sale of a property in Wellington, one of the assets of the trust. When the deposit with the National Bank matured, Mr Goddard, who had already discussed investment options with DFC, placed a deposit of $2 million for one year with DFC. Mr Goddard claimed that he left instructions for the $2 million term deposit, together with interest thereon, to be transferred to the National Bank account upon maturity on 22 September 1989. However, an employee of DFC, having failed to contact Mr Goddard upon maturity, left the money on deposit on call. When he returned to Wellington on 24 September, Mr Goddard failed to contact DFC until 3 October owing to work commitments. By this time however DFC had been placed under statutory management.

Normally, the relationship between the parties in this case would be one of debtor-and-creditor, so that the Goddards would be in no better position than all the other creditors of DFC and would be affected by the moratorium imposed by the appointment of the statutory manager. However, they claimed their funds in preference to DFC's other creditors, for two reasons. First, that from the time of deposit the funds were impressed with a trust in their favour because DFC held such funds as a fiduciary; and secondly, that DFC became a constructive trustee as a result of its actions after the deposit matured.

At first instance, the New Zealand High Court dismissed the first argument, saying that the special circumstances alleged were insufficient to alter their contractual relationship, but upheld the claim under the second argument that the funds were held by DFC on constructive trust for the Goddards. The reason given by the High Court for imposing a constructive trust was that DFC, by taking a decision to re-invest the funds which only the trustees were entitled to make, had intermeddled in the affairs of the trust. The Court of Appeal unanimously rejected this reasoning, with Cooke P saying:

> It is elementary that an unsecured deposit, whether for a term or at call, with a bank or similar financial institution creates normally only a debtor-and-creditor relationship and not one of trust . . .

Notwithstanding the clarity of exposition of such principle, the Court of Appeal failed to analyse the legal status of the funds subject to the unexecuted transmission order.

The facts in *Goddard* raised two important issues. First, the general character of funds subject to an unexecuted order, and secondly whether it makes any difference to such character, if the customer happens to be a trustee.

A trustee customer

To take the second issue first, it is a general rule in banking law that a bank is not concerned with the source, origin or the nature of the funds in the accounts. There are, however, two known situations where such lack of concern may make a bank liable: first, the obvious case of a bank holding funds as a trustee under an express trust and, secondly, the case where the bank had knowingly received into an account funds paid by a customer in breach

of a trust owed by the customer to a third party.

A bank's knowledge that the customer is a trustee makes no difference to the contractual nature of the funds in the account, the bank's liability still being one of debt repayable upon demand. A case in point is the Privy Council decision in *Space Investments Ltd v Canadian Imperial Bank of Commerce and Trust Co (Bahamas) Ltd and ors* [1986] 3 All ER 75. In this case, by a deed of trust the Mercantile Bank and Trust Co Ltd (MBT) was appointed trustee of certain funds, giving it the authority "to deposit such funds with any bank" and deposited them with itself as bankers. Upon Mercantile Bank and Trust Co going into liquidation, a question arose as to whether such funds were held on trust for the beneficiaries of the trust, or whether the newly appointed trustee would rank equally with the unsecured creditors of the bank. The Privy Council did not regard as important the knowledge of Mercantile Bank and Trust Co that the funds belong to a trust, in holding, upon an appeal by Space Investments on behalf of the unsecured creditors, that the funds were recoverable only as a debt owed to the trustee.

The character of the funds

The important issue therefore, was the character of the funds when the account matured. If such funds were held by DFC for the Goddards, by re-investing them against the mandate DFC was in breach of trust and the funds remained on a constructive trust for the Goddards; on the other hand if the funds were held on a contractual basis (as Gallen J had found initially), Goddards' action could only have been one of damages for breach of the mandate and for a contractual claim for their return, unless there were special circumstances.

It is a well-established principle that although the relationship between a bank and customer in respect of funds deposited is one of debtor-and-creditor, in carrying out the customer's orders of payment the bank acts as his agent. The importance of this agency relationship within the primary debtor-creditor relationship in resolving issues between a bank and customer, was highlighted in *Barclays Bank v Quincecare* [1988] 1 FTLR 507, where the Court rejected any interference of equity preferring to examine whether the bank as agent had failed in its duties owed to the principal, the customer. What, then, is the character of funds subject to a payment order? To illustrate the question in a different way, if a bank goes into liquidation after an order is received but before the funds are paid/transmitted, would the bank hold such funds as the agent of the customer and therefore in a fiduciary capacity, or are they owed as a debt under the primary banker-customer relationship? There are no recent authorities on this point, however this issue was discussed in a series of cases decided by the Full Court of the Supreme Court of Victoria consequent upon the collapse of the City of Melbourne Bank in 1895.

In *In re City of Melbourne Bank Ltd (In liq), Ex Parte The Melbourne and Metropolitan Board of Works* (1895) 21 VLR 563, the Melbourne and Metropolitan Board of Works had, by a cheque drawn on its account with the bank, asked the bank to remit the funds represented by the cheque less exchange to its creditor in London. The bank debited Melbourne and Metropolitan Board of Work's account and wrote to its correspondent in London to debit its account with the correspondent, and to make the funds available to the creditor. But before the funds were released in London, the bank went into liquidation. The question was whether the bank held the funds represented by the cheque for Melbourne and Metropolitan Board of Works, or whether Melbourne and Metropolitan Board of Works should rank equally with the other creditors of the bank. At first instance, Madden CJ held that the banker-customer relationship was maintained in respect of such funds because the transmission was through an account and because the funds had not been appropriated for a particular purpose. His Honour distinguished the present case from *Seeley v Mercantile Bank of Australia* (1892) 18 VLR 485 – where rents collected on behalf of a customer, which should have been retained in an "Agency Account", had been wrongly paid into a current account in the customer's name. In the Full Court however, the decision was reversed, the Court rejecting Madden CJ's distinction between funds given to a bank for transmission and a transmission of funds already in an account. The Full Court held, that by debiting the account against the cheque, the bank had specifically appropriated the funds for transmission and the funds were therefore held on trust for Melbourne and Metropolitan Board of Works.

In another case against the same bank, *In re City of Melbourne Bank Ltd (In liq); Ferguson's Case* (1897) 23 VLR 78, Ferguson, by drawing a cheque on his already overdrawn account, obtained a draft payable to his creditor in London and sent it to him. The draft was accepted for payment by the correspondent in London but remained unpaid, because before the expiry of the sixty day period for payment, the bank went into liquidation. Upon a claim that the bank remained a fiduciary in respect of the funds represented by that draft, Madden CJ reluctantly agreed, saying that he felt bound by the Full Court decision in *Melbourne and Metropolitan Board of Works*. But the Full Court held, distinguishing its decision in *Melbourne and Metropolitan Board of Works*, that a fiduciary relationship did not exist, saying that the fact that payment in this case was to be effected by an ordinary mercantile instrument made the difference.

With respect, the reasons given by the Full Court to distinguish between the two cases lack coherence. The decision in *Foley v Hill* (1848) 2 HLC 28, which presumably was available then, was not discussed in either of them. The finding of a fiduciary relationship in the first case may not have been sustainable if *Foley v Hill* had been cited. The correct view, it is submitted, is that, although in carrying out a payment order a bank acts as the agent of the customer, the funds subject to such order – in the absence of a clear "intention to appropriate" for a particular purpose – retain the character of a debt under the primary banker-customer relationship. That remedy available to a customer, in such a case, is

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Books

Cheshire and North's Private International Law

By P M North CBE, MA, DCL, FBA and JJ Fawcett LLB, PhD

London, Butterworths, 12 ed, 1992, ci + 936 pp (including index), ISBN 0-406 53081 5. Price $127 + GST

Reviewed by D J Goddard, Partner, Chapman Tripp Sheffield Young

The previous edition of *Cheshire and North's Private International Law* was published in 1987. Reviewing that edition in this journal, Professor P R H Webb observed that *"Cheshire and North* is proving to be yet another example of an English textbook of first class repute whose 100% usefulness (as opposed to jurisprudential interest) in New Zealand gradually decreases with each new edition". The changes in the twelfth edition are substantial. They reflect the continuing flow of decisions from the Courts, and, still more importantly, the considerable legislative activity in England in the area of private international law. The recent legislation is founded principally on European Community developments, but also on the work of the English Law Commission. This edition confirms both that *Cheshire and North* is a first class textbook, and that its relevance for the New Zealand practitioner seeking guidance on the state of the law is ever decreasing.

Nature of private international law

The excellent introductory chapters, which discuss the nature of private international law and its theoretical and practical evolution, are largely unchanged. No person with anything more than a passing interest in the field – a class into which most practitioners ought to fall – can afford not to have read and thought about the issues discussed in this section. It is difficult to think of a better treatment of the issues which does them full justice.

Jurisdiction and foreign judgments

The impact of judicial activity in the areas of jurisdiction and recognition of foreign judgments is apparent in the chapters which deal with the "traditional rules" in these areas. The authors have taken full account of *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, and of subsequent decisions exploring its implications. *Spiliada* appeared shortly before the previous edition was published, and was referred to extensively. However one surmises that time was too short to engage in the rewriting that this edition displays – exemplified by the evolution of the heading "Is there a doctrine of forum non conveniens in English law?" into the more confident "Development of the doctrine of forum non conveniens in English law". The adoption of the *Spiliada* test by the New Zealand Courts, and the reaffirmation by the Privy Council of the underlying similarity of jurisdictional issues despite the differences between rules 219 and 220 of the High Court Rules and RSC Ord 11 (In *Kuwait Asia Bank EC v National Mutual Life Nominees Limited* [1991] 1 AC 187), makes these chapters of the book particularly useful in New Zealand.

The chapters on jurisdiction and enforcement of foreign judgments under the Brussels Convention, and the Civil Jurisdiction and Judgments Act 1982 (UK), have been revised to take account of the Lugano Convention between the European Community and the EFTA bloc (Austria, Finland, Iceland, Norway, Sweden and Switzerland). They are of little practical relevance in New Zealand at present. However the Law Commission proposes to undertake a review of our law on jurisdiction and enforcement of foreign judgments, and the international documents discussed here are likely to play a significant role in any such review. An understanding of their provisions will be important for informed participation in debate over these developments. Indeed the Lugano

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either for wrongful dishonour (if payment was to be effected by a bill of exchange) or for breach of mandate, in addition of course to a contractual action to recover the funds in the account.

Conclusion

In regard to the issue raised at the outset, it is submitted, that a payment order only imposes duties of agency upon a bank in executing such payment, but it does not alter the character of the funds subject to such order – except in circumstances where either expressly or by implication both parties had agreed to an appropriation of such funds for a particular purpose.

This would mean that in *Goddard*, when the account with DFC matured, in the absence of any evidence that the parties had intended to appropriate the funds in such account for a particular purpose, they were held by DFC as a debt owed to the Goddards.

An attempt could however be made to distinguish *Goddard* from the two *Melbourne Bank cases*, on the ground that in the latter, the accounts concerned were current and continuing, whereas in the former the bank-customer relationship had come to an end with the closure of the account consequent upon the instruction to transfer the balance on maturity. Even if this argument is upheld still, the termination of the relationship does not automatically extinguish certain contractual obligations undertaken during the currency of the relationship (for example, the duty of secrecy), and therefore it could be argued that this fact should not make any change to the conclusion reached above. □

Convention, unlike the Brussels Convention, is open to accession by any state: accession by New Zealand is one reform option that might be considered by the more internationalist lawyer.

Law of contract

The biggest loss for the New Zealand lawyer is the section on choice of law in contract. The helpful discussion of the common law in the eleventh edition has been completely replaced by a discussion of the Contracts (Applicable Law) Act 1990 (UK), which implements the 1980 Rome Convention on the Law Applicable to Contractual Obligations. This legislation almost entirely supersedes the concept of the proper law of a contract, and most of the existing caselaw – indeed the authors of *Cheshire and North* expressly warn that even in areas where the convention appears familiar to English lawyers, resort to the old common law rules "is not usually justified and would be a dangerous habit to get into" (at p 465). The few areas where the common law remains relevant are not seen as justifying a retention of a discussion of the common law. Instead, the reader is referred to the eleventh edition of *Dicey and Morris (The Conflict of Laws,* ed Collins, London, Stevens & Sons, 11 ed, 1987). It remains to be seen how the common law will be treated in the next edition of that text.

Trusts

The other section of *Cheshire and North* which has been completely rewritten, again to the loss of the New Zealand reader, is the chapter on trusts. The enactment of the Recognition of Trusts Act 1987 (UK), to give effect to the Hague Convention on the Law Applicable to Trusts and on their Recognition, has superseded the rather ad hoc common law in this area. The new chapter is concerned almost solely with an analysis of the provisions of the Act and the Convention.

Family law

The discussion of family law has been updated to take account of developments in the common law, and of legislation affecting private international aspects of the law on marriage, legitimacy, legitimation and adoption. The warning of the reviewer of the eleventh edition, that the New Zealand lawyer should read the whole of the Part concerned with family law bearing very carefully in mind the existence of New Zealand's own legislation in this area, cannot be reiterated too strongly.

Importance for New Zealand practitioners

The overall impression from an examination of this text is that it continues to play an important role in the library of the serious student of private international law, and some sections will continue to be consulted by New Zealand practitioners. The lawyer with an eye to likely developments in New Zealand law will read other sections with a sense of impending relevance. The likely impact of the Brussels Convention on jurisdiction and enforcement of judgments has already been mentioned, and Australia's accession to the Hague Convention on Trusts must raise the possibility that we will follow suit. One of the core concepts of the Contracts (Applicable Law) Act 1990 (UK) is that of a contract's "characteristic performance". That concept has also been invoked across the Tasman in the Australian Law Reform Commission's recent recommendations for reform in the area of choice of law in contract. (Australian Law Reform Commission, *Choice of Law,* Sydney, 1992 (ALRC 58)). These developments in the law of our CER partner are certain to influence the Law Commission's current work on choice of law, and any reforms which flow from it.

The final reflection prompted by this text is that the need for a comprehensive New Zealand work on private international law is greater than ever! A considerable quantity of New Zealand law is not adequately discussed in any published form. A New Zealand text which identified in some detail which parts of foreign texts such as *Cheshire and North* are of direct relevance in New Zealand would also significantly enhance the usefulness of those texts for the New Zealand practitioner. In this area, as in others, Butterworths' *Laws of New Zealand* project should meet a real need, and cannot come to fruition too soon. □

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1 Private international law aspects of family law are discussed in Butterworth's Family Law Service (ed Webb and others, New Zealand, 1992). The topics of jurisdiction and enforcement of foreign judgments, and some aspects of choice of law, are dealt with from a practical perspective in Goddard, "Conflict of Laws – The International Element in Commerce and Litigation" (1991 New Zealand Law Society seminar).

Lawyers in American government

THE CURRENT fashionable sneers about corporate lawyers who presume to exert influence and power in and out of government run counter to the historical evidence. As President Bush implied when he tried to run as Harry Truman, and as successive Democrats have stressed when the Republicans try to claim they won the Cold War, Truman's Democratic administration of 1945-53 was, in its achievements and in its members, one of the greatest governing groups of the American century. It was also packed to the hilt with lawyers.

Clark Clifford's recent embarrassments over the BCCI banking scandal have helped give a bad name to corporate lawyers who dabble in government. But as Truman's young aide, Clifford helped frame and define the Cold War consensus. That ultimate corporate lawyer John J McCloy helped carry that policy out as America's proconsul in Germany. And Truman's secretary of state, Dean Acheson himself, was architect, builder, and finally head of household of that visionary policy that set out to contain the Soviet threat, and build up America's allies as bulwarks against it. And then he went back to his corporate law practice.

Martin Walker
Guardian Weekly
(from *The Washington Post*)
31 January 1993

Law's role in a changing region

The role of law in a region undergoing dramatic change will be a major focus of the 13th Biennial LAWASIA Conference, to be held in Colombo (Sri Lanka) from 12-16 September 1993.

In four days, the conference – the foremost law conference in the Asia-Pacific region – will give its expected 800 delegates valuable insights into the most crucial legal issues facing the countries of the region.

The conference will provide an opportunity too for lawyers and others from the nations of Asia and the Pacific to meet and get to know each other.

Hosted by the Bar Association of Sri Lanka, the LAWASIA conference will be held at the famous Bandaranaike Memorial International Conference Hall, a huge centre set in tropical gardens in the centre of Colombo.

Topics for the conference will include:

Intellectual Property Law
Infringement of trade marks and unfair competition in international trade
Are service marks intellectual properties?
Multinational protection of copyright
Law of patents in scientific and agricultural development
Biotechnological invention – should be patentable?
Intellectual property in computer technology
Intellectual property rights in technology transfer and investment – experiences in the region
Towards uniformity in intellectual property laws
International developments in intellectual property

Commerce & Finance
International trade treaties – impact on the developing countries
Trends in double taxation treaties
Documentary credits – the importers' dilemma
Carriage of goods by sea and limitation of shipowners' liability
Developments in the arrest of ships and sister ships.
Liberation of economies and trade barriers in the region
Privatisation
Mergers and monopolies – a threat to free trade?
Asian common market?
American trade law – relevance to Asia
International trade – the use of standard forms
International construction – the use of standard forms
Insolvency and bankruptcy laws in the region

Human Rights
Political refugees, political prisoners and suspects of political violence
Right to live in human dignity – problems and perspectives in the region
Political violence – experiences in the region
Human rights, development and democratization
Role of lawyers in human rights issues
A human rights commission/court for the Asia-Pacific region?
Reverse discrimination

Criminal Justice
Victims of crime
Terrorism and political violence
Victims of terrorism and political violence
Extradition, expulsion and abduction – legality in domestic law
Crimes against humanity – the need for international sanctions
Political crime – exception to extradition?
International co-operation in the prevention, detection, investigation and prosecution of crime
Transnational criminality – the need for international policing
Criminality of spreading disease
The presumption of innocence – the need for constitutional safeguards
Medico-legal aspects of AIDS

Environmental Law
Agenda 21 – its application in the region
Role of non-governmental organisations in the implementation of Agenda 21
Cultural and ecological effects of tourism
Cross border pollution

Dispute Resolution
Arbitration in the region
Law delays – a way out

Women's Rights
Matrimonial violence
Equal work – equal pay?

Family Law
Surrogate parents
Liberalisation of divorce laws
Protection of the economically weaker spouse
Cross-border adoptions

Legal profession
Compulsory continuing legal education?
Changing concepts in legal education

Products Liability
Laws in the region
Producers' view
Consumers' view

The Judiciary
The judge – the conscience of the people
The judiciary – the guardian of the people

Media Law
The right to privacy
Sub-judice rule
Transborder communication
International defamation

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Windsor and Watergate

By Nigel Jamieson, Senior Lecturer in Law, University of Otago

The current difficulties of the House of Windsor have some historical parallels. In this article Mr Nigel Jamieson notes some of these marital issues, more particularly the "scandal" culminating in the abdication of Edward VIII in 1936.

The convention of not hitting a man while he is down, as reflected by Hugh Walpole's school stories of *Jeremy and Hamlet* and *Jeremy at Craile,* is typically an English tradition. When Sir Compton Mackenzie (more widely remembered for the post-war film of his book *Whiskey Galore* than for the fact that as Rector of Glasgow University he asked my mother for the first dance to open the Charities Ball) took up his pen in *The Windsor Tapestry* on behalf of abdicated King Edward VIII, it was much in the same public school tradition of helping a downed man to his feet.

Mackenzie's defence of the Duke of Windsor — aptly coming, *cuidich an righ,* from a Highland writer identified with the Scottish National Movement, provides a remarkable paradox. It gives that intertwining twist of circumstance so beloved by Celtic art — the Duke's best defence comes from someone who is not just sitting on the constitutional fence but from someone who in approaching the matter might be expected to maintain a differently voiced allegiance. As a fitting tribute to the autochthony of the still united kingdom, therefore, *The Windsor Tapestry* begins with a discussion of whether the young Compton could in 1894, the year of the uncrowned king's birth, see Windsor Castle from the grounds of his English public school.

The early Compton, so first surnamed and christened Edward, left St Paul's School to read for the Bar until, assuming the penname of Mackenzie, he relinquished law for literature. Being born in County Durham, his birthplace would be treated as English by the Scots, and as Scots by the English, thus suffering constant reprisals from both sides. In establishing a vogue for the realistic biographical novel, to be followed by Cronin and others, he would lead the twentieth century revival in Scottish literature. No better champion, trained in law and popularly esteemed in letters, invalided out of Gallipoli, and director of the Aegean Intelligence Service, could have come to the defence of the royal house of Windsor after the abdication of King Edward VIII. "Poor Teddy!" a previous reader wrote in the margin of my copy of Compton's account. "Yes, indeed, poor Teddy" — thereafter to be known as England's uncrowned King, and by the title of his dukedom, remembered with his new wife, the former Wallis Simpson, as being more Windsor than the house from whose responsibilities to rule England he abdicated.

What is it to be crowned King of England but to take an oath of responsibility to maintain law and order, administer justice, and uphold the Christian faith? In both substance and form this very same coronation oath goes back to Anglo-Saxon days. Even the Normans adopted it. What the credentials are for taking this oath came to the fore with the abdication of Edward VIII in 1936, and the coronation of George VI as Edward's successor in 1937. The same credentials for kingly office are under consideration again today, 57 years later. It seems from afar, that all London's burning over what Fleet Street equates with Watergate. What's left of the Commonwealth is likely to catch fire over a series of scandals involving those who in the accustomed order of things would accede to the position of our heads

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Law & Technology
Torts arising from the use of computers and high technology
Reception and admissibility of information provided by computers and electronic devices
Use of expert systems and demonstrative evidence in court
Communication laws in the region
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Constitutional Law
Manipulating the constitution
Practice of law in Hong Kong in the year 2000
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Right or privilege!
The New Zealand experience

Ombudsman
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Further information about the conference is available from:

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SRI LANKA □

of state. Is it possible to say anything at all about this topic without adding more fuel to the fire? Compton Mackenzie thought so – he even cancelled publishing contracts for the final two volumes of his four volume novel on the *Winds of Love* to do so. The near 600 pages of *The Windsor Tapestry*, however, could only come after Edward VIII's abdication. Sir Compton was a commoner then. Could a commoner's testimony of faith in Edward's actions have changed history, and would his arguments in Edward's favour have received a hearing, had they been communicated with foresight, rather than with the hindsight of two years after Edward's abdication and on the eve of another world war? Alas, how long it takes to write a book; what little pleasure lies in having one's unspoken prophecies substantiated as recorded history!

As a young Glasgow undergraduate my mother may have danced with Sir Compton at the Charities Ball, but she had a very different view than he did of what he would call the Windsor tapestry, and what she would call the Simpson affair. Studying for a masters in maths and classics may have marked her out in those pre-feminist days as a blue stocking, but she was most certainly not a product of any public school. Later, as a school marm, she believed in applying discipline until finally the recipient behaved differently; and if this meant helping someone up, as in a wild west movie, simply for the purpose of knocking them down again, then so be it. As the daughter of an Irish immigrant blacksmith who had brought his family to live in Glasgow, Sir Compton's dancing partner that night would have taken the part of the commons against the Crown.

What accounts for this difference between public opinion and the support for the Crown which, as Sir Compton concedes, was so much the minority view? According to the mother's milk that I've imbibed, the British press had been silenced from above. On the monarch's account, they were being coerced into keeping quiet about the Simpson affair. This emphasises what we now call the gate-keeping power of the press. As Chris Trotter wrote in the founding issue of New Zealand's *Political Review*, the freedom of the press is derived from property rights – it depends on who owns the paper. In so far as this freedom is a long established property right it also relies on the social convention of what old school ties bind all the newspapers together.

Compton Mackenzie complained of the silence of the British press. In keeping silence, quite out of keeping with the muck-raking concept of Grubb Street, the stiff upper lip of the British press intrigued European and astounded American journalism. As champion of Edward VIII's friendship with Mrs Simpson, Mackenzie scorned Fleet Street's silence as stemming from funk in general and fear of libel in particular. Well, wouldn't the Duke of Windsor eventually bring a libel action against author Geoffrey Dennis and Messrs Heinemann as publishers – so why scoff at the British press for being afraid of such a law suit? In any case, if Mackenzie supported the King's behaviour how could he equate what the press would have said with risking a suit for libel? One surely can't have it both ways. What Mackenzie would think of the present press coverage, after he had complained of its former silence is hard to say. As it stands, it is certainly inconsistent that when the British press is targeted today for speaking out (an expression now more apt for talk-back radio and television) it is vilified for its poor taste (although some transcripts of tapes have been withheld until long after the Crown prince's announced separation) whereas the royalists of the thirties vilified the press, and dealt with them as roundheads, for their reverse response of keeping quiet.

As for roundheads, Cromwell is remembered throughout Ireland for having ravaged that emerald isle; yet my mother – despite dancing with one royalist and later marrying another – knew where she stood and still stands. She has never read *The Windsor Tapestry*, and, needing now big printed books for the partially blind, there is little likelihood that she ever will, but what I'm sure would firmly set her mind against Mackenzie's apologetics for the king's conduct would have been his typically legal reasoning. Compton's argument in defence of Edward VIII is based on precedent. He argues that the British nation should have accepted the situation engendered by Edward VIII because so many other pre-eminently English Kings had done no differently.

Most of Mackenzie's 600 pages reduces the heroics of English history from the black and white of conventional morality to different shades of grey. That dear old mother of mine, as I know from my own upbringing, however, would never countenance the argument that two blacks make a white. Instead, she would go on knocking down the proponent of such a view until he had abandoned his stance of moral relativity and reclaimed the accustomed social conscience contrasted clearly in terms of black and white. How Henry VIII had got along by chopping off the heads of his opponents and George IV had managed to evade the issue by pretending it did not exist would have been quite beside the point.

So far as the King's relationship with Mrs Simpson was concerned, therefore, my mother took the average Glasgow undergraduate's view, that the press were being coerced into keeping quiet about the affair. Why, even Mackenzie himself reports on the role of MI5 and the sinister evasiveness of the authorities regarding the McMahon trial.

> That there is still a firm belief in America and on the Continent in a theory of a combination of powerful interests, political, ecclesiastical, social and journalistic to drive King Edward from the Throne,

comes from a former director of military intelligence whose own memoirs were banned under the Official Secrets Act in 1932. Nowadays, it is big business that is our bogeyman, but to blue stockings of the provincial thirties it was the old school tie of Eton and Harrow and the collegial camaraderie of Oxford and Cambridge (when Sir Compton went to Oxford's Magdalen) that held the reins of power. Some journalists, such as Andrew McMahon, found themselves in prison, but what can you expect of a journalist who not only reports but makes the news by throwing a loaded revolver at the feet of the reigning monarch? Of course as a result of press silence,

rumours were rife – the reverse of the present occasion in which one can barely believe the news. The wildfire spread, and provoked more decisive response, as these things do, the further it travelled from the centre of government. The citizens of Aberdeen for example took it as a positive insult that the King would use their railway station in which to meet Mrs Simpson but would refuse to open their Royal Infirmary at Woolmanhill because he was still in mourning for his father, the late George V. The irony for Aberdeen folk lay in that he who was in fact to open it became their King – for it was opened by the Duke of York, within the year to become George VI.

The Scots nation, being a revolutionary one, will condone murder (which its legal system does by recognising reduced responsibility) but, rather than countenancing hypocrisy, will hang every hypocrite twice over. Even in the Anglo-Irish and therefore greener parts of Glasgow, the reputed embargo on royal news riled the populace more than the actual issue being suppressed. The rumour – or was it real news – that caused most offence to the northern light of the United Kingdom was that this Mrs Simpson, like the Mrs Fitzherbert of George IV, was being already treated, if not being actually presented to foreign dignitaries, as their queen.

All the same, could Edward VIII, so much more high spirited and heroic (more kingly in a sense) than his shy and retiring successor George VI, have avoided the Second World War? Even in the event of war, had the British nation been less judgmental and more forgiving of his relationship with Mrs Simpson, would it have softened transatlantic politics sufficiently to secure an earlier and more united western front? Who can say, but it is clear from Mackenzie's treatement of the tapestry of events from *fin de siecle* in 1894 to his publication of that tapestry in 1938, that in one sense everything leading up to Edward VIII's abdication was destined. One can still feel the hand of destiny in tracing the American connection from George III's loss of the American colonies, through the United States citizenship of Mrs Simpson, to the friendship of the Duchess of York with a Texas oil baron. In another sense, however, destiny is distinguishable from fate. Mackenzie makes his own conclusion clear that had the abdication of Edward VIII not been governmentally required, the whole course of world events from that point on would have been not only vastly different but all the better for it.

There is speculative history just as there is speculative philosophy and speculative jurisprudence – all by and large anathema to the substantive lawyer who prefers to keep a more practical score. The practical score begins with facts, such as when the Prince of Wales first met Mrs Simpson and ends with events such as the abdication of Edward VIII from the British throne on 11 December 1936. In front of facts, and between and after events, however, there are all sorts of prescriptive values employed that make every substantive lawyer as much a speculative philosopher as he is a man of action. We can least avoid these values whenever we consider the day to day relations with our head of state at constitutional law. When ought the British government (especially including the churchmen) to have known that their head of state was serious about Mrs Simpson, instead of their turning a blind eye to what could have been, historically speaking, yet another royal mistress? Remember, too, that since the time of William the Bastard, now known as Conqueror, the Norman English as distinct from the Anglo-Saxon Scot and the Celtic Irish, have been muddled about matrimony – John Milton their national poet promoting divorce and Bertrand Russell their national philosopher reiterating its action.

We can least avoid this muddlement over matrimony when we consider the relations with our head of state at constitutional law. The dilemma for Henry VIII between continuity of kingship and domestic tranquillity is proverbial, but it was also tragic for Sir Thomas More, his Lord Chancellor. In the same way when United States reporters asked of Lady Asquith whether her evaluation of Edward's position as tragic meant tragic for Edward or tragic for England, her sybilline refusal to reply really signified tragic for both. Simply because we are a monarchy, then whether we like it or not, all royal tragedy is shared by the whole kingdom. Those who would like to divest themselves of this experience by laughing at how the mighty have fallen are perhaps case-hardened by the history of our constitutional monarchy in being pre-eminently one of long conflict between Crown and commons. It is one of open conflict between contrary ideas, more often resolved by fragile compromise between conflicting values than events. We have learned to pride ourselves on this political expedience of keeping a steady state, and so have become vulnerable to losing it.

In so far as our present circumstances can be seen as history repeating itself I have, as delicately as possible, refrained from recounting the obvious. The Highland temperament dwells on Celtic synchronicities of time and space. It weaves an art form out of what for others are merely facts. Were Sir Compton Mackenzie to write a sequel to *The Windsor Tapestry* now he could no more overlook the burning down of Windsor Castle than he could overlook Watergate, but on both these matters, unlike those of 1936, the popular press has already been vociferously explicit. □

Law and monarchy

Ostensibly, Elton is concerned [in his new book *The English*] with the question: what were the historical forces that conferred a distinctive character on the English people, and how has this changed – if at all – down the ages? His answer has at least the merit of brevity. It was monarchy and law that did the trick, from Anglo-Saxon times onwards. The Church gets an occasional look in; while "administration" can mediate handily between kings and courts. But fundamentally, the English are the product of royal authority and legal convention. They were forged by them, moreover, into a self-conscious nation as early as the 10th century, before the arrival of the Normans.

Perry Anderson
Guardian Weekly
31 January 1993

Landlocked land

By Andrew S Butler, Faculty of Law, Victoria University of Wellington

Section 129B of the Property Law Act 1952 allows for the granting of rights of way where land is landlocked in terms of the section. The operation of the section has given rise to a number of cases at High Court and Court of Appeal level. In Cleveland v Roberts *(Court of Appeal, CA 130/90, 123-4/91, 23 November 1992) the Court of Appeal clarified a number of aspects of the operation of the provisions. In this article Andrew Butler discusses the interpretation of the section arising out of the Court of Appeal decision.*

The author wishes to thank Dr Brian Davis of the Faculty of Law, Victoria University of Wellington and Dr Don McMorland of the Faculty of Law, University of Auckland for their comments.

Section 129B of the Property Law Act 1952 provides a statutory mechanism according to which the High Court is empowered to grant reasonable access to a "piece of land" when the Court is satisfied that it is "landlocked" in terms of subs (1). The recent decision of the Court of Appeal in *Cleveland v Roberts* (Court of Appeal, CA 130/90, 123-4/91, 23 November 1992) clarifies a number of aspects of the operation of the section.[1]

Relevant parts of the section

Most of the appeal concerned the interpretation of subss (1), (6) and (8). Those subsections read:

> **129B. Reasonable access may be granted in cases of landlocked land**—(1) for the purposes of this section,—
>
> (a) A piece of land is landlocked if there is no reasonable access to it: . . .
>
> (c) "Reasonable access" means physical access of such nature and quality as may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land for any purpose for which the land may be used in accordance with the provisions of any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the provisions of the Resource Management Act 1991.
>
> . . .
>
> (6) In considering an application under this section the Court shall have regard to—
>
> (a) The nature and quality of access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land;
>
> (b) The circumstances in which the landlocked land became landlocked;
>
> (c) The conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land;
>
> (d) The hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and
>
> (e) Such other matters as the Court considers relevant.
>
> . . .
>
> (8) Any order under this section may be made upon such terms and subject to such conditions as the Court thinks fit in respect of—
>
> (a) The payment of compensation by the applicant to any other person; . . .

The facts

The respondent bought five titles of land in the Todds Valley area of Nelson between 1969 and 1970. These titles occupied one side of the valley, and consisted of both hillside and valley floor. There was reasonable access from the public highway to the respondent's residence which lay on the hillside. Access to the back block titles, which lay on the valley floor, was possible by means of an existing track of poor quality which ran from the respondent's main residence along the side of the valley, at one stage turning down into the valley and along the valley floor at a point close to a woolshed used by the respondent. In heavy rain this track was totally inadequate for vehicular access.

For at least a hundred years access to the back blocks had been by an entirely different route: a road running along the valley floor which passed over the appellants' land (the appellants acquired the property in 1982) allowed access to the back blocks of the respondent's land. The background to this access was that in 1865 a right of way had been granted by deed over the land occupied by the appellants in favour of a predecessor in title of one of the titles now owned by the respondent. In 1983, the appellants discovered that the easement had not passed with the land, and claimed that accordingly the respondent had no legal right of access to his back block over their land. In 1987, after four years of negotiations had failed to produce a satisfactory settlement to the problem, the respondent lodged an application in terms of s 129B. In 1988, the appellants constructed a ditch across the "right of way" preventing access over it to the back block.

In the High Court, the respondent argued that the track to the back blocks over his own land was inadequate and did not provide reasonable access to that land. He applied for a right of way to be granted in his favour over the appellants' land along the route of the 1865 easement. Jeffries J found in favour of the respondent and granted an interim order allowing access over the right of way to the respondent's land (High Court, Nelson, M 18/87, 23 February 1990,

hereafter "High Court No 1"). In a later judgment, his Honour granted the respondent an alternative and less intrusive right of way over the appellants' land while at the same time awarding $5,000 compensation to the appellants (High Court, Nelson, M 18/87, 11 April 1991). Both decisions were appealed against. The judgment of the Court of Appeal, delivered by McKay J, upheld both of Jeffries J's decisions.

The Court of Appeal decision

(a) "Piece of land"

One of the most important aspects of the Court of Appeal's decision is the definition of the threshold phrase, "a piece of land". The trial Judge had effectively regarded the applicant's land as being made up of two "pieces of land" for the purposes of the section: one was the land on the hillside and the second was the land constituting the valley floor. His Honour then held that while access to the hillside portion of the respondent's land was adequate (see High Court No 1, p 13), access to the valley portion over his own property was not reasonable. On this basis, the Judge granted a right of way over the appellant's property.

It was contended on behalf of the appellants that this approach to the threshold test was incorrect; rather "piece of land" referred to the whole parcel of land which comprised the respondent's five titles ("the wide test").[2] Counsel for the appellants took the decision of Greig J in *Mowat v Federated Farmers of New Zealand (Waikato Provincial District) Inc* [1982] 2 NZLR 585 as support. In that case, the land in question was a commercial site on which a warehouse had been erected occupying all but two feet of the property's 50-foot street frontage. The appliant had contended that the rear portion of the section, access to which was blocked by the building, was a "piece of land"; which was landlocked for the purposes of the section. This contention was roundly rejected by the Judge, who said (at p 588);

> It was argued that the reference in the section to "a piece of land" referred to a part or piece of the land in question and that therefore the rear of the applicant's land was a piece of land which did not have reasonable access. I do not accept that argument. The phrase "piece of land" is common usage in conveyancing but means a distinct and separate whole and that is in accordance with the ordinary grammatical meaning of the word. It is not open to an applicant *in the circumstances of this case* to divide up his land for the purposes of access alone and then make a claim under the section in respect of some particular part or fragment of the piece of land of which he is the owner. (Author's emphasis)

On the basis of this passage, it was contended that it was not open to an applicant to divide up his parcel of land for the purposes of the section and claim that while some of it had reasonable access, other parts did not.

Indeed, the appellant's argument is not without some academic authority, as the learned authors of *Introduction to Land Law* had taken the view that the case stood for the proposition that:

> The phrase "piece of land" means a distinct and separate whole and not a part of the owner's land. (Hinde, McMorland & Sim, *Introduction to Land Law*, (2nd ed), (Wellington: Butterworths, 1986), 6.047, fn 5.)

The Court of Appeal, however, rejected the appellants' contention. Referring to *Mowat*, the Court approved the passage cited above, but put a different interpretation on it to that proposed by the appellants. The Court stated (p 11):

> We respectfully agree with [Greig J]. It is not open to an applicant to *artificially* divide his land in order to say that part of it is landlocked. There must be a "piece of land" which is a distinct and separate whole in the sense that the contours or character of the terrain are such that it should be so regarded. (Author's emphasis)

In the context of this case, the Court accepted that the area of flat land which constituted the back block of the respondent's parcel of land was a piece of land quite distinct from the hillside on which the rest of the respondent's land lay. That piece of land stood on its own and access to it was the subject to be examined in considering the respondent's application.

Subject to what is said in the last paragraph of this section, it is submitted that on the definition of "piece of land" the Court's approach is correct. First, the phrase is a broad term which in ordinary meaning refers to any parcel of land which is a distinct and separate whole. This is confirmed by the context in which the legislation is designed to operate. Boundaries are not drawn up on a certificate of title with regard to providing ease of access to the land comprise therein and to adjacent titles which may subsequently be bought up by the land owner (as was the case here). Nor do they necessarily take into account the physical terrain of the land comprised within the title. To have used the titles as the referent by which to define "piece of land" for the purposes of determining the quality of physical access to particular portions of land would not have made sense. Second, acceptance of the appellants' argument would have severely cut down the potential scope of the section. In particular farms which stretch out over a number of valleys would certainly have been restricted in the extent to which they could invoke s 129B – in effect reasonable access to one part of a large parcel of land may well have deprived a landowner of the potential to invoke the Court's ameliorating jurisdiction under s 129B. In addition, it must be remembered that satisfying the "piece of land" test is only a threshold and does not in itself determine whether a remedy ought to be given.

The effect of the decision will be that when considering what constitutes a "piece of land" for the purposes of s 129B, it will, in the words of Jeffries J, be open to the Court to have regard to the great variety of barriers, such as "steepness of the land, ruggedness, rivers or streams, flora, crevices, distance, even buildings." (High Court No 1, p 16).

To some extent, however, one must wonder whether the dispute over the definition of "piece of land"

is not misconceived. If, "the central issue [in s 129B applications] is reasonable access to land" (High Court No 1, p 14, approved by the Court of Appeal, at p 10), then surely consideration of the "piece of land" issue prior to a consideration of what access is required by the applicant, and to which part of his land access is required, is to put the cart before the horse. For instance, let us assume that "the wide test" had been adopted by the Court of Appeal. Assume further, that the applicant as in the instant case, shows that there is no reasonable access to a woolshed on his back block. In such a case, the s 129B application would still succeed, notwithstanding the wide test, because the applicant would be in a position to establish, in the words of subs (1)(c), that he or she does not have "physical access of such nature and quality" as is reasonably necessary to enable him or her to use all of his land for wool collection (a use of his land which is presumably lawful under the Resource Management Act). This approach best accords with the acknowledged centrality of "reasonable access", and demonstrates that the dispute over the definition of "piece of land" is a distraction.

(b) "Reasonable access"

A question which had attracted some attention in earlier High Court judgments on s 129B was whether the question of reasonable access under subs (1)(c) was to be considered in terms of present fact or whether regard ought to be had to the potential for the construction of adequate access over the applicant's own land. In *Cooke v Ramsay* [1984] 2 NZLR 689, 695, (approved by Eichelbaum J in *White v Barnett*, High Court, Wellington, 20 February 1985, M 565/83 at p 20) Savage J took the view that

> The Court has to determine whether at the time of the application being heard there is in fact physical access of such nature and quality as is reasonably necessary to enable the then occupier to use and enjoy the land in terms of the definition in the Act. . . . Matters such as whether there is legal access, its state, the cost of upgrading it and maintaining it are all, in my view, relevant to the second issue of whether or not the Court should grant relief.

By way of contrast, in *Gardner v Howie* (High Court, Auckland, M 327/77, 1 June 1983, at p 9) Ongley J held the Court had to consider whether existing frontage access "already provides or is *capable of providing* . . . reasonable access". (Author's emphasis. See also *Williams v Joslin* (1981) 1 NZCPR 273, 276 where Thorp J considered issues such as the cost of upgrade as arising under "reasonable access".)

In the instant case, counsel for the appellants contended that if the possibility of upgrading any track(s) over the applicant's land existed, then the applicant could not meet the requirement under subs (1)(a) that it be shown that "there is no reasonable access to [the piece of land]." In support, it was argued that there is a presumption that the land of the defendant ought not to be subject to interference by a s 129B order if the applicant's land was reasonably capable of being upgraded so as to provide reasonable access. This presumption was said to be founded on a prior presumption in favour of non-interference with the land of a defendant.

The Court of Appeal dealt shortly with this issue, without reference to the earlier cases, saying (at p 12):

> The statute . . . says that land is landlocked if there is no reasonable access to it, which *is a question of present fact*. If the land in fact is without reasonable access, then it is landlocked and the section can be invoked. The fact that access could be created on the applicant's own land will then be relevant under paragraphs (c), (d) and (e) of sub section (6), and may lead to the refusal of an order. (Author's emphasis)

Furthermore, the Court rejected the presumption of non-interference with a defendant's land saying, "We find no basis in the section for any such presumption. . . . [T]here is no justification in a remedial statute for reading down the provision or approaching it with hostility".

The effect of the Court's approach to "reasonable access" is to establish a generously wide threshold test in favour of an applicant. While this may be inevitable when interpreting a "remedial statute", it does appear odd that a landowner's failure to maintain or upgrade existing tracks or to pursue other means of securing access over her own land should entitle that person to invoke the Court's jurisdiction under s 129B. That said, the Court's statement that upgrading is a matter to be considered under paragraphs (c), (d) and (e) of s 129B(6) shows that a broad interpretation is also to be given to concepts such as "conduct of the applicant", "hardship" to the defendant, and "such other matters as the Court considers relevant". In this way, the issue of upgrade can be invoked by the defendant at the later balancing stage.

The Court's dismissing of the non-interference presumption argument is, however, unfortunate. While it may be that such a presumption is not appropriate at the threshold stage, one would imagine that such a presumption ought to be adopted under s 129B(6)(e) as a matter of relevant concern in determining whether an order should be granted. As Robertson J said in *Hunter v Butcher* (High Court, Dunedin, CP 45/87, 16 August 1988, at p 7):

> Even the concession which this Section [s 129B of the Property Law Act 1952] provides, must be considered against the general integrity that any owner has in respect of the enjoyment of his own land.

Indeed, when considering applications under the equivalent legislation (Property Law Act 1974-85, s 180), the Courts of Queensland have emphasised, "[O]ne should not interfere readily with the proprietary rights of an owner of land sought to be made the subject of a right of user under the Act.": *Re Seaforth Land Sales Pty Ltd's Land* [1976] Qd R 190, 193, followed in *Re Worthston Pty Ltd* [1987] 1 Qd R 400, 402-3. (See also *Ex parte Edward Street Properties Pty Ltd* [1977] Qd R 86, 91.)

(c) Factors to be considered under s 129B(6)

(i) Hardship

In the High Court, significant weight was attached to the hardship which would result to a third party, the Walkers, if a s 129B order was not granted. The Walkers, *after* the discovery of the true nature of the legal status of the 1865 right of way, commenced to build a residence on one of the back block titles, and in 1985 entered into a conditional contract to buy the site (see High Court No 1, p 9). Mr Walker admitted that before commencing building he was aware that there were problems with the status of the 1865 easement. It was submitted by the appellants that any hardship which the Walkers would suffer by denial of a right of way over the appellant's land was as a result of a risk taken by the Walkers. The Court of Appeal, however, dismissed these objections saying (p 16);

> We do not think Mr Walker is to be criticised for assuming that any problems would be sensibly resolved between neighbours given the long history of the accessway, and we do not think the Judge was wrong in taking full account of the hardship which the denial of access caused to Mr and Mrs Walker.

With respect this conclusion is surely incorrect. The significance of knowledge as to the legal status of accessways was an important consideration in the earlier decision of *Cooke v Ramsay*, supra. In that case, the applicants bought land knowing that the best access to it (over the defendants' property) had been at the pleasure of the defendants, and, further, it had been made clear that the defendants would not grant the same access to subsequent purchasers. In these circumstances, Savage J declined relief, holding that the applicants' purchase of the land amounted to a "calculated risk".[3]

Applying this test to the facts of this case, it would appear that the Walkers had, like the applicants in *Cooke*, taken a calculated risk as to what would happen in the future as regards access to their proposed residence. Granted, the defendants in the instant case had not been as insistent as the defendants in *Cooke* that access would be denied (preferring instead to try to negotiate an acceptable compromise route over their land), yet the difference in knowledge is only one of degree. Inconvenient as the denial of the right of way would have been to the Walkers, it was a risk they were aware of, and any hardship which they might suffer ought not to have been considered under s 129B. For similar reasons, the comment by Jeffries J that the Walkers' situation added considerably to the applicant's hardship is flawed (High Court No 1, p 22). Indeed, the effect of the Court's decision in this case was to put a premium on the action of the Walkers in proceeding with building plans when matters were unsettled concerning the legal status of access rights. This is hardly fair to persons such as the defendants.[4]

(ii) Upgrade of existing access

The Court of Appeal made it clear that where a defendant resists a s 129B order on the ground that upgrading work could provide access, work which would merely create "some limited access" (in the sense of only providing access for certain types of activity to which the land is put) will not meet the statutory aim of ensuring "reasonable access". On the facts of this case, engineering survey work showed that upgrading the existing track would not provide a road of sufficient standard for the passage of logging trucks and sheep lorries (the respondent had a small forest on one of the back blocks as well as a woolshed), whereas the road over the appellants' land had been able to accommodate such traffic in the past. In these circumstances, the Court upheld the High Court ruling that the upgrading option was unrealistic.[5]

(d) Compensation

As regards the issue of compensation, the Court of Appeal amplified a number of points made in the *Jacobsen Holdings Ltd v Drexel* case (fn 3). First, the Court held that when reaching an appropriate sum the hypothetical "willing seller" and "willing buyer"

> would not close their minds to the past history of use of the existing track . . . and to the acceptance of that use by the appellant's predecessors in title. These are factors that would be reflected in any price reached by "friendly negotiation" . . . (p 19)

Second, where an applicant stands to gain from the granting of a right of way, while the defendants stands to lose

> one might expect friendly negotiations to arrive at agreement somewhere between these two figures, so that there would be a gain to both parties. (p 20).

Third, in calculating the value gained by the grant of the right of way, it is not open to the applicant's valuer to reduce the projected gain by a deduction reflecting the actual costs of litigation in obtaining the s 129B order. (p 21) □

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1 For a good analysis of a number of the High Court decisions and the one previous Court Appeal decision on the section, see K Grant, "Applications under s 129B of the Property Law Act" [1989] NZLJ 146.

2 In the case of the former being the correct definition, it was contended that in that there was reasonable access to some of the land the land could not have "no reasonable access" within the meaning of subs (1). It was also contended that, alternatively, the phrase "piece of land" could refer to the whole of a parcel of land comprised within an individual certificate of title. In the case of the latter, the argument of the appellants was much more complicated, relating to the specific physical contours of the parcel of land in question, and is unnecessary for consideration in this note.

3 Savage J's approach was approved by the Court of Appeal in *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324, though distinguished on the facts of the case. See also Grant, supra note 1, at p 150.

4 This point is put in sharp relief when the attitude of the High Court and Court of Appeal in the instant case is contrasted with the judgment of Gault J in *Knowles v Henderson* (1991) 1 NZConvC 190, 704. In considering an application for an injunction connected to an application under s 126G of the Property Law Act 1952 (which allows a Court to extinguish easements) his Honour stated (at 190, 716): "Refusal of an injunction where there is found to be a clear breach of an easement has the potential to encourage flagrant breaches followed by pleas of hardship, so as to effectively bulldoze away the rights of owners of a dominant tenement."

5 The Court of Appeal also accepted Jeffries J's assessment that an upgrade which would allow vehicular and pedestrian, all weather, day and night, ordinary car, and average driver access would only be possible at exorbitant cost (Court of Appeal, p 12-14).