THE NEW ZEALAND
LAW JOURNAL
21 MAY 1993

Courts

It is disconcerting to hear politicians making sneering references to the health system, as we know it, as having an obsession with buildings, bricks and mortar. They seem to think that heart operations and hip replacements and birth itself could be undertaken in the open air with the beneficent help of the clean green environment that New Zealand farmers are so commercially proud of; or at worst that these medical treatments could be attended to in army tents. It would be ludicrous if it were not so sad.

The legal system, like the health system, has need of appropriate surroundings, of practical and effectively designed buildings that serve both to make the working of the system efficient, and the serious social significance of Court proceedings manifest. It has been important therefore that over the past decade or more the seats of justice in the High Court and District Court in Christchurch, Auckland and now Wellington have been given proper buildings.

The importance of the building is indicated of course by the fact that we use the word Court, at least in the legal context, in four quite different senses. Its more romantic implications, its sporting associations, or its royal connections can be left aside. But in legal parlance the word Court applies to the Judge himself or herself, to the judicial institution, to a sitting, or to the building where trials take place and decisions are made. The Court building is at once a metaphorical symbol of justice and a practical place of work for those involved in the system.

The derivation of the word Court in its judicial connotations is of course royal. The Judges are the Queen's Judges, not the Prime Minister's nor the Cabinet's. Historically it was the monarch's justice that was dispensed through the Judges who declared the common law of England. The historical background is neatly stated in David Walker's most useful book *The Oxford Companion to Law* at p 301. Mr Walker writes:

> A Court was originally the King's or a great lord's palace or mansion, the place where he stayed with his retinue of friends and advisers, eg the Court of St James's, and the name became transferred to the group of confidants, advisers, and chief administrators, to those who, singly or in groups, in the sovereign's or lord's name exercised judicial functions and also to the places where justice is administered. In the last senses a court is accordingly a person or group of persons having authority to hear and determine disputes in accordance with rules of law. Tribunals or adjudicators who exercise adjudicative functions by virtue of contract or of the voluntary submission of persons to their decisions, such as arbitrators, disciplinary bodies or committees of clubs, trade unions, and the like are not, strictly speaking, courts because they do not exercise jurisdiction by force or authority of law. Nor is a person or body a court merely because he or it has to hear evidence, to act fairly and impartially, to reach decisions, or because it is subject to appeal. Bodies, frequently called tribunals, may have many of the characteristics of courts, while bodies called courts may in fact have mainly or entirely administrative functions.

To try to define a Court, as an institution, would not be simple. The difficulty was touched on by Fry LJ in 1892 in the case *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431. The case involved a claim of absolute privilege for defamatory statements made in proceedings before a Court. Lord Justice Fry said:

> I do not desire to attempt any definition of a "Court". It is obvious that, according to our law, a Court may perform various functions. Parliament is a Court. Its duties as a whole are deliberative and legislative : the duties of a part of it only are judicial. It is nevertheless a Court. There are many other Courts which, though not courts of justice, are nevertheless Courts according to your law. There are, for instance, courts of investigation, like the coroner's court. In my judgment, therefore, the existence of the immunity claimed [that defamatory statements made in proceedings before a "Court" are absolutely privileged] does not depend upon the question whether the subject-matter of consideration is a court of justice, but whether it is a Court in law.

In modern states there are innumerable institutions known as or commonly called Courts. There are certain general classifications that are commonly used. There is the fundamental distinction between civil Courts and criminal Courts. There is a second distinction between Courts of general jurisdiction and Courts of special jurisdiction. A third distinction is that between superior Courts and inferior Courts. And fourthly there is the basic distinction between trial Courts, those of first instance, and appeal Courts. There are numerous other differences varying from country to country and between one legal system and another. The important fact is, however, that Courts are an integral part of the constitutional structure of all modern States; and thus the buildings in which they are housed are themselves significant.

On Friday 16 April 1993 the new High Court building in Wellington was officially opened by the Minister of Justice and on Monday 19 April a first formal sitting took place in the new Number One Courtroom. For the Judges and members of the profession in Wellington this was a significant occasion. In this issue of *The New Zealand Law Journal* the relevant speeches are published to mark this occasion.

P J Downey

Case and Comment

Liability of a retired partner — again.

Pont and Pont v Wilkins and Martin and Martin (High Court, Wellington; CP 584/92; 6 October 1992, Master Williams QC) comes hot on the heels of Master Williams's judgment in *Hammond v Hamlin* [1992] BCL 754. Upon the present occasion he had to deal with a summary judgment application brought by a Mr and Mrs Pont against Messrs Wilkins (W) and Martin (M), the first and second defendants, seeking in each case judgment for $576,328.76, together with interest and costs. The application was based on breach of fiduciary duty on the part of W and M and in respect of money had and received.

The background facts and defences

It was common ground that M and W were formerly in partnership as chartered accountants and that the matters with which the claims were chiefly concerned mainly took place after W had retired from the firm. W claimed to have a defence in that he was no longer M's partner at the material time and that the sum of money referred to later was paid to the accountancy practice after his retirement. Both M and W claimed that summary judgment was, on the facts of this matter, inappropriate. M also claimed that his former firm had complied with the obligations imposed upon it by the Ponts when their money was received by it.

The Ponts were clients of the firm for about ten years up to the events with which the present claim was concerned. M and W had become partners in 1979 in a two-man firm. W had already had a lengthy professional career as a chartered accountant, including some ten years or so as a New Zealand Law Society Senior Auditor.

It was common ground that W retired as a partner on 31 March 1990 and that no formal notice was ever given of this crucial event and that no notice was ever given in the *New Zealand Gazette* of his retirement. Evidently W remained on in the firm — as an employee of M — until 7 May 1991, when, being of advanced years, he retired completely.

It appeared from the papers that M retired from the firm on 28 February 1992 but that "he was certainly the partner in the firm at all times material to this matter." Ms Carol Martin, the third defendant, was the daughter of M and an employee of the firm. (No application for summary judgment was brought against her; and she did not appear and was not represented.) M said that she was only a part-time employee, that her employment was terminated in December 1990, that she thereafter rented an office in the accountancy firm's offices and would sometimes assist office staff. It was not clear how long she remained in that capacity, but she certainly appeared to have used the office and to have operated out of it at all material times. It was also not clear who actually did the Pont's business in the firm. W said he did not act for them, stating that he met them once in the early 1980s. Mr Pont, on the other hand, said he and his wife had lunch with M and W on 31 May 1990 and no mention was then made of W's retirement some two months prior to this. Mr Pont also said he saw W still at the premises on occasions when he subsequently visited and that he was unaware that Ms M had ceased her employment with the firm in December 1990. He added that, as late as December 1991, she was still holding herself out by her conduct as an agent or employee of the firm.

Notwithstanding the above, W said he believed that fact of his retirement on 31 March 1990 was common knowledge, that the Ponts, as long-standing clients, would have been aware of the position, and that they would have been told of his retirement by M himself just as he had told other clients of it. M said it was common knowledge among the firm's clients that his daughter had ceased to be employed by the firm in about December 1990.

The crucial facts giving rise to the Ponts' application

In October 1991 the Ponts sold some motels which they owned and Mr Pont said that they then sought advice from the firm as to investing the proceeds of sale. He put in evidence a letter, written to him and his wife on Messrs M & W's letterhead and dated 17 October 1991, in which Ms M clearly gave them advice and recommended what should be done with the funds. The Ponts decided to accept the proffered advice, viz, to invest the funds with Nathan Finance Ltd through Messrs M & W. On 5 November 1991 a letter was sent to the Ponts signed by another employee of the firm, a Ms Barlow, dealing with the investment. That letter, too, was on Messrs M & W's letterhead. Despite W's retirement 20 months previously, the letterhead still had W's name and qualifications printed on it. Further, W's name remained in the firm's name, not only on the letterhead but also in the signature. (The second letter confirmed details of the investment and stated that the deposit was expected to be made on 2 December 1991. It also detailed the expected interest payments). When the funds became available — some $600,000 — Messrs M & W sent the Ponts a receipt for them on their official trust account form. It was sent off with an accompanying letter about the funds — again on Messrs M & W's letterhead bearing W's name and qualifications. It was signed by Ms Martin. Inter alia, it stated "please find enclosed our trust account receipt for the $600,000 which has since been deposited as per your request."

The nub of the Ponts' complaint

Mr Pont said that, on 31 December 1991 and 31 March 1992, he and his wife received interest payments in the sums that had been indicated in the letter of 5 November 1991. At that juncture, the Ponts thought that there was nothing untoward about the matter, but Mr Pont went on to say that investigations in 1992 suggested that the payments made on account of interest might in fact have been deductions from the principal sum. In May 1992, Mr Pont's independent inquiries of Nathans Finance Ltd elicited the unpalatable fact that that company had at no time had money invested on the Pont's behalf. Mr Pont said he confronted Ms Martin and Ms Barlow with this fact whereupon Ms Martin admitted to him in Ms

Barlow's presence that she had misappropriated the funds and had used almost all of them to pay off her debts and said that she could not repay the funds. As a consequence, formal demands for payment of the balance of the investment (ie the $600,000 less the two interest payments) were made. They were not honoured. Hence the present proceedings.

The observations and judgment of Master Williams QC

As to W's claimed defence that he was not liable because he had not been a partner for some 20 months or more when the funds were deposited and later presumably misappropriated, it was held that the provisions of s 39 of the Partnership Act 1908 were applicable. The section, so far as it is here material, reads thus:

> **Rights of persons dealing with the firm against apparent members** — (1) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.
>
> (2) An advertisement in the *Gazette* shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.
>
> (3) The estate of a partner . . . who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the . . . retirement . . .

Master Williams QC went on to say:

> Counsel for Mr Wilkins submitted that the evidence in this case was not such as would enable the Court to draw any conclusions without viva voce evidence on that topic and accordingly the application for summary judgment ought to be dismissed. However, in this Court's view, this submission is unsustainable. It is clear that no formal notification of Mr Wilkins' retirement was ever sent to the clients of the firm and in particular the Court accepts Mr Pont's assertion that they were never given any formal notice. Mr Wilkins continued to work for the firm for something over a year following his retirement and during that period he must have been aware that the firm's letterhead, still containing his name and qualifications, was being used by the firm, certainly by a trusted employee such as Ms Barlow and presumably by Ms Martin. Yet there is nothing in his evidence to suggest that he took any step to have the old stocks of letterhead destroyed or to restrict their use or to have them overprinted deleting his name. Nor, for that matter, did he take any step to have his name taken out of the partnership name. As an experienced chartered accountant, particularly one with his background, he must have recognised the problems which he might encounter having regard to the provisions of the Partnership Act 1908 s 39 as a result. In this Court's view he continued to permit himself to be treated as an apparent member of the old firm notwithstanding his retirement. Persons in the position of Mr Wilkins have an obligation to ensure that formal notice of their retirement is given or that the indicia of apparent membership change if they wish to avoid the effect of s 39. The continued use of their names on notepaper is one of the most commonplace indications of apparent membership.
>
> In addition, it appears from the evidence that Mr and Mrs Pont were aware that Mr Wilkins was a partner in the firm prior to his retirement on 31 March 1990 as a result of their dealings with the firm over the previous decade or so. In this Court's view, therefore, Mr and Mrs Pont were entitled to treat Mr Wilkins as an apparent member of the old firm until they received any formal notice of the change and they received no such notice during the period with which this case is concerned. The case therefore comes within the ambit of such authorities as *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397, 403-44 and *Elders Pastoral Ltd v Rutherfurd* (1990) 3 NZBLC 101,899, 101,901. In the latter case Somers J, speaking of s 39(1), says:
>
> > The use of the word 'still' indicates that the creditor must have known that the partner who has retired was a member of the old firm. Liability then continues because of want of notice and apparent continuing membership.
>
> and a little later:
>
> > We should think that a retired partner who gives no notice may be an apparent partner if his name continues to be used. That is something he can prevent or counter by notice of retirement.
>
> . . . Therefore should it have been necessary to do so, this Court would have accepted Mr Pont's evidence on the question and declined to accept the rather tentative evidence as to notice given by Mr Wilkins. The Court accordingly declines to accept Mr Wilkins's claimed defence.
>
> Mr Martin, too, claims to be entitled to the defence that the evidence on the matter is such that the case ought not to be one for summary judgment but there is little which he can add to the evidence given by Mr Wilkins on that topic and the Court reaches the same conclusion.

M also claimed by way of defence that he believed that, if funds had gone missing, they had gone missing from Nathans Finance Ltd and not from his firm's trust account. That, in Master Williams' view, was a matter where M was better informed than were the Ponts or was able to be better informed than them. M accepted that the funds were paid into the firm's trust account to be dealt with in accordance with the Pont's instructions and the Court accepted Mr Pont's assertion notwithstanding that it was hearsay, that the funds were never paid to Nathans Finance Ltd. Even if they had been so paid, Master Williams considered that it would follow that the only persons who could have withdrawn them would be the Ponts or their agents, Messrs M & W. The Ponts clearly did not withdraw any funds, but some funds must have been withdrawn from any investment to make the interest payments received in December 1991

and March 1992. Master Williams continued thus:

> This, therefore, is one of those cases where notwithstanding that the onus of proof is on the plaintiff throughout summary applications, an evidentiary onus shifts to Mr Martin because the facts of the defence to which he claims to be entitled are or should be available to him (*Farmers Trading Ltd v Holgate* (1986) 1 PRNZ 26). If, therefore, he does not put the necessary evidence before the Court on which the claimed defence can be more securely based, the Court can do little but accept the plaintiff's evidence and accordingly holds that it is satisfied to the standard required by R 136 and the cases decided under that rule on that aspect of the case as well.

The Court then returned to the terms of the statement of claim, observing that it was not in doubt that the firm of Messrs M & W was under a fiduciary duty to the Ponts to carry out their investment instructions. The firm had clearly not dealt with the funds in the way required. As a result of the breach of fiduciary duty the Ponts had suffered the loss in respect of which they now sued Messrs W & M. As to the claim for money had and received, the money was certainly received, demand was made apart from the December 1991 and March 1992 payments, and no money was repaid. Accordingly, on both causes of action, it was held that the Ponts had reached the required degree of satisfaction under Rule 136 of the High Court Rules.

It was formally ordered that the Ponts were entitled to (a) summary judgment against each of M and W for $576,328.76 plus interest thereon at 11% from August 1992, the date of commencement of the proceedings to the date of delivery of judgment and (b) costs of $2,000 plus disbursements as fixed by the Registrar, this to include the Ponts' counsel's return air fares.

It may be added here that W had issued a claim against M seeking summary judgment by way of indemnity. That had been adjourned to 10 November 1992 and so required no more than noting at the present stage.

Comment

In the light of this decision it can only be said that the two decisions concerning s 39 of the Partnership Act 1908 specifically referred to by Master Williams and, for that matter *Hammond v Hamlin,* supra, indicate that it is only too apparent that there is still a woefully imperfect understanding of the full impact of s 39 of the 1908 Act in some professional and some commercial quarters. Or could it possibly have been crroneously supposed that the provisions of s 39 were strictly confined to trade debts and so could not apply in the case of a breach of fiduciary duty or in the case of a claim for money had and received?

Whatever may be the case, this decision provides another sharp lesson to retiring partners who depart from their firms without ensuring that they have done everything necessary to avoid falling foul of the provisions of s 39.

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Refusal by bank to honour mandate

Renshaw v Post Office Bank Ltd (1992) 3 NZBLC 102, 846

A bank's duty to honour the mandate of a customer has always been regarded as an important incident of its contractual relationship with the customer. However such duty is not an absolute one, and the bank is entitled to dishonour a payment-order for example – if the customer has insufficient funds in the account or if the account is attached by a Court order. The mere suspicion of any impropriety by the customer which may result in the funds in the account being called to settle a debt to a third party, should not adversely impact on the bank's duty to pay. It is in regard to this issue that the recent High Court decision in *Renshaw v Post Bank Ltd* (1992) 4 NZBLC 102,846 becomes relevant.

In the above case, Renshaw was a solicitor entrusted with the investment of clients' money through his firm's trust account. He also held a private account with Post Bank into which he deposited $30,000 of such funds. Later, he was convicted of misappropriating clients' funds on a massive scale and the Law Society was appointed to take control of the administration of the firm's trust account. Renshaw tried to withdraw $10,000 from his account and, upon refusal by Post Bank after repeated attempts, filed action for wrongful dishonour. He claimed that the bank was bound under its contract with him to honour his mandate, while the bank argued that if it had honoured it it would have been liable to the Law Society as a constructive trustee.

Renshaw is unique at least in two important respects: Firstly, although in the recent past there have been several decisions which have examined the scope of a bank's liability as a constructive trustee for knowing receipt and knowing assistance, there are no reported cases where a bank has refused to honour an otherwise valid customer's order for fear of such liability; and secondly, cases dealing with constructive trustee liability for knowing assistance – which Post Bank feared the Law Society would have alleged against it if it had paid the Renshaw cheque – have mainly been concerned with a bank's liability to the customer, but not to a third party, for assisting an authorised person to misappropriate funds from the customer's account.

The early decisions on the issue of a bank's duty to honour a customer's order for payment depict a very strict obligation to pay if the order is within the mandate given, without much regard for the consequences of such payment upon the rights of third parties. Thus in *Tassell v Cooper* (1850) 9 CB 509, where the manager of a bank had dishonoured cheques presented by a customer having been persuaded by a person that the money in the account belonged to him as the principal and that he would indemnify the bank against any loss from such action, the Court awarded damages to the customer for wrongful dishonour saying, ". . . the transaction was regular and lawful so far as the plaintiff and the bankers were concerned; it was a simple transaction of loan". In *Fontaine-Besson v Parr's Banking Co and Alliance Bank (Ltd)* (1895) 12 TLR 121, a husband had obtained an injunction against the bank restraining the bank from paying a draft drawn on the account, alleging that the wife had stolen such money. The English Court of Appeal lifted the injunction, saying that it would cause irreparable injury to the bank

and also would amount to interfering between the bank and the customer without the customer being before the Court. The Court went on to say that the appropriate order would be to restrain the wife from drawing drafts, and not to restrain the bank from honouring drafts already drawn.

Holden (J Milnes Holden: *The Law and Practice of Banking* Vol 1, 4th ed, 1986) argues that a bank's primary duty is to its customers and that third parties cannot properly intervene without legal process, and says:

> The legal process which is available to a third party is to obtain an injunction from the Court restraining the customer from withdrawing funds from the account, pending the determination of the ownership of the funds by the Court. If such an injunction is granted and the bank is notified, the bank should dishonour cheques subsequently presented with the answer "injunction granted". If the bank has noted that an application for an injunction is being made, but the injunction has not yet been granted, it would seem that the bank's duty to honour cheques still exists. However, in exceptional circumstances, the bank may be justified in dishonouring cheques with the answer "notice of application for injunction".

The above legal position advocating a strict obligation to pay except in circumstances where a third party has either obtained injunctive relief against the customer or is about to do so, has changed dramatically in the recent past due to the preponderance of decisions imposing constructive trustee liability on banks to protect third party interests. Particularly in New Zealand this trend has even extended to the granting of equitable relief based on "good conscience" the granting of equitable relief based on "good conscience" and "fairness" (see Cooke P in *Elders Pastoral v BNZ* [1989] 2 NZLR 180 and Cooke P and Gault J in *Liggett v Kensington* [1933] 1 NZLR 257), a remedy that has come to be known as "a remedial constructive trust". Also important to constructive trustee liability in the recent past has been the issue of the degree of knowledge required before its imposition – the categories of knowledge under the so-called "Baden Rules" (see *Baden, Delvaux and Lecuit v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1983] BCLC 325). In the New Zealand context, at least one Court of Appeal decision (*Westpac Banking Corporation v Savin* [1985] 2 NZLR 41, Richardson J) has favoured all five categories of knowledge in both knowing assistance and knowing receipt. The strength of these authorities has alerted the banks to the need for prudence in honouring their customers' orders of payment, and the likelihood of liability for such failure.

However two recent English decisions (*Lipkin Gorman v Karpnale Ltd and Anor* [1989] 1 WLR 1340 (CA) and *Barclays Bank Plc v Quincecare Ltd and Unichem Ltd* [1988] 1 FTLR 507 (QB)) have rejected the need for equitable intervention in the banker-customer relationship preferring to rely on the implied terms in their contract to define the scope of the obligation to pay. In *Barclays Bank v Quincecare,* Stein J, having recognised the circumstances under the first three categories of *Baden* (actual knowledge of any dishonesty, shutting one's eyes to the obvious fact of dishonesty, or failing recklessly to make inquiries which a reasonable person would feel compelled to make) as giving the right to refuse payment, said:

> The critical question is what lesser state of knowledge on the part of the bank will oblige the bank to make enquiries as to the legitimacy of the order?

In answering this question, he identified two policy considerations that need to be balanced in order to formulate the limitations on the duty to pay: the need not to impose too burdensome an obligation on bankers, and the need to exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. The compromise, he thought, was

> . . . simply to say that a banker must refrain from executing an order, if and for as long as the banker is "put on enquiry" in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate funds . . .

In the present case it could be argued that there is very little doubt that Post Bank was "put on enquiry" and had not differed from the standard of a prudent banker, although it did not have proof that the money in the account was misappropriated clients' funds. At the time the cheque was presented for payment Renshaw had been convicted of theft of clients' funds, the Law Society put in charge of the administration of the clients' trust account, and several applications filed before the Court by parties keen to get their hands on his assets. The bank also gave him the opportunity to come forward with evidence to dispel its doubts as to the origins of the funds in the account, but Renshaw was not only unable to provide such information – the answers given led to further suspicion that he was not able to account for such money.

However the danger inherent for banks for over-vigilance of their customers' affairs should also be remembered. As a bill of exchange is payable on demand, a bank has a duty to pay without delay if presented for payment by a customer. Even in circumstances when a bank is "put on enquiry", as was noted by the Court of Appeal in *Lipkin Gorman,* any temptation to make inquiries from an outside source should be resisted, because such action would breach the bank's duty of secrecy to its customer. All this would mean that banks are in a no-win situation once again; their actions would be judged in retrospect to see when the decision to refuse payment was made, whether they had acted as "prudent bankers". Decided cases show that this standard has not been very helpful for banks collecting cheques on account of their customers, when faced with conversion actions by true owners of such cheques. It can only be hoped that in contestable circumstances banks will be exonerated for their reasonable actions.

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Lord Goff's visit

On 24 February 1993 it was intended to hold a formal sitting of the Court of Appeal in honour of the visit to New Zealand of Lord Goff of Chieveley, Lord of Appeal in Ordinary and thus a member of the Judicial Committee of the Privy Council as well as of the House of Lords. Unfortunately the hearing did not proceed because of the temporary indisposition of the President of the Court of Appeal. It was intended that welcomes to Lord Goff would be extended by the President, the Solicitor-General, the President of the Wellington District Law Society, and the President of the New Zealand Bar Association. As a matter of record, and for the information of the profession, the remarks that were intended to be made on that occasion are published herewith.

Proposed remarks of Sir Robin Cooke at Sitting of Court of Appeal in honour of Lord Goff of Chieveley, 24 February 1993.

In recent years this Court has been building up a tradition of having distinguished overseas Judges sitting with us. The first was that great Australian figure, Sir Ninian Stephen; the most recent Judge Stewart Hancock of the New York Court of Appeals, noted for his honourable dissenting judgment in the America's Cup case. From England I can mention the famous Nuremberg trials advocate, Lord Shawcross, who to qualify him to sit on the bench had to be described as a former Recorder of Kingston-upon-Thames; and the charming Law Lord and Glamorgan seam bowler, Lord Griffiths. Today it is Lord Goff of Chievely.

I first knew of Robert Goff in the early nineteen-fifties when he was a young law don at Oxford and I was a young law don at Cambridge. It is a delight to my brothers and myself to welcome him to these shores forty years on, though with reference to that phrase he might wish it noted that his school was Eton rather than Harrow.

In those distant days our paths did not in fact cross, but they have crossed since at quite numerous points. I have watched his career with admiration. Perhaps the two most outstanding highlights have been his co-authorship of one of the handful of major new textbooks published in the second half of the century, *Goff and Jones on Restitution*, a pioneering work; and his elevation to the House of Lords. It is an open secret that many lawyers have looked to the latter step as potentially marking a renaissance of the House of Lords and two of his recent judgments are seen as evidence that

Lord Goff with Judith Potter

this is under way – the *Woolwich Building Society* case on recovery of illegally levied taxes; and *Lipkin Gorman* on the recovery by a solicitor's firm of moneys fraudulently gambled away by a partner – a decision which may attract at least a wistful glance at the forthcoming conference of the New Zealand Law Society.

Lord Goff and Lady Goff may have a strenuous time at that conference and because of other commitments which he has generously undertaken here; but, as today's gathering shows, he can be fortified by knowing that at all times they will be among friends and well-wishers, and it can be said of him truly that he arrived to find us in a fog and it was dissipated in no time.

Fittingly we are the largest number of serving Judges who have sat on this bench at any one time. It is also gratifying to see here so many members of the Bar particularly well-known to us from their appearances in this Court. I would like to call on you all to speak (in turn, of course) but Lord Goff wishes to be in the South Island while there is still daylight. So it is proposed to invite to speak for you the Solicitor-General, the President of the New Zealand Bar Association, and a Vice-President of the Wellington District Law Society, on behalf of the New Zealand Society.

Address by John McGrath, QC, Solicitor-General

Your Honours, Lord Goff:

It is a great privilege to welcome your Lordship at this special sitting of the Court of Appeal. To the New Zealand profession, Lord Goff is a member of our highest appellate Court. He has sat as a member of the Judicial Committees on many New Zealand appeals, often delivering the opinion of the Board. Your Lordship sits today with six New Zealand resident members of the Privy Council three of whom have sat with you at various times in Downing Street.

Your Lordship's career in the law has throughout combined the academic as well as the practising branches. After graduating from New College, Oxford you spent four years as a fellow and tutor of Lincoln College, Oxford. You maintained that academic interest throughout your subsequent career at the bar. The first issue of your book on the Law of Restitution was published while you were at the junior Bar and the award of your Doctorate of Common Law from Oxford University came while you were a Silk. You have since held many visiting chairs and lectureships at Universities throughout the world. This dimension of your life in the law has continued since 1986 when you became a member of the House of Lords and came regularly to sit in the Privy Council.

One unheralded aspect of Lord Goff's contributions has had special relevance for New Zealand. In 1987 Your Lordship took an initiative to develop links between young lawyers in England and other countries in the common law world. The Pegasus Trust was entirely your own idea although the Inner Temple and other legal institutions joined with you in launching it. It enables gifted young lawyers to travel and learn about the practical workings of the common law system in other countries. As first chairman of the trust Lord Goff initiated the New Zealand link and invited Sir Robin Cooke to launch and foster the trust's New Zealand operations. The result has been that three or four young lawyers each year have come to New Zealand to work in law firms or at the private Bar. In Lord Goff's words

> They will become less provincial in outlook and obtain insights from the manner in which other countries overcome problems of administration of justice, problems which in varying forms face us all.

Putting aside the difficult constitutional issue of what form New Zealand's highest Court should take, I can confidently say that for any New Zealand barrister an appearance before the Privy Council is a professional highlight. In part it is being in the presence of one of the great legal institution of the Commonwealth where the common law has for centuries been moulded. In part it is the adrenalin flow in anticipation of the challenge of the dialogue of appellate argument, knowing the Board members' reasoning and analysis will dissect counsel's argument, in his or her presence, despatching a case irretrievably in one direction or the other. What many who have never had the opportunity of appearing before your Lordship will not know however is that your considerate and unfailingly courteous approach will make the occasion personally a very pleasurable if highly demanding one.

Your Lordship is primarily in New Zealand as a guest of the 1993 New Zealand Law Society Conference. In anticipating your contributions I note that you have recently spoken out on important legal issues of the day from your position in the House of Lords. A particularly topical occasion arose in 1989 when you addressed the House on the Government's proposals for the reform of the legal profession. The theme of your Lordship's approach then was that you were not an enemy of reform but had concerns over the adequacy of the process leading to it. You sought an indication from the executive of willingness to consult, to explore practical effects of proposals and fairly to weigh the merits of present as well as proposed systems in the reform debate. Subject to such process you were confident valuable reforms could be achieved.

In speaking in this way you have aligned yourself with many who want change to come only after intelligent debate. Law Conferences are all about such debate on the adequacy and appropriateness of the law and the framework within which it is presently administered. It is with considerable excitement that in this regard we look forward to your Lordship's participation and several scheduled contributions during the Conference.

It is a great honour for the legal profession to welcome Lord Goff to New Zealand. I hope that your Lordship and Lady Goff will enjoy your stay and that you will be able to look back with pleasure on the memories of your time here.

Address by James Farmer, QC, on behalf of New Zealand Bar Association

My Lord, on the last occasion on which my learned friend Mr McGrath and I appeared before you *(Minister of Energy v Petrocorp Exploration Ltd* [1991] 1 NZLR 641) he was successful in persuading you that a majority of this Court was wrong. It is a matter of relief to me – and no doubt to the majority of this Court – that he and I are today in agreement in the objective which we seek to achieve – namely, your welcome to this country.

Your Lordship's legal knowledge and skills have been long known to lawyers in this country through the pioneering work on Restitution which you first wrote, together with Professor Gareth Jones, over 25 years ago. It is probably true to say that that work was more influential than any other in leading the Bar back to an examination of the principles of Equity, to some extent hitherto overlooked, in dealing with the problems created by complex commercial transactions in modern times.

It has to be conceded that what is now accepted in that work as self-

evident, initially was regarded as heresy, even by some Judges of this country. Thus, in rejecting the adoption of principles of unjust enrichment exposed in the then first edition of Your Lordship's and Professor Jones' work, the late Mr Justice Mahon in 1975 in a case reported as *Carly v Farrelly* ([1975] 1 NZLR 356, 367) said:

> I must say that on the facts of this case I think I am being asked to apply a supposed rule of equity which is not only vague in its outline but which must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result. It cannot be sufficient to say that wide and varying notions of fairness and conscience shall be the legal determinant. No stable system of jurisprudence could permit a litigant's claim to justice to be consigned to the formless void of individual moral opinion.

No one who has read your judgments, not only in Equity, but also in the Conflict of Laws and in other important areas affecting commercial life would believe that you have ever advocated a system of justice based on the formless void of individual moral opinion. Nevertheless, if I may say so with respect, you have shown that legal principle needs to be tempered with sound judicial discretion if justice is to remain relevant to modern society.

My Lord, on behalf of the New Zealand Bar Association and of all barristers practising in the Courts, I extend to you a warm welcome to New Zealand and wish you an enjoyable stay.

Address by P J H Jenkin QC, President of the Wellington District Law Society

It is a great pleasure to appear again before your Lordship and an even greater pleasure that it is in this Court.

On behalf of both the New Zealand Law Society and the Wellington District Law Society, I welcome you to Wellington. We are delighted that you will be our guest during the Conference next week.

In New Zealand, as I am sure you are aware, a barrister may choose to practise either at the separate Bar, or as a barrister and solicitor. Mr Farmer has welcomed you on behalf of the separate Bar, but you will be pleased to know that there is also a very strong representation here this morning of those who practise in our Courts from the "fused" Bar.

The profession as a whole is honoured to have with us a Judge who has had such a singular influence on the development of the law both in Britain and New Zealand.

I trust that your Lordship will have a pleasant and stimulating sojourn in this City. □

LAWASIA Conference — Colombo

Details of the programme for the 1993 LAWASIA Conference in Colombo, Sri Lanka from 12 September to 16 September 1993 are now complete. Each day of the Conference there will be seven different contemporaneous working sessions to choose from. This will include, in addition to general legal issues, special series on Environmental Law, UNCITRAL Model Laws (on a variety of different topics), and Legal Education. The general topics will include such issues as Commerce and Finance, Family Law, the Legal Profession, Criminal Justice, Intellectual Property, Women's Rights, Banking Law, Product Liability, Labour Law, Human Rights, Sale of Goods, Taxation, Public Interest Litigation, Dispute Resolution, and Media Law.

There is thus a wide range of legal subjects to be discussed and much to learn of legal developments within the Asian and Pacific region, a region in which New Zealand's future becomes more obviously set. The need to know and understand the legal situation and professional attitudes in other countries within the region becomes clearer all the time.

Mr Anil Divan, the President of LAWASIA, has expressed the view that the Conference will be rewarding and memorable because the legal order in the Asian and Pacific region has to adapt to the region's relentless onward march. In the programme, which is now available, he went on to state:

> I am sure this year's conference in Sri Lanka will once again give a new direction to our lawyers. We must now interact and create new legal structures and forms to match the phenomenal changes sweeping across the region.

The President of the Bar Association of Sri Lanka, Ranjit Abeysuriya PC, has struck a similar note in extending a welcome to the Conference. He writes:

> It is a matter of great joy to us in Sri Lanka that after 14 years, LAWASIA will be back in Colombo for its 13th biennial conference. During this period, rapidly accelerating changes have overtaken our region. LAWASIA '93 addresses the legal implications of these multi-dimensional trends, and facilitates the formulation of suitable responses.

Even this early the organising committee is pleased to be able to report that over 300 delegates have confirmed their attendance, and there are 94 paper writers and 33 keynote speakers who will introduce the various topics.

New Zealand practitioners who might be interested in considering attending can obtain further information from Margaret Stewart, Secretary of the New Zealand Law Society LAWASIA Standing Committee, PO Box 5041, Wellington. □

Obviously the aim of the Act is to institute a new regime for funding and there are extensive provisions in the civil arena for contributions, repayment and charges, with the aim being that the legal aid dollar goes further. The Act primarily speaks of justice, however, and aims to have legal advice spread more widely; not cut back. Many criminal defendants have no means at all, face serious consequences if they are convicted and are least able to help themselves. It is contended that recognition of these particular interests of justice has been taken both at common law and in the New Zealand Bill of Rights Act 1990 ("Bill of Rights").

Early common law

The common law initially did not recognise the right of a person to be defended by a lawyer. Although this rule was gradually relaxed and, over time, counsel became entitled to argue points of law on behalf of a defendant, it was not until the Trial for Felony Act 1836 that a defendant in England charged with a felony became entitled to legal assistance for all aspects of this trial. This did not extend to free counsel if legal assistance was beyond his reach. Consequently, a defendant who was too poor to instruct counsel was disadvantaged. Sir James Stephen said tellingly in *A History of the Criminal Law of England* (1833, Vol 1 p 442) that:

> When a prisoner is undefended his position is often pitiable, even if he has a good case.

Fortunately, the common law has evolved since the 19th century.

New Zealand case law

New Zealand Courts have long supported the principle of an accused's right to a fair trial and that, as Cooke P said in *Crown v Tamihere* (1991) 7 CRNZ 376, 377:

> If an accused person is unable to meet the costs, as is very often the case, the State does so under the New Zealand system.

Admittedly there are limits. But the powerful decision of McGechan J in *Wahrlich v Bate* [1990] 3 NZLR 97 indicates that justice is not a closed book. Examples were given by His Honour (at p 105) of situations such as a test case being brought to clarify the law for general public benefit or that of a handicapped defendant who is unable properly to handle a courtroom situation himself. The case itself concerned the Offenders Legal Aid Act but for the purposes of this analysis, the Acts are materially identical. The Legal Services Act has only, arguably, a greater emphasis on efficiency as well as justice. Williams J on review in the *Darvell* case (10 June 1992) indicated that the new Act in contrast to its predecessor:

> . . . is redolent of the need to ensure that the operation of the Criminal Legal Aid Scheme is as inexpensive and efficient as is consistent with the spirit of the Act.

It is well to remember that efficiency has a certain overlap with justice in any case. For example, the prompt disposal of cases will often be enhanced by legal representation and so will be more efficient both from the point of view of the criminal system, resources, Judge time etc as well as efficiency in the criminal legal aid system. Mr Justice Fisher in *R v Doctor* [1992] BCL 1408 commented, for example, on the importance and cost-effectiveness of senior counsel. His Honour also stated:

> A logical extension of this is of course that at least in some types of case, the absence of counsel altogether can in the long run prove more expensive to the state quite aside from considerations as to the quality of justice which may result.

It is submitted that the new Act is not so radical a departure from the old, as to take away from the learned Judge's primary conclusion (at pp 101-102 and pp 111-112) that the finite nature of funds for criminal legal aid is not a relevant consideration in the formation of an opinion as to the desirability or otherwise of a grant in the interests of justice.

His Honour was dealing with the case of a refusal of legal aid for an alleged shoplifter of an item of clothing worth less than $100. The respondent Judge had assumed that there was no likelihood of a custodial or quasi-custodial sentence for such an offence and may also have assumed (although there was no evidence to this effect) that she had no previous convictions. In fact, she had four previous convictions for theft. Both assumptions (if made) were wrong. The offence carried a maximum penalty of three months' imprisonment and ss 6-8 of the Criminal Justice Act notwithstanding this could not be ignored even in the realm of praxis. His Honour stated (at p 106) that the existence of previous convictions, if known, could be used in the applicant's favour but otherwise the decision-maker should not assume that the applicant was a first offender. His Honour said:

> I do not see the deliberate extraction, demand for, or supply of information as to previous convictions as appropriate.

Admittedly, this statement was made in the context of a statute where a Judge was to make the decision as to eligibility for legal aid. The Judge might come to know of previous convictions and then later find himself trying the defendant. Under the Legal Services Act the Registrar is the primary workhorse but the Judge has a role also on review and if it is the first offenders among the applicants who are generally denied legal aid, previous convictions may become known in the reverse sense through information simply being on the Court file that the defendant is in receipt of legal aid.

McGechan J noted that legal aid *may* be granted under the Act but he did not see much modern scope for a residual discretion in the event that the interests of justice were satisfied. By the same token, desirability in the interests of justice was not a strict test and appeared to allow the granting of legal aid even if it were not *essential* in the interests of justice. His Honour then went on to state that the forming of an opinion as to the desirability of granting legal aid must be one which is tenable and could reasonably be formed (see eg *Reade v Smith* [1959] NZLR 996). The

Court placed the emphasis on the interests of justice. The other criteria as to gravity of the offence etc were only to be taken into account in reaching that ultimate goal. The sole material change in the new Act is that interests of justice and insufficient means now ride in tandem. The focus under the Legal Services Act is on both and both must now be satisfied.

One of the factors to take into account is that of gravity and McGechan J stated that this was not to be a self-sufficient criterion but that (at p 104) "the greater the danger to the applicant, the greater the need for protection". His Honour saw gravity of the offence in the wider sense as including repercussions to the offender and noted that in any event the effect of a conviction on an offender was another relevant consideration and could be taken into account under the catch-all provision of "any other circumstances". Matters such as notional sentencing levels, prevailing sentencing levels, the (shifting) opinion of society, the particular circumstances of the offending, the occupation of the offender, whether he or she was working, and whether the offender had children were all also seen as relevant.

On this subject, Holland J in *Prasad v District Court and another* [1992] BCL 1950 held that it would be very rare (as where it may be shown clearly that there is no defence) for it to be in the interests of justice that a person not be granted legal aid particularly where there is a liability to imprisonment.

McGechan J in *Wahrlich v Bate* saw the ultimate funding of criminal legal aid as the legislature's problem and if the legislature had wanted otherwise, it would have said so. The Act was construed as benevolent legislation – not designed with the express or implied purpose to "control" or "regulate" legal aid spending. The question was left open whether it was proper at the individual Court level to elevate gravity as an indirect means of procuring monetary savings (p 112) but His Honour stated generally that the question of funding and the limitations to be placed on the grant of legal aid were questions to be decided at the political level.

Section 10 of the Criminal Justice Act 1985

A defendant may not generally receive a full-time custodial sentence unless he or she has been legally represented (including duty solicitor representation: *Brown v Police* [1992] BCL 2019) at the stage of the proceedings at which he or she was at risk of conviction. This does not apply, materially, where he or she has been informed of his rights relating to legal representation and legal aid and he or she makes a fully informed (spot the Catch 22) decision not to have counsel or is unsuccessful in obtaining legal aid. This section might seem to sanction defendants being unrepresented when they face serious charges. Tipping J felt constrained by the section in *Parkhill v MOT* (Christchurch, AP 135/91, 12 June 1991) not to disturb an unrepresented defendant's sentence. His Honour noted that the defendant's lawyer's out of Court advice did not qualify as representation, especially in light of the Bill of Rights. The High Court did not tackle the thornier question of whether s 10 should be read down to a practically non-existent level by requiring that any decision as to legal aid should be a valid one consistent with the Bill of Rights. It is questionable in any event whether a Court on appeal should exercise such a review function.

International Agreements

The International Covenant on Civil and Political Rights, which was signed by New Zealand, contains the following provision:

> Article 14(3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it . . .

The parallel provision in the European Convention on Human Rights states:

> Article 6(3). Everyone charged with criminal offences has the following minimum rights: . . .
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require.

Whilst such international agreements do not have the binding status of domestic law they point the way to what the content of such law should contain. Their principles were, it is submitted, already evident in the common law and these have now found expression in the Bill of Rights.

Bill of Rights

The Bill of Rights is much in the news and is quoted daily in the Courts. Most are familiar with the principle of a defendant's right to legal representation upon arrest (including de facto arrest) or detention under ss 23 and 24 of the Act. In case this is seen as the same right as everyone has to wear a Gucci watch, it is provided in s 24(f) that everyone who is charged with an offence shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance.

Other rights recognised in ss 24, 25 and 27 of the Bill of Rights would be fairly academic, it is submitted, if a lawyer were not appointed. These rights include the right to adequate time and facilities to prepare a defence, the right to a fair hearing and one in accordance with natural justice, the right to present a defence and the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution. Simply put, the struggle between the

(professional) prosecution and a litigant in person is generally an uneven one.

Duty solicitors arguably do not have the authorisation under s 157 of the Legal Services Act to bridge the gap (unless the Legal Services Board sees fit to impose such duties on them) and many criminal lawyers would argue that it is dangerous and potentially negligent for them to try. Then again there is the pilot scheme for a Public Defender . . .

Interaction of the Legal Services Act and Bill of Rights

The notice of justice in both the Legal Services Act and the Bill of Rights is vague and involves many competing elements and interpretations. The Bill of Rights itself may not directly conflict with another piece of legislation such as the Legal Services Act (especially as the latter Act is more recent) but any meanings of the Legal Services Act which may be discerned to be consistent with the Bill of Rights are to be preferred. This is in accordance with the common law presumption that the legislature does not intend to limit vested rights further than clearly appears from the enactment: *re Metropolitan Film Studios Ltd v Twickenham Film Studios Ltd* [1962] 3 All ER 508, 517 per Ungoed-Thomas J. It is recognised that the practical availability of criminal legal aid appears to be shrinking but it is submitted that this is in spite of and not as a result of the wording of the Legal Services Act, despite the understandable reaction of Holland J in considering the interaction of the two Acts in *Prasad v District Court* that

> Parliament, as is often the case, appears to speak with two voices, one motivated by Treasury and the other by a recognition of human rights.

The Bill of Rights is overall subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The interpretation of "prescribed by law" with respect to the Canadian Charter of Rights and Freedoms ("Charter") has been a wide one: *R v Therens* (1985) 18 DLR (4th) 655, 680. However, the only potentially limiting law in the area of legal aid is the Legal Services Act itself. Both Acts point to the interests of justice and so I hope that I am on safe ground in arguing that no statutory reconciliation is necessary. Legal aid should be granted when it is in the interests of justice to do so and an applicant cannot afford a lawyer. The Legal Services Act contains more detail concerning the means of an applicant but the Bill of Rights (and common law) has set up a detailed framework concerning the content of justice for a defendant in a criminal case.

The American Constitution

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

In *Powell v Alabama* 287 US 45 (1932) the Supreme Court recognised the constitutional right of a poor defendant charged with a capital offence to have the assistance of a lawyer. The Court did not base its decision on the Sixth Amendment but held that the right to counsel in a capital case is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. While that decision was initially limited to capital cases where the defendant was both poor and unable to conduct his own defence through some disability or inadequacy, the spirit of the *Powell* decision would suggest the need for appointment of counsel generally. This was recognised in *Gideon v Wainwright* 372 US 335 where the Supreme Court held that the Fourteenth Amendment incorporated the Sixth Amendment right to counsel. That case involved a prosecution for felony and, although the Court did not expressly restrict its ruling to felony (ie more serious) cases, later cases interpreted the decision in *Gideon* as establishing the right to counsel only for felonies. However, in *Argersinger v Hamlin* 407 US 25,32 the Supreme Court held that the principle enunciated in *Powell* and *Gideon* applies whenever loss of liberty is involved.

It is important to note that the decisions of the Supreme Court do not expressly state that it is the role of government to pay for legal representation, but such would appear to be implied in *Argersinger v Hamlin.*

Canadian law and the Charter

In *R v Littlejohn* (1978) 41 CCC (2d) 161,173, the Ontario Court of Appeal accepted as self-evident the proposition that a person charged with a serious offence is under a grave disadvantage if, for any reason, he is deprived of the assistance of competent legal representation. This was a pre-Charter case. The Bill of Rights is closely modelled on the Charter and it is instructive to set out the relevant provisions of the Charter: Section 10(b) of the Charter is similar to s 23(1)(b) of the Bill of Rights and states:

> 10. Everyone has the right on arrest or detention . . . .
>
> (b) to retain and instruct counsel without delay and to be informed of that right . . .

Sections 7 and 11(d) of the Charter may be found substantially in ss 8, 21, 22, 25, and 27 of the Bill of Rights and read:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice . . .
>
> 11. Any person charged with an offence has the right . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . .

It is instructive that the Charter confers a broad discretion on a Court to fashion any remedy it sees fit to redress a breach of the Charter (the Bill of Rights has no such provision and this provoked His Honour Judge Hobbs in *Noort v MOT* at first instance to describe the legislation as "crippled" until he was modified progressively as the case went first to the High Court and then the Court of Appeal). Also, the

Charter does not constitutionalise the right to free legal assistance. It contains no equivalent of s 24(f) of the Bill of Rights.

Yet it had already been recognised by the Ontario High Court in *Re Ciglen v R* (1978) 45 CCC (2d) 227, pre Charter, that while there was no law or rule of practice that a defendant must be provided with counsel, where a trial becomes unfair because of the absence of counsel it could be aborted or its results set aside. In that case, the accused had been indicted directly and joined with two co-conspirators who had the benefit of a preliminary hearing. The accused had been refused legal aid. The relevant area director's decision had been reviewed unsuccessfully and the review had not been overturned on appeal to the Ontario Court of Appeal and the Supreme Court of Canada. The accused did, however, successfully apply in part to quash the indictment. The indictment was severed and the trial against the two conspirators continued. The Ontario High Court reasoned that it could not be said that the accused had made a voluntary decision not to be represented by counsel.

In *R v Littlejohn* it was stated to be a fundamental postulate of the particular legal aid "plan" that no person charged with a serious crime should be deprived of the assistance of counsel because he lacked the means to pay for such assistance. By the same token it was recognised by the Ontario Court of Appeal in *R v Rowbotham* (1988) 63 CR (3d) 113,171 that if a person had the means to pay the costs of his or her defence but refused to retain counsel he or she might properly be considered to have chosen to defend himself or herself.

It was recognised by the Court of Appeal in that case that the Charter did not in terms constitutionalise the right of a poor accused to be provided with a free lawyer. In the Court's opinion, the draftpersons of the Charter did not entrench the right of a poor accused to be provided with counsel, because they must have considered that generally speaking the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means. However, it was stated that in cases not falling within the appropriate provincial legal aid plans, the Charter's guarantee to an accused of a fair trial in accordance with the principles of fundamental justice required that funded counsel be provided if the accused wished counsel but could not afford to pay for it and representation was essential to a fair trial. This was recognised also by the Alberta Court of Appeal in *R v Robinson et al* (1989) 73 CR (3d) 81.

The Court in *Rowbotham* considered Craig J's decision in *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985) 48 CR (3d) 166. In that latter case, it was held in effect that there was no constitutional right to funded counsel under s 10(b) of the Charter and that ss 7 and 11(d) of the Charter did not confer a constitutional right to funded counsel per se but in cases where representation was essential to a fair trial an impoverished accused had a constitutional right to funded counsel. Craig J said, at pp 173-174:

> In conclusion as to this issue, under the common law the accused has a right to a fair trial and the trial judge is bound to ensure that an accused person receives a fair trial. Here, the accused faces possible imprisonment. Pursuant to section 7 of the Charter, the accused has an entrenched right not to be deprived of his liberty except in accordance with the principles of fundamental justice. Also, pursuant to section 11(d) he has an entrenched right to a "fair and public hearing". The right to fundamental justice and a fair and public hearing includes the right to a fair trial. There may be rare cases where legal aid is denied to an accused person facing trial, but, where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel, in such a case it seems to follow that there is an entrenched right to funded counsel under the Charter.

McDonald J in *Panacui v Legal Aid Society of Alta* [1988] 1 WWR 60, 54 Alta LR (2d) 342, expressed potentially wider dicta at p 349:

> In my view, the foregoing statement of the purposes and interests which sections 7, 10(b) and 11(d) are meant to protect when the issue is the scope and extent of the right to counsel, lead me irresistibly to the conclusion that a person charged with an offence that is serious and complex, when he cannot afford to retain counsel, is constitutionally entitled to have counsel provided to assist him at the expense of the state: See *R v Stioupu; Re MacKay v Legal Aid Society of Alta* (1983), 8 CRR 216 (Alta QB, Sindart CJQB) and *Deutsch v LSUC Legal Aid Fund* . . . . (I have referred only to serious and complex offences, for the present accused faces charges that he has committed serious offences. It is unnecessary in this case to express any view as to whether a person charged with less serious offences, or a person who for any reason has been arrested or detained wishes to have the lawfulness of his detention or arrest determined in a Court of law, or a person who has been detained for reasons not involving the criminal law or any quasi criminal law has the right to counsel under section 10(b)).

The Ontario Court of Appeal in *Rowbotham* indicated that it was not necessary for the purposes of the appeal that it was dealing with to consider the wider dicta of McDonald J as it was only considering a serious offence and a lengthy trial. Nevertheless, the Court indicated (at p 175):

> Furthermore, the trial judge, in our view, has inherent power, in order to ensure a fair trial, to appoint counsel to defend an indigent accused. In former times, counsel (sometimes eminent counsel) were appointed by the trial Judge to defend an indigent accused charged with a capital offence. Counsel appointed by the trial Judge in those circumstances frequently acted without remuneration. Members of the defence bar also defended many other kinds of criminal charges on a purely voluntary basis. Having regard to the increase in the length and complexity of modern trials and the increase in overhead costs, the

Speech by the Hon Paul East, Attorney-General

Those of us who looked up as we entered this new building noticed an artwork made of ever widening blue circles and feathers. This is not to suggest that in the High Court one goes around in circles until feathers fly. It represents our early natural heritage when birds, feathers and bush were abundant. The moving materials have been selected to communicate the idea (which your Honour has just described) that change appropriately forms part of the justice system as do the traditional concepts of constancy and certainty.

The artwork in the building deserves special mention as it has both an aesthetic and a practical purpose. A particular example is provided by the sand blasted window designs on the entrances to various Courtrooms in the building. These designs were by first year students at the Wellington Polytechnic course of contemporary Maori design and show elements of New Zealand's past and of Wellington, including flax plant patterns made of birds and sacred mountains. They also serve a functional purpose because counsel and members of the public will be able to glance through the designs to check on progress in the Courtroom without disturbing those involved in the Courtroom proceedings.

It is pleasing that this building has been designed throughout after consultation with the Judges and Court staff and that those who are to use the building played a major part in ensuring that the premises are both functional and pleasant to work in.

There has been a long wait for a new High Court in Wellington. In fact, there have been plans to build a Court House on this site since the 1960s when the idea was first promoted by the then Prime Minister, Sir John Marshall.

This is an historic occasion because this new building will be taking the High Court into the 21st century. There is a jury room with excellent jury facilities including a small kitchen, the administration area is improved, public galleries have been provided, there is a parents' rest room, there is a large Law Society library, and there are better conditions for prisoners and for prison officers. I'm told that even the cells are not as depressing as they used to be.

But these magnificent new surroundings are more than just a building – they represent an opportunity to lauch a new era in the place of the judiciary in our society. In times of affluence and when we face no major difficulties no one questions the structure of our society or whether the institutions on which it is based are serving the people well or will take the next generation through to the 21st century and beyond. But times are not that certain any more.

What we can be grateful for is that from our earliest days our judiciary and profession have built

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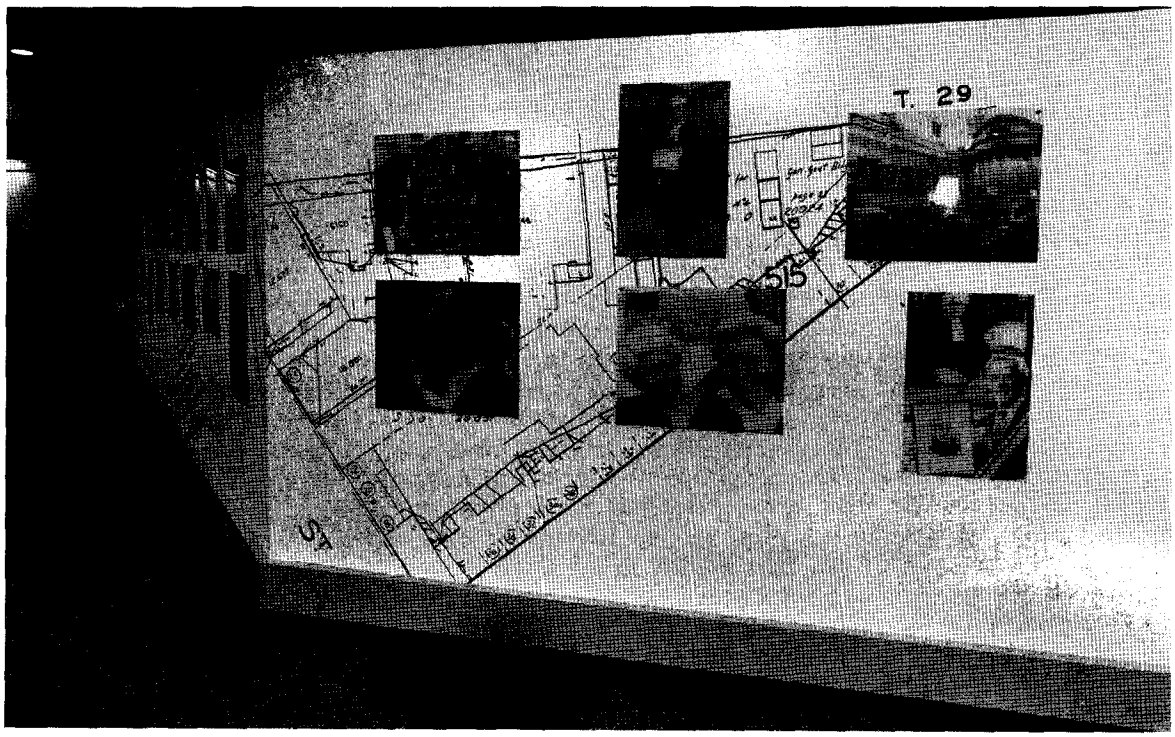


Historical time line in the entrance foyer of the Wellington High Court

up a tradition of achievement and developed a reputation for competence that has earned world wide respect. That that is so has been demonstrated recently when New Zealand was suggested as a possible venue to try two Libyans accused of terrorist activity in relation to the sabotage of the American aircraft over Scotland.

But while we can hold our heads up high and be justifiably proud of a judicial system that is the equal of anywhere in the world for its integrity, its expeditious dispatch of Court business, and the quality of its Judges, we are in no position to be complacent. Our legal system is evolving all the time and has now reached the point where New Zealand has its own jurisprudence, drawing on the common law, the laws of other jurisdictions, and the laws of New Zealand as they have developed over the last 150 years.

As we move to a more indigenous jurisprudence, we need to make sure that the Courts continue to command the respect of society and that the independence of the judiciary is upheld and maintained. In this regard we need to ensure that the judicial system continues to meet the needs of the people of New Zealand, its institutions and the Crown that represents and serves them. The need to be in touch with those who call on the services of the judicial system is paramount.

Right now there is a real danger that the Court system will price itself out of the market, and that litigants, looking for a less expensive solution to disputes, will seek out alternative forums of redress. But it is not just the cost of the services that will determine its strength in today's market place. The Courts need also to arrive at a just solution that the parties recognise as inherently fair, and to do so in a realistic time frame so that any remedy granted will be a real one in the circumstances of the case.

I am pleased to see the High Court Rules are being examined with a view to incorporating procedures for alternative dispute resolution, mediation and more judicial intervention by way of judicial conferences and settlement conferences. The High Court Rules are recognising also that the judicial system itself is an expensive resource and the move to more judicial control of litigation is a reflection of the fact that while the Courts are there to apply and enforce the law, they are an extravagant means for negotiating a settlement.

But if our Courts are to be seen as relevant and an integral and necessary part of our society they need also to be sensitive to public opinion. Particularly this is so in the criminal area where increasing lawlessness and levels of criminal activity are a matter of concern to people in all walks of society. Parliament and the Courts can be faced with a difficult balancing exercise between the need to protect individuals from any excesses of the law while at the same time ensuring that the law is enforced for the safety of all. Parliament's responsibility is to legislate in a way that will provide a basis for the Courts to achieve both of those, bearing in mind the overall interests of justice.

In recent times the law relating to the admissibility of confessions has undergone some radical changes. Plainly the Courts are not there to prop up a conviction where a confession has been illegally or unfairly obtained or admitted in evidence, and this area of the law has been the subject of careful research and consideration by the Law Commission. But equally the Courts need to be sensitive to the needs to enforce the criminal law and to protect society. If the existing

balance is too greatly disturbed, then respect for the Courts from the point of view of the public and law enforcement agencies may be diminished. That is something to be avoided lest the legal system lose the essential underpinning of that general community acceptance and respect it now commands.

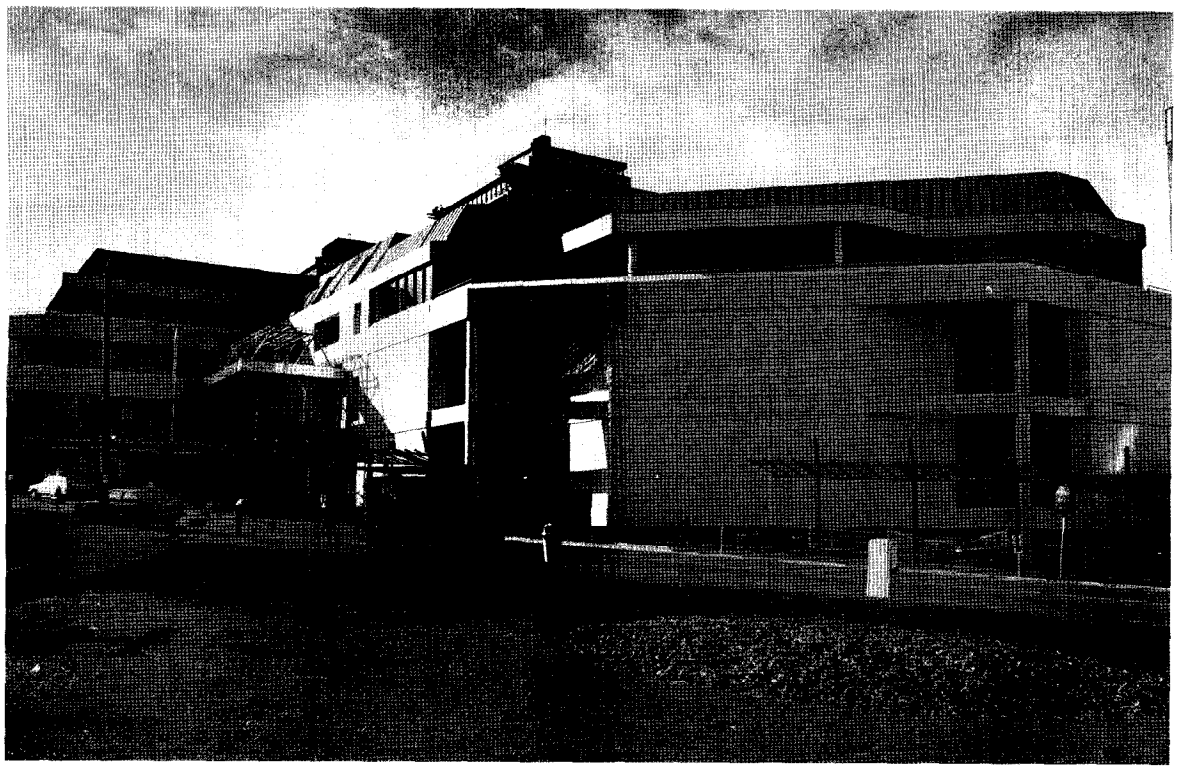
The decision of the Court of Appeal in the *Goodwin (No 2)* case, where evidence of a confession was excluded on the grounds that it was obtained in breach of the right not to be arbitrarily detained, squarely raises these difficult issues about the extent of the rights of the citizen within the process of criminal investigation. Much will change with the development of rights under the Bill of Rights Act. There is a sense in which we are judged by how we treat those suspected of crime, but people are not egg shells that need to be handled with delicacy or kid gloves. They have duties and obligations as well as rights and might reasonably be expected to explain their actions to the police and assist the police to arrive at an understanding of any events that might be the subject of enquiries. That is not to say that admissions may be coerced by improper pressure or that there is no right to avoid self incrimination.

For their part the police must be able to fairly and professionally question those associated with the commission of an offence, whether as a witness or as a perpetrator, while the events are fresh in people's minds and before they start to conceal their own involvement or protect the identity or involvement of others. In many cases, the evidence of the witnesses is the main evidence against an accused that will enable a crime to be prosecuted. if that is unreasonably inhibited the ability of the police to protect innocent citizens must be seriously undermined.

And we need to bear in mind also that while we at present have a police force that is as free from corruption as any in the world, the police also need the support of the Courts. Without it, morale drops, and the temptation to enforce the law by other means (a feature of many overseas jurisdictions – including, sadly, the United Kingdom) in the interests of achieving the job they are employed to do is one that is ever present. There must be a balance, but if it sways too far in favour of the accused we ultimately place at risk the society we are trying to protect.

For these reasons Parliament must now look at clarifying the law in this area of confessions so that both the police and suspects are clear on the procedures to be followed and the respective rights and responsibilities of the parties. In many ways it is preferable to have the flexibility of Court interpretations of the legislation so that the multiplicity of situations can be accommodated without the need for a set of rules that will apply arbitrarily without accommodating the nuances of the individual case. But there is also a need for certainty and for the enforcement of the criminal law to proceed without being unduly hindered. The freedom of our society depends on it.

The opening of this fine Court building is indeed an important occasion. But as we leave today's sitting it is important to bear in mind the need for those increasingly wide circles of justice depicted in the artwork to touch all the citizens of New Zealand in a way that promotes the interests of all who seek to be protected by the law. □



Chris Coad

The new High Court building in Molesworth Street, Wellington

The right to criminal legal aid

By Steven Zindel, a practitioner of Nelson

Legal aid is generally seen as an essential element in any consideration of access to justice. An increase in crime consequently increases the demands on legal aid funds, often, as at present, at the very time the government is seeking to reduce expenditure. This article looks at the consequent tension in this area and argues that legal aid in criminal cases is a right, and it is also in the interest of the justice system to avoid inefficiencies in trials.

The fiscal crisis and justice

The government has had to make cutbacks in its spending at the same time as legal aid has attracted much media attention for having experienced a cost blow-out. The Minister of Justice remarked in a speech in Auckland on 27 September 1991 that spending on criminal legal aid had increased 1000% in a decade. However, only approximately a quarter of legal aid spending is on criminal legal aid and the rise that there has been is perhaps explicable in view of the increase in crime and greater legal requirements. Commercial fraud and serious criminal trials have produced some big bills but the value for money of the taxpayer's dollar given the time and difficulty of these cases has not been properly analysed. Yet, these are the cases that are pointed to in an endeavour to cut back spending in other areas of criminal legal aid.

The Legal Services Act 1991 has produced a narrowing of the gap between the charge-out rates for criminal and civil legal aid work but nevertheless there are apparently wholesale cutbacks in the number of successful applications for criminal legal aid. This is occurring despite a rising number of criminal cases. There is a real risk of injustice in all this. Every day unrepresented defendants are shunted around from duty solicitor to duty solicitor with ultimately no help if they have a defence or complicated points in mitigation. Whatever one's opinion about the importance of legal aid for crime as opposed to other areas of the law, I propose to discuss the legality of funding cutbacks for criminal representation.

Legal Services Act 1991

Under s 7, the Registrar has the discretion to grant legal aid if, in his opinion, "it is desirable in the interests of justice" *and* if the applicant does not have sufficient means to enable him or her to obtain legal assistance. Criteria as to means are similar as for civil legal aid and are set out in detail within the Act. The only other factors that the Registrar must have regard to are set out in subs (2): the gravity of the offence, the grounds of any appeal and finally (and far from illuminatingly) "any other circumstances that in the opinion of the Registrar are relevant". One of these could be, for example, the merit of a defence at first instance. Criteria in the former legislation, the Offenders Legal Aid Act 1954 were materially identical. These were described as uncertain by McGechan J in *Cuneen v Bate* (1989) 5 CRNZ 170, 173. No attempt has been made in the new legislation to provide specific guidance for the exercise of the Registrar's discretion such as an indication, for example, that all persons who have been remanded for a pre-sentence report should ordinarily be granted legal aid if their means are insufficient. A summary of the principles to be applied under s 7 is to be found in the judgment of Fisher J in *R v Tairakena* [1992] BCL 1733.

Only in the Court of Appeal does a Judge have any input at first instance to the decision of whether legal aid should be granted (s 15(1) of the Legal Services Act) but a Judge of the Court concerned does have a power of (effectively internal) review under s 16. There is no further right of appeal but judicial review in the administrative law sense is open.

In addition to the discretion as to whether to grant or refuse legal aid, the Registrar has a discretion as to how much of the proceedings or the expenses should be covered by legal aid and may require a contribution unless, in his opinion, the making of such a contribution would cause the applicant hardship. The Registrar may also change his mind and once this is communicated to the lawyer for the defendant, no further fees may be charged. How this sits with the concept of fixed fees for the job has not been determined.

At the apex of the structure for the administration of legal aid in this country is the Legal Services Board. It issues instructions to the District committees, sub-committees and Registrars and these instructions will normally provide guidance to Judges exercising a review function: *R v Tairakena.*

One of its principal functions under s 95 is to ensure that the operation of the criminal legal scheme is "as inexpensive, expeditious and efficient as is consistent with the spirit" of the Act. The Act speaks throughout of the interests of justice and the Long Title states that it is:

> An Act to make legal assistance and legal services more readily available to persons of insufficient means, and to repeal the Offenders Legal Aid Act 1954 and the Legal Aid Act 1969.

Obviously the aim of the Act is to institute a new regime for funding and there are extensive provisions in the civil arena for contributions, repayment and charges, with the aim being that the legal aid dollar goes further. The Act primarily speaks of justice, however, and aims to have legal advice spread more widely; not cut back. Many criminal defendants have no means at all, face serious consequences if they are convicted and are least able to help themselves. It is contended that recognition of these particular interests of justice has been taken both at common law and in the New Zealand Bill of Rights Act 1990 ("Bill of Rights").

Early common law

The common law initially did not recognise the right of a person to be defended by a lawyer. Although this rule was gradually relaxed and, over time, counsel became entitled to argue points of law on behalf of a defendant, it was not until the Trial for Felony Act 1836 that a defendant in England charged with a felony became entitled to legal assistance for all aspects of this trial. This did not extend to free counsel if legal assistance was beyond his reach. Consequently, a defendant who was too poor to instruct counsel was disadvantaged. Sir James Stephen said tellingly in *A History of the Criminal Law of England* (1833, Vol 1 p 442) that:

> When a prisoner is undefended his position is often pitiable, even if he has a good case.

Fortunately, the common law has evolved since the 19th century.

New Zealand case law

New Zealand Courts have long supported the principle of an accused's right to a fair trial and that, as Cooke P said in *Crown v Tamihere* (1991) 7 CRNZ 376, 377:

> If an accused person is unable to meet the costs, as is very often the case, the State does so under the New Zealand system.

Admittedly there are limits. But the powerful decision of McGechan J in *Wahrlich v Bate* [1990] 3 NZLR 97 indicates that justice is not a closed book. Examples were given by His Honour (at p 105) of situations such as a test case being brought to clarify the law for general public benefit or that of a handicapped defendant who is unable properly to handle a courtroom situation himself. The case itself concerned the Offenders Legal Aid Act but for the purposes of this analysis, the Acts are materially identical. The Legal Services Act has only, arguably, a greater emphasis on efficiency as well as justice. Williams J on review in the *Darvell* case (10 June 1992) indicated that the new Act in contrast to its predecessor:

> . . . is redolent of the need to ensure that the operation of the Criminal Legal Aid Scheme is as inexpensive and efficient as is consistent with the spirit of the Act.

It is well to remember that efficiency has a certain overlap with justice in any case. For example, the prompt disposal of cases will often be enhanced by legal representation and so will be more efficient both from the point of view of the criminal system, resources, Judge time etc as well as efficiency in the criminal legal aid system. Mr Justice Fisher in *R v Doctor* [1992] BCL 1408 commented, for example, on the importance and cost-effectiveness of senior counsel. His Honour also stated:

> A logical extension of this is of course that at least in some types of case, the absence of counsel altogether can in the long run prove more expensive to the state quite aside from considerations as to the quality of justice which may result.

It is submitted that the new Act is not so radical a departure from the old, as to take away from the learned Judge's primary conclusion (at pp 101-102 and pp 111-112) that the finite nature of funds for criminal legal aid is not a relevant consideration in the formation of an opinion as to the desirability or otherwise of a grant in the interests of justice.

His Honour was dealing with the case of a refusal of legal aid for an alleged shoplifter of an item of clothing worth less than $100. The respondent Judge had assumed that there was no likelihood of a custodial or quasi-custodial sentence for such an offence and may also have assumed (although there was no evidence to this effect) that she had no previous convictions. In fact, she had four previous convictions for theft. Both assumptions (if made) were wrong. The offence carried a maximum penalty of three months' imprisonment and ss 6-8 of the Criminal Justice Act notwithstanding this could not be ignored even in the realm of praxis. His Honour stated (at p 106) that the existence of previous convictions, if known, could be used in the applicant's favour but otherwise the decision-maker should not assume that the applicant was a first offender. His Honour said:

> I do not see the deliberate extraction, demand for, or supply of information as to previous convictions as appropriate.

Admittedly, this statement was made in the context of a statute where a Judge was to make the decision as to eligibility for legal aid. The Judge might come to know of previous convictions and then later find himself trying the defendant. Under the Legal Services Act the Registrar is the primary workhorse but the Judge has a role also on review and if it is the first offenders among the applicants who are generally denied legal aid, previous convictions may become known in the reverse sense through information simply being on the Court file that the defendant is in receipt of legal aid.

McGechan J noted that legal aid *may* be granted under the Act but he did not see much modern scope for a residual discretion in the event that the interests of justice were satisfied. By the same token, desirability in the interests of justice was not a strict test and appeared to allow the granting of legal aid even if it were not *essential* in the interests of justice. His Honour then went on to state that the forming of an opinion as to the desirability of granting legal aid must be one which is tenable and could reasonably be formed (see eg *Reade v Smith* [1959] NZLR 996). The

Court placed the emphasis on the interests of justice. The other criteria as to gravity of the offence etc were only to be taken into account in reaching that ultimate goal. The sole material change in the new Act is that interests of justice and insufficient means now ride in tandem. The focus under the Legal Services Act is on both and both must now be satisfied.

One of the factors to take into account is that of gravity and McGechan J stated that this was not to be a self-sufficient criterion but that (at p 104) "the greater the danger to the applicant, the greater the need for protection". His Honour saw gravity of the offence in the wider sense as including repercussions to the offender and noted that in any event the effect of a conviction on an offender was another relevant consideration and could be taken into account under the catch-all provision of "any other circumstances". Matters such as notional sentencing levels, prevailing sentencing levels, the (shifting) opinion of society, the particular circumstances of the offending, the occupation of the offender, whether he or she was working, and whether the offender had children were all also seen as relevant.

On this subject, Holland J in *Prasad v District Court and another* [1992] BCL 1950 held that it would be very rare (as where it may be shown clearly that there is no defence) for it to be in the interests of justice that a person not be granted legal aid particularly where there is a liability to imprisonment.

McGechan J in *Wahrlich v Bate* saw the ultimate funding of criminal legal aid as the legislature's problem and if the legislature had wanted otherwise, it would have said so. The Act was construed as benevolent legislation – not designed with the express or implied purpose to "control" or "regulate" legal aid spending. The question was left open whether it was proper at the individual Court level to elevate gravity as an indirect means of procuring monetary savings (p 112) but His Honour stated generally that the question of funding and the limitations to be placed on the grant of legal aid were questions to be decided at the political level.

Section 10 of the Criminal Justice Act 1985

A defendant may not generally receive a full-time custodial sentence unless he or she has been legally represented (including duty solicitor representation: *Brown v Police* [1992] BCL 2019) at the stage of the proceedings at which he or she was at risk of conviction. This does not apply, materially, where he or she has been informed of his rights relating to legal representation and legal aid and he or she makes a fully informed (spot the Catch 22) decision not to have counsel or is unsuccessful in obtaining legal aid. This section might seem to sanction defendants being unrepresented when they face serious charges. Tipping J felt constrained by the section in *Parkhill v MOT* (Christchurch, AP 135/91, 12 June 1991) not to disturb an unrepresented defendant's sentence. His Honour noted that the defendant's lawyer's out of Court advice did not qualify as representation, especially in light of the Bill of Rights. The High Court did not tackle the thornier question of whether s 10 should be read down to a practically non-existent level by requiring that any decision as to legal aid should be a valid one consistent with the Bill of Rights. It is questionable in any event whether a Court on appeal should exercise such a review function.

International Agreements

The International Covenant on Civil and Political Rights, which was signed by New Zealand, contains the following provision:

> Article 14(3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . .
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it . . .

The parallel provision in the European Convention on Human Rights states:

> Article 6(3). Everyone charged with criminal offences has the following minimum rights: . . .
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require.

Whilst such international agreements do not have the binding status of domestic law they point the way to what the content of such law should contain. Their principles were, it is submitted, already evident in the common law and these have now found expression in the Bill of Rights.

Bill of Rights

The Bill of Rights is much in the news and is quoted daily in the Courts. Most are familiar with the principle of a defendant's right to legal representation upon arrest (including de facto arrest) or detention under ss 23 and 24 of the Act. In case this is seen as the same right as everyone has to wear a Gucci watch, it is provided in s 24(f) that everyone who is charged with an offence shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance.

Other rights recognised in ss 24, 25 and 27 of the Bill of Rights would be fairly academic, it is submitted, if a lawyer were not appointed. These rights include the right to adequate time and facilities to prepare a defence, the right to a fair hearing and one in accordance with natural justice, the right to present a defence and the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution. Simply put, the struggle between the

(professional) prosecution and a litigant in person is generally an uneven one.

Duty solicitors arguably do not have the authorisation under s 157 of the Legal Services Act to bridge the gap (unless the Legal Services Board sees fit to impose such duties on them) and many criminal lawyers would argue that it is dangerous and potentially negligent for them to try. Then again there is the pilot scheme for a Public Defender . . .

Interaction of the Legal Services Act and Bill of Rights

The notice of justice in both the Legal Services Act and the Bill of Rights is vague and involves many competing elements and interpretations. The Bill of Rights itself may not directly conflict with another piece of legislation such as the Legal Services Act (especially as the latter Act is more recent) but any meanings of the Legal Services Act which may be discerned to be consistent with the Bill of Rights are to be preferred. This is in accordance with the common law presumption that the legislature does not intend to limit vested rights further than clearly appears from the enactment: *re Metropolitan Film Studios Ltd v Twickenham Film Studios Ltd* [1962] 3 All ER 508, 517 per Ungoed-Thomas J. It is recognised that the practical availability of criminal legal aid appears to be shrinking but it is submitted that this is in spite of and not as a result of the wording of the Legal Services Act, despite the understandable reaction of Holland J in considering the interaction of the two Acts in *Prasad v District Court* that

> Parliament, as is often the case, appears to speak with two voices, one motivated by Treasury and the other by a recognition of human rights.

The Bill of Rights is overall subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The interpretation of "prescribed by law" with respect to the Canadian Charter of Rights and Freedoms ("Charter") has been a wide one: *R v Therens* (1985) 18 DLR (4th) 655, 680. However, the only potentially limiting law in the area of legal aid is the Legal Services Act itself. Both Acts point to the interests of justice and so I hope that I am on safe ground in arguing that no statutory reconciliation is necessary. Legal aid should be granted when it is in the interests of justice to do so and an applicant cannot afford a lawyer. The Legal Services Act contains more detail concerning the means of an applicant but the Bill of Rights (and common law) has set up a detailed framework concerning the content of justice for a defendant in a criminal case.

The American Constitution

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

In *Powell v Alabama* 287 US 45 (1932) the Supreme Court recognised the constitutional right of a poor defendant charged with a capital offence to have the assistance of a lawyer. The Court did not base its decision on the Sixth Amendment but held that the right to counsel in a capital case is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. While that decision was initially limited to capital cases where the defendant was both poor and unable to conduct his own defence through some disability or inadequacy, the spirit of the *Powell* decision would suggest the need for appointment of counsel generally. This was recognised in *Gideon v Wainwright* 372 US 335 where the Supreme Court held that the Fourteenth Amendment incorporated the Sixth Amendment right to counsel. That case involved a prosecution for felony and, although the Court did not expressly restrict its ruling to felony (ie more serious) cases, later cases interpreted the decision in *Gideon* as establishing the right to counsel only for felonies. However, in *Argersinger v Hamlin* 407 US 25,32 the Supreme Court held that the principle enunciated in *Powell* and *Gideon* applies whenever loss of liberty is involved.

It is important to note that the decisions of the Supreme Court do not expressly state that it is the role of government to pay for legal representation, but such would appear to be implied in *Argersinger v Hamlin.*

Canadian law and the Charter

In *R v Littlejohn* (1978) 41 CCC (2d) 161,173, the Ontario Court of Appeal accepted as self-evident the proposition that a person charged with a serious offence is under a grave disadvantage if, for any reason, he is deprived of the assistance of competent legal representation. This was a pre-Charter case. The Bill of Rights is closely modelled on the Charter and it is instructive to set out the relevant provisions of the Charter: Section 10(b) of the Charter is similar to s 23(1)(b) of the Bill of Rights and states:

> 10. Everyone has the right on arrest or detention . . . .
>
> (b) to retain and instruct counsel without delay and to be informed of that right . . .

Sections 7 and 11(d) of the Charter may be found substantially in ss 8, 21, 22, 25, and 27 of the Bill of Rights and read:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice . . .
>
> 11. Any person charged with an offence has the right . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . .

It is instructive that the Charter confers a broad discretion on a Court to fashion any remedy it sees fit to redress a breach of the Charter (the Bill of Rights has no such provision and this provoked His Honour Judge Hobbs in *Noort v MOT* at first instance to describe the legislation as "crippled" until he was modified progressively as the case went first to the High Court and then the Court of Appeal). Also, the

Charter does not constitutionalise the right to free legal assistance. It contains no equivalent of s 24(f) of the Bill of Rights.

Yet it had already been recognised by the Ontario High Court in *Re Ciglen v R* (1978) 45 CCC (2d) 227, pre Charter, that while there was no law or rule of practice that a defendant must be provided with counsel, where a trial becomes unfair because of the absence of counsel it could be aborted or its results set aside. In that case, the accused had been indicted directly and joined with two co-conspirators who had the benefit of a preliminary hearing. The accused had been refused legal aid. The relevant area director's decision had been reviewed unsuccessfully and the review had not been overturned on appeal to the Ontario Court of Appeal and the Supreme Court of Canada. The accused did, however, successfully apply in part to quash the indictment. The indictment was severed and the trial against the two conspirators continued. The Ontario High Court reasoned that it could not be said that the accused had made a voluntary decision not to be represented by counsel.

In *R v Littlejohn* it was stated to be a fundamental postulate of the particular legal aid "plan" that no person charged with a serious crime should be deprived of the assistance of counsel because he lacked the means to pay for such assistance. By the same token it was recognised by the Ontario Court of Appeal in *R v Rowbotham* (1988) 63 CR (3d) 113,171 that if a person had the means to pay the costs of his or her defence but refused to retain counsel he or she might properly be considered to have chosen to defend himself or herself.

It was recognised by the Court of Appeal in that case that the Charter did not in terms constitutionalise the right of a poor accused to be provided with a free lawyer. In the Court's opinion, the draftpersons of the Charter did not entrench the right of a poor accused to be provided with counsel, because they must have considered that generally speaking the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means. However, it was stated that in cases not falling within the appropriate provincial legal aid plans, the Charter's guarantee to an accused of a fair trial in accordance with the principles of fundamental justice required that funded counsel be provided if the accused wished counsel but could not afford to pay for it and representation was essential to a fair trial. This was recognised also by the Alberta Court of Appeal in *R v Robinson et al* (1989) 73 CR (3d) 81.

The Court in *Rowbotham* considered Craig J's decision in *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985) 48 CR (3d) 166. In that latter case, it was held in effect that there was no constitutional right to funded counsel under s 10(b) of the Charter and that ss 7 and 11(d) of the Charter did not confer a constitutional right to funded counsel per se but in cases where representation was essential to a fair trial an impoverished accused had a constitutional right to funded counsel. Craig J said, at pp 173-174:

> In conclusion as to this issue, under the common law the accused has a right to a fair trial and the trial judge is bound to ensure that an accused person receives a fair trial. Here, the accused faces possible imprisonment. Pursuant to section 7 of the Charter, the accused has an entrenched right not to be deprived of his liberty except in accordance with the principles of fundamental justice. Also, pursuant to section 11(d) he has an entrenched right to a "fair and public hearing". The right to fundamental justice and a fair and public hearing includes the right to a fair trial. There may be rare cases where legal aid is denied to an accused person facing trial, but, where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel, in such a case it seems to follow that there is an entrenched right to funded counsel under the Charter.

McDonald J in *Panacui v Legal Aid Society of Alta* [1988] 1 WWR 60, 54 Alta LR (2d) 342, expressed potentially wider dicta at p 349:

> In my view, the foregoing statement of the purposes and interests which sections 7, 10(b) and 11(d) are meant to protect when the issue is the scope and extent of the right to counsel, lead me irresistibly to the conclusion that a person charged with an offence that is serious and complex, when he cannot afford to retain counsel, is constitutionally entitled to have counsel provided to assist him at the expense of the state: See *R v Stioupu; Re MacKay v Legal Aid Society of Alta* (1983), 8 CRR 216 (Alta QB, Sindart CJQB) and *Deutsch v LSUC Legal Aid Fund* . . . . (I have referred only to serious and complex offences, for the present accused faces charges that he has committed serious offences. It is unnecessary in this case to express any view as to whether a person charged with less serious offences, or a person who for any reason has been arrested or detained wishes to have the lawfulness of his detention or arrest determined in a Court of law, or a person who has been detained for reasons not involving the criminal law or any quasi criminal law has the right to counsel under section 10(b)).

The Ontario Court of Appeal in *Rowbotham* indicated that it was not necessary for the purposes of the appeal that it was dealing with to consider the wider dicta of McDonald J as it was only considering a serious offence and a lengthy trial. Nevertheless, the Court indicated (at p 175):

> Furthermore, the trial judge, in our view, has inherent power, in order to ensure a fair trial, to appoint counsel to defend an indigent accused. In former times, counsel (sometimes eminent counsel) were appointed by the trial Judge to defend an indigent accused charged with a capital offence. Counsel appointed by the trial Judge in those circumstances frequently acted without remuneration. Members of the defence bar also defended many other kinds of criminal charges on a purely voluntary basis. Having regard to the increase in the length and complexity of modern trials and the increase in overhead costs, the

appointment of counsel to act without remuneration is no longer feasible, and indeed in many cases would be unfair to counsel. See *R v Stioupu; Re MacKay v Legal Aid Society of Alta* at p 233.

The Court indicated that if a trial Judge were confronted with a situation where legal aid had been refused and was of the opinion that representation was essential to a fair trial, the Judge might, upon being satisfied that the accused lacked the means to pay for a lawyer, stay the proceedings until the necessary funding was provided. This was stated to be a power of the Judge existing even before the advent of the Charter. The Court found support for this proposition also in the decision of the British Columbia Court of Appeal in *R v Ewing* [1974] 5 WWR 232, 18 CCC 2d 356,365 (per Seaton JA). The Court of Appeal felt that it was unnecessary to decide whether the trial Judge would also have the power to *direct* that legal aid pay the fees of counsel. A case involving at least a serious or complex offence or a trial could simply not go ahead until funding was resolved.

Conclusion

There does seem to be a right to criminal legal aid in most cases and it is just that this should be so. Panic reactions to budget overspending should not stand in the way of a criminal defendant's right to legal representation, especially when he or she is from either a subjective or objective point of view facing a serious or complex charge. On the subject of complexity, it ought to be a rare case when a person is, through lack of financial resources, left to represent himself or herself at any pre-trial conference, preliminary hearing, defended hearing or trial.

This is all in keeping with our common law rights as recognised in New Zealand in the Bill of Rights. Canada and the United States are two of the many jurisdictions in the world which have recognised the right for criminal legal aid and New Zealand as a member of a civilised international community would be falling short of its obligations if it traded off fiscal savings for human rights.

In any case, criminal legal aid is in the justice system's own interests. Unrepresented defendants waste time for all those involved in the system and have no or little understanding of the process. When the inefficiencies of not having funded counsel are married with the sense of injustice experienced by participants and onlookers alike at the treatment of unrepresented defendants in our Courts, justice can only be the loser. □

Books

Principles of Civil Procedure

By Andrew Beck
Brooker & Friend Ltd, Wellington, 1992, $84.38. ISBN 08-6472-0823.

Reviewed by the Honourable Mr Justice E W Thomas

Andrew Beck is a worthy successor to Charles Foster. Foster's *Treatise on the Principles and Practice of the Supreme Court Code* was published just on a century ago. It referred to the first Code of Civil Procedure contained in the Schedule to the Supreme Court Act 1882 and, until contradicted, I am prepared to assert that it is the only treatise hitherto written on civil procedure in this country. Of course, it is out of date. Since then practitioners have had the advantage of annotated texts to the Rules; Sim & Cain's *Practice and Procedure*, now in its twelfth edition, and, more recently, the comprehensive *McGechan on Procedure*. Without doubt, these looseleaf volumes will remain valuable aids to the practitioner engaged by choice, whim or circumstance in civil litigation. Beck's *Principles of Civil Procedure* is now an essential addition to his or her polemical armoury.

In the preface to the book Beck outlines his objective. It is to provide a picture of the way in which a claim is brought to trial. While this necessitates an explanation of the status quo, Beck seeks to illustrate the dynamic nature of procedure by examining the reason for particular rules or practices and by exploring trends and possible directions in the law. He observes that the flexibility of procedural rules is one of the aspects which makes a study of procedure interesting and different from a study of more substantive areas of the law. Accordingly, he states his intention of emphasising this flexibility wherever appropriate. In the result, Beck's concern is essentially with principle.

The structure of the book which Beck had adopted promotes this objective. Each chapter or section is introduced with a subheading, such as "principle", "purpose" or "general rule" under which Beck then states the principle or purpose concisely and clearly. He next proceeds to deal with practical questions relating to jurisdictional issues, the documentation required, the form of any application, the nature of the procedure followed, and the like. These tasks are accomplished with equal clarity and economy of language.

I thoroughly endorse Beck's approach. While I am not certain that the more substantive areas of the law to which Beck alludes are any less inherently flexible, his concentration

on the underlying principles and purpose of the rules is wholly laudable. The Courts, I venture to suggest, do not need to be overburdened with cases. A succinct statement of the underlying principle or purpose of a rule will generally suffice to enable the Judge to determine the procedural issue in a manner which will secure a just, speedy and inexpensive resolution. That, after all, is the explicit function of the Rules. Justice between the parties is the primary aim, and it is an aim which is well-served by Beck's approach.

A concrete example is at hand. Within a week of being given *Principles of Civil Procedure* to review, I thought to refer to Beck's text for a concise statement of the relevant principle when deciding an interlocutory application. The question was whether the privilege attaching to a written report had been waived. A senior executive of a pending defendant had discussed the contents and conclusions contained in the report with the solicitor for the plaintiff over the telephone. Beck states the principle in the following terms:

> . . . the question is one of waiver by implication. Mere reference to a document is not generally sufficient to amount to a waiver of privilege; it must be unfair to allow the party to refer to or use the document and still claim privilege. Where there has already been substantial disclosure of the contents of a document, a claim of privilege would normally be unfair and the Court is likely to find an implied waiver. (footnote references omitted)

This statement of principle was sufficient for me to resolve the point — although I leave open the question whether it was resolved correctly.

Focusing on principle means that Beck has not attempted to refer to numerous cases in his text or in footnotes. He specifically renounces any attempt to do so, preferring to use a limited number of cases for illustrative purposes only. I have already extolled this approach. It means, however, that practitioners will occasionally discover that a case which they might expect to find cited in the book is not mentioned. *DFC v Bielby* [1991] 1 NZLR 587 on the question of costs is one obvious example. But the omission of any reference to the odd case or two is inevitable when a simple and uncluttered approach is deliberately adopted by an author. The Court's resolution of procedural issues will not suffer simply because a clear enunciation of the underlying principle or purpose of a rule is preferred to a compendious list of allegedly relevant authorities.

Beck's work is also devoid of long, or any, quotations. The famous dicta of famous Judges which dispense the test to be applied in certain cases are referred to and briefly paraphrased. An example is Beck's reference to Lord Diplock's dictum in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, at 407- 408. In referring to the test for determining whether interim relief should be granted, Beck shortly states:

> The leading decision on the test to be applied is *American Cyanamid Co v Ethicon Ltd* which stated that the applicant must establish a serious question to be tried and the balance of convenience in its favour. This test has been accepted as a useful general statement by the Court of Appeal, although it has been stressed that the final determination must always be where overall justice lies. (footnote references omitted)

No more is required to formulate the test of balance of convenience and justice — to give it its modern formulation. Yet, it stands in stark contrast to the standard submission on the point. Lord Diplock's dictum will be set out in full in the written submission of counsel for the applicant and, probably, counsel for the respondent as well. When reaching it counsel will say; "Well, your Honour must know this dictum off by heart, so there is no need for me to read it". But notwithstanding this fair and acceptable deference to the state of the Court's knowledge, counsel will then proceed to read it, although, it is to be conceded, they will read it very quickly.

Beck has not sought to write a dissertation on the many fascinating issues which arise from a consideration of the law of procedure. Many such questions trouble the mind; the extent to which the adversarial system has been eroded, and should be further eroded, in order to facilitate the just and expeditious dispatch of the Court's business; whether the uniquely English concept of the "continuous trial", thought to derive from trials by jury which was the predominant method of trial in the Common Law Court, should be modified or abandoned; whether the Court should have the capacity to intervene in the conduct of the trial, independently questioning or calling witnesses or the like; whether the rules of Court should authorise compulsory references to other forms of dispute resolution, such as mediation; and the question, when considering rights of appeal, of the need for finality as against the desirability of obtaining the "right" answer. Devoting his book to an account of the principles and practical requirements of civil procedure, Beck does not seek to expand upon these issues. But his treatise nevertheless provides an overview of the subject which is an essential pre-requisite for any reader wishing to address them.

Andrew Beck set out to explain procedure in "simple and clearly understandable language". He also succeeds in this objective. Indeed, at times the simplicity of Beck's style may convey the impression that the subject matter is simpler than it really is. But that is not a fault; it is the mark of a good writer.

Principles of Civil Procedure will be an asset to law students and practitioners alike. It will become, I predict, an essential book in every law library and an essential aid at the elbow of every aspiring law graduate and every practitioner confronted with a task in civil litigation. It will, as well, be of immense assistance to Judges, certainly to this Judge, in coping with the many diverse and significant procedural questions which come daily before the Courts. □

Anthropomorphism rampant: Rounding up executive directors' liability

By David A Wishart, Lecturer in Law, University of Canterbury

Company law is one of the great legal fictions. To treat a group of people acting together for restricted purposes and with limited responsibility as if they constituted one natural person is as unrealistic as the law can get; but in commercial terms company law probably ranks with bankruptcy and insurance as an essential basis of our modern business system. We just take it for granted as a system for sharing losses — or even in some cases for sharing gains. One problem is the company that is in reality a one-person company. The problem that then arises, as in the Trevor Ivory *case, is whether the individual carrying on business in, and behind, the name of the company can be personally liable in negligence when the company has been found to be negligent. In the* Trevor Ivory *case the Court of Appeal, reversing Barker J, held that the person involved could not be liable for the actions of his company, even though he personally was the only one involved. The author is critical of this decision on the basis of authority and of principle.*

As the centenary of *Salomon's Case* approaches it is as well to reflect that it is only one hundred years old. Conceptual problems arising from the absolute nature of the separate legal personality of a company still plague the law. The AIC collapse alone spawned cases in the Court of Appeal and the Privy Council concerning both the duties of appointee directors to their appointors *(Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513) and the definition of those to whom the duties of auditors are owed *(Deloitte Haskins & Sells v National Mutual Life Nominees* (1991) 5 NZCIC 67,418.) In essence the cases were about the way a company and its organs are to be conceptualised in a complicated corporate environment. Similarly, the decision of Barker J in *R v Rada Corporation Ltd (No 2)* [1990] 3 NZLR 453 dealt with "round robin" transactions (apparently legitimising them) and the way statements about the availability of finance are to be perceived in the context of a group of companies.

Yet *Salomon's Case* was about the other end of the spectrum of firms: the "one person company". *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors* [1992] 2 NZLR 517, a decision of the Court of Appeal, reveals that all the consequences of separate legal personality of companies have not been worked through in even this, apparently simpler, situation. The issue facing the Court was whether a person behind and carrying on the activities of a one person company is personally liable in negligence when the company has been found to be negligent.

The writer must, at this early point, confess that he had, prior to reading of the case, innocently thought the situation was simple: if the "one person" owed a duty of care that person was liable. So too might the company be liable, either vicariously or originally on the basis of *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705 and, locally, *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 756, but this, he thought, was a separate question, depending on whether liability for a person's acts could be attributed to the company. No matter what, one began with the negligent human. In *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors*, however, the Court of Appeal thought otherwise. The Court found the company (Trevor Ivory Ltd) liable and only subsequently asked whether the person behind the company (Trevor Ivory), who actually did the negligent deed, was negligent. The Court held that Trevor Ivory was not liable. He was not liable because he was acting as the company in the sense spoken of by Viscount Haldane in *Lennard's*. The anthropomorphic attribution of the qualities of thought and intention to the company seems to have deprived the person behind the company of another human quality: responsibility for action.

What Trevor Ivory had done was to advise as to the use of Roundup — a powerful herbicide — to remove couch-grass from a raspberry plantation. (It appeared the couch-grass was not a great problem, but the managing owner of the raspberry plantation had a deep-seated personal dislike of it.) Trevor Ivory forgot to tell the managing owner of the raspberry plantation that certain foliage ("green side suckers") on the raspberry plants (or "canes") had to be removed before spraying Roundup in the prescribed way. As a result the foliage was not removed, the herbicide was taken up by the raspberry plants and the crops for next three years were ruined. The raspberry plants eventually had to be replaced with boysenberries. The total loss of the raspberry plantation owners was held to be slightly more than $145,000.

Trevor Ivory Ltd was, as its name suggests, the company in front of Trevor Ivory. It had been set up by Trevor Ivory to be the vehicle for his business of agricultural and horticultural supply and advisory service. He had not set it up for taxation reasons, rather because of

the protection it offered: he had a clear desire to distance himself from personal liability in the inherently risky business of dealing and advising as to agricultural sprays. The Court accepted Trevor Ivory's evidence that he "made it very clear early in the piece that [his] company was the contracting party" with the plantation owners ([1992] 2 NZLR 517 at 531, as quoted by McGechan J.) All invoices were in the name of the company, referring when necessary to Trevor Ivory's personal attendances. On the other hand the managing owner of the raspberry plantation had wanted Trevor Ivory's personal services, and not anyone else's.

The contract under which the advice was given was held by the Court to be between the company and the partnership of plantation owners, one of whom was its manager. Under the terms of the contract a fee of $5,000 per annum was to be paid by the plantation owners and Trevor Ivory Ltd was to be responsible for regular supervision of, and all important decisions relating to the management of the crops. It also was to supply sprays.

The whole Court held that the issue in the case was best resolved by determining whether Trevor Ivory had assumed personal liability. Distinguishing *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, *Fairline Shipping Corporation v Adamson* [1975] QB 180 and a swathe of other cases, the Court found he did not assume personal responsibility. Special facts were needed to establish that and in each of the previous cases where there was liability such special facts could be found, said the Court. Cooke P, without committing himself to any general proposition, stated that if the case had been one as to personal injuries rather than economic loss, he might have been disposed to have found a personal duty of care on the basis of the very obvious risk to health in handling herbicides. ([1992] 2 NZLR 517 at 524.) McGechan and Hardie Boys JJ (at 532 and 528) thought the case marginal.

The clear policy behind the decision was taken by McGechan and Hardie Boys JJ (at 529 and 528) to be as expressed by Slade J in *Spritebrand* [1985] 2 All ER 415, 424: that commercial enterprise and adventure would be deterred by the imposition of onerous potential liabilities. Similarly, Cooke P referred to long established legislative policy in favour of limited liability companies [1992] 2 NZLR 517 at 524.) The Court thus signalled its approval of the limited liability company form as an appropriate vehicle for economic activity. So much is unexceptionable.

The decision, however, goes further than merely asserting the utility of the corporate form. All three members of the Court referred to Trevor Ivory's desire for protection from liability in an inherently risky business as being crucial to the decision (Cooke P at 524, Hardie Boys J at 528 and McGechan J at 532). Yet a desire for protection from liability does not, of course, mean that protection is available in law. Until now "limited liability" has not been taken to be an assertion to the world that responsibility for action does not rest with the actor, rather it has referred to s 211 of the Companies Act 1955, that the liability of a shareholder for a company's debts is limited to unpaid amounts on shares. Separate legal personality implies that each person's responsibility for action is separately assessed. The decision, therefore, extends the meaning of "limited liability" far beyond its erstwhile confines. With all due respect, this extension is not as self-evident as the Court appears to have found it.

Whether limited liability or separate legal personality does indeed imply that the acts of a person acting for a company are not to be taken as the acts of that person, but rather are only the acts of the company was not considered by the Court. The answer was assumed. Cooke P did so in the following passage:

> It is elementary that an incorporated company and any shareholder are separate legal entities, no matter that the shareholder may have absolute control. For New Zealand the leading authority on the point is the decision of the Privy Council in *Lee v Lee's Air Farming Ltd* [1961] NZLR 325; [1961] AC 12. Both Lord Reid and Lord Morris of Borth-y-Gest, who were members of the Board in *Lee's* case (Lord Morris in fact gave the judgment), later joined in affirming in *Tesco Ltd v Nattrass* [1972] AC 153, 170-1, 180, that a person may be identified with a corporation so as to be its embodiment or directing mind and will, not merely its servant, representative, agent or delegate. . . . The reconciliation must be that the *Lee* case looks at questions between the shareholder and his company, whereas the *Tesco* case is concerned with questions between third parties or the outside world and the company, arising for instance as in *Tesco* itself under statutory provisions creating offences. The present is a question of the third party type, and it seems to me that the *Tesco* doctrine assists in deciding it. If a person is identified with a company *vis a vis* third parties, it is reasonable that *prima facie* the company should be the only party liable (at 520.)

Tesco may well deal with the relations between the outside world and the company by identifying what acts are acts of the company, but that is a doctrine enabling the company to be directly liable in tort. With respect, it does not follow from a doctrine extending liability to the company that the company should be the only party liable. That all partners in a partnership are liable in tort for every partner's actions in the ordinary course of business does not imply that the acting partner is not liable. Again, it is true that an agent is not liable on contracts made on behalf of a principal, but the agent does not thereby receive protection from liability for negligent advice. This second example was acknowledged by Hardie Boys J in the following passage, after asserting the *Tesco* (in his case *Lennard's*) analysis:

> To describe a director as an agent of the company can be deceptive. It is a useful description, for a corporation, being an "abstraction" (per Lord Haldane in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705), cannot of itself think, resolve or act, but does so through its directors. In that sense they are certainly agents; but in the popular rather than the

strictly legal sense of the word. It is not the case that they are always agents in the legal sense. The concept of corporate personality means that for some purposes the directors and the company are one. . . .

An agent is in general personally liable for his own tortious acts: *Bowstead on Agency* 15 ed, p 490. But one cannot from that conclude that whenever a company's liability in tort arises through the act or omission of a director, he, because he must be either an agent or an employee, will be primarily liable, and the company only liable vicariously. In the area of of negligence, what must always first be determined is the existence of a duty of care. As is always so in such an enquiry, it is a matter of fact and degree, and a balancing of policy considerations. In the policy area, I find no difficulty in the imposition of personal liability on a director in appropriate circumstances. To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation. Those purposes relevantly include protection of shareholders from the company's liabilities, but that affords no reason to protect directors from the consequences of their own acts and omissions. What does run counter to the purposes and effect of incorporation is a failure to recognise the two capacities in which directors may act; that in appropriate circumstances they are to be identified with the company itself, so that their acts are in truth the company's acts. Indeed I consider that the nature of corporate personality requires that this identification normally be the basic premise and that clear evidence be needed to displace it with a finding that a director is acting not as the company but as the company's agent or servant in a way which renders him personally liable (at 526.)

What Hardie Boys J does not make clear is why a director must be an agent or servant of the company if the director is to be liable for advice he or she has given. One would have thought an executive director would be more rather than less likely to be liable – at least that is Professor Ford's opinion! There is no reason why company and director should not both be liable: the director because he or she did the deed, and the company because the policy behind *Tesco* and *Lennard's* is that the company should not escape liability. Alternatively, why should a director not act both as employee and head and brains? That a director can do this was precisely the decision in *Lee v Lee's Air Farming Ltd* [1961] 1 NZLR 325; [1961] AC 12.

McGechan J did not take *Lennard's* as his starting point. He appears at first to hold the simple vision adverted to earlier. After rejecting an automatic duty of care for executive directors when the company owes one, he asked whether Trevor Ivory owed an independent duty of care. He began his answer with the tantalising comment: "Whether one adopts the renaissance vision of *Anns* or the medieval retreat of *Murphy*, or some workable intermediate position as the touchstone for imposition of a duty of care" ([1992] 2 NZLR 517 at 530) and proceeded:

> a common denominator of liability for negligent word has been the assumption by the speaker of personal liability. As with the defendant in *Fairline*, who "assumed and owed" a duty of care in relation to negligent acts and omissions, so with defendants who utter advice. The touchstone has been the assumption of responsibility, albeit objectively identified. To succeed on the facts of this case, the plaintiff must establish Mr Ivory assumed personal responsibility for advice given in the course of the company's operations (ibid).

At this point the logic fits established concepts of legal personality: to ask whether each separate person is separately liable, regardless of their private relationships. McGechan J's version of the assumption comes later, after a recital of the evidence relating to the plantation manager's clear focus on Trevor Ivory's personal services, and Trevor Ivory's clear desire to distance himself from personal liability. McGechan J states this:

> When it comes to assumption of responsibility, I do not accept a company director of a one man company is to be regarded as automatically accepting tort responsibility for advice given on behalf of the company *by himself.* (at 532.) [Emphasis added.]

Nothing in the judgment to that point deals with the question of whether the interposition of a company between adviser and recipient is effective in law to deny personal responsibility for careless advice.

The cases considered by the Court do not establish that an executive director acting as the company is by reason of that status not also acting personally. Certainly they affirm that an executive director is not automatically liable when the company is liable in tort (ie McGechan J's proposition immediately above but without the italicised portion) and discuss the point at which conduct on behalf of the company can be attributed to the executive director, the choice being between acts expressly or impliedly directed or procured on the one hand, and the knowing and deliberate or reckless conduct on the other *(C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, 423 per Slade L.J.) That is, of course, the converse of *Lennard's.* In *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors* it was undeniable that Trevor Ivory had himself given the advice. The cases considered by the Court are therefore to that extent irrelevant.

The only case where limited liability was accepted to extend to the acts of directors was the decision of Nourse J in *White Horse Distillers Ltd v Gregson Associates Ltd* [1984] RPC 61. This decision was applied in three English Courts of first instance. Nourse J stated obiter, purportedly relying on Canadian decisions:

> Before a director can be held personally liable for a tort committed by his company he must not only *commit* or direct the tortious act or conduct but he must do so deliberately or recklessly and so as to make it his

> own, as distinct from the act or conduct of the company. [Emphasis added] (at 91)

The use of "commit" was not supported by authority or discussion. Slade LJ in *Spritebrand* confirmed the use of the word was unwarranted when he described the principles as expressed by Nourse J to be "not sufficiently qualified ([1985] 2 All ER 415, 424). More cogently, he had earlier reaffirmed that a director cannot

> escape personal liability to third parties for torts which he has personally committed by his own hand (or mouth) merely because he committed the tort in carrying out his duties as director of his company. He can escape personal liability for such torts no more than can an employee acting in the course of his employment for a company, or an agent acting in the course of his agency for a company. (at 419.)

Close analysis of the Canadian decisions also reveals that direct commission of the acts in question is outside their ambit.

The cases cited by the New Zealand Court of Appeal assert the necessity for the executive director to owe a duty of care if he or she is to be found liable in negligence. This is the obvious implication of separate legal entitihood and the corollary of the point that directors, even executive directors, do not owe an automatic duty of care when the company owes one. The necessity for (and potential liability resulting from) a duty of care was accepted in *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors* [1992] 2 NZLR 517 by McGechan and Hardie Boys JJ in the passages quoted above, and in this way by Cooke P:

> There can be no doubt, though, that an officer or servant of a company, whether as senior as a governing director or lower in the hierarchy like the master and boatswain in *Adler v Dickson* [1955] 1 QB 158, may in the course of activities on behalf of the company come under a personal duty to a third party, breach of which may entail personal liability. (at 520.)

All three members of the Court uniformly used the phrase "assumption of responsibility" to indicate the circumstances in which the Court would find a duty of care was owed. Each asserted that the cases require "something extra" to establish an "assumption of responsibility" where a company is interposed between adviser and recipient (per Cooke P at 524; per Hardie Boys J at 527; per McGechan J at 531-532.) However, the requirement for "something extra" in the cases cited by the Court derived from the need for extra evidence to sheet home conduct on behalf of the company to the particular executive director, not to establish the duty of care. The Court of Appeal in *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors* thought "something extra" was necessary to establish the duty of care, rather than to determine whether it was breached by the particular executive director. This was not strictly accurate: a consideration of whether Trevor Ivory owed a duty of care on the given facts using established principles of tort law was precluded by the denial that his actions were his in law – he could not have breached the duty. "Something extra" was necessary to convert the negligent acts back into his actions so that any duty he owed could be breached. What in general would be that "something extra" even in the limited situation of one person companies was not described, Cooke P going so far as to say that to try to do so would be a "contradiction in terms". (at 524.) In the instant case "something extra" could not be found. Trevor Ivory's actions were those of Trevor Ivory Ltd alone.

This note has attempted to demonstrate that it was inconsistent with authority and principle to deny that Trevor Ivory's actions were his own. One should start with the careless human and avoid stretching the corporate metaphor too far with anthropomorphic excesses. Were the Court of Appeal to have started with Trevor Ivory, there would have been no requirement for "something extra" to establish an "assumption of responsibility", and whether or not he owed a duty of care would have been determined on established principles of tort law just as if he were an employee or agent of the company. In any event, given that it is not part of a director's duties to do the business of the company, rather to attend board meetings and make decisions about the business of the company, on the basis of *Lee v Lee's Air Farming Ltd* (supra) Trevor Ivory in giving the advice about Roundup was acting as an employee and his liability should have been assessed as such. It was not.

Of course, Trevor Ivory might have been held not to owe a duty of care according to the existing case law. This was the logic and decision in *Sealand of the Pacific v Robert McHaffie Ltd* (1975) 51 DLR 3d 702, 706, rather than that for which it was cited in *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors* [1992] 2 NZLR 517 at 522, that "something extra" was required to establish a duty of care. The logic used in *Sealand* is appropriate for all employees, creating in them a prima facie exception to tortious liability on *Hedley Byrne* (*Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465) principles that tort liability is quite irrespective of contractual relationships. The Court in *Sealand* thought that they were not acting contrary to those principles, but it is quite clear in the following passage that the duties are held to flow with contract:

> An employee's act or omission that constitutes his employer's breach of contract may also impose a liability on the employee in tort. However, this will only be so if there is breach of a duty owed (independently of the contract) by the employee to the other party. Mr McHaffie did not owe the duty to Sealand to make inquiries. That was a company responsibility. It was the failure to carry out the corporate duty imposed by contract that can attract liability to the company. The duty of negligence and the duty in contract may stand side by side but the duty in contract is not imposed upon the employee as a duty in tort. (*Sealand of the Pacific v Robert McHaffie Ltd,* supra)

If it is thought on policy grounds that the tort liability of the "one person" of one person companies is

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The Crown as a legal concept (II)

By Philip A Joseph, Senior Lecturer in Law, University of Canterbury

This is the second part of an article on the constitutional concept of the Crown. The first part was published at [1993] NZLJ 126. In the first part Mr Joseph expressed the view that to deny that the Crown has legal existence strips away the legal focus of executive government. He also argued that the Crown has all the capacities inherent in legal persons. In this part of the article Mr Joseph develops this latter point in challenging the opinion to the contrary of D L Mathieson QC. Mr Joseph argues that Dr Mathieson's thesis is not in accord with historical tradition and judicial authority; and that it is not the way in which executive government operates in practice.

A Introduction

Part I of this article (see [1993] NZLJ 126) reviewed the English Court of Appeal ruling in *M v Home Office* [1992] 1 QB 270, that the Crown lacked legal personality. It identified that ruling as contrary to authority, historical tradition and the practice of British public law. Under the Westminster system, the Crown is the juristic entity for grounding constitutional and administrative law principles. It supplies the legal focus of government action. Part II of this article challenges D L Mathieson's related thesis; that all government action, to be lawful must point to some positive authorisation under statute or the prerogative ("Does the Crown have Human Powers?" (1992) 15 NZULR 117).

Part I earlier concluded [1993] NZLJ at 126:

> Reinstating the Crown to its legal position would provide the conceptual justification for recognising its freedom to act as a legal person, when not labouring under any disability, to do whatever is not forbidden by law.

The Crown's legal powers are of two kinds: statutory and prerogative. What has been called the "third source of authority" for government action identifies the Crown's natural abilities as a legal person, to act within the law, without need of justification or power (see B V Harris, "The 'Third Source' of Authority for Government Action" (1992) 109 LQR 626). This third source evolved historically from kingship, is the essence of legal personality, is supported on the authorities, and is indispensable to constitutional government. The following critiques Dr Mathieson's article.

B The King's two bodies

Mathieson's thesis contradicts kingship and the historical Crown. He contended that the Crown possessed none of the natural capacities of a free individual. It had statutory and prerogative powers, but it could do nothing beyond those powers, properly construed.

Part I traced the Crown's evolution – from feudal King, to corporation sole, then aggregate. In the *Case of the Duchy of Lancaster* (1567) 1 Plowden 212 at 213; 75 ER 325 at 326, the ancient distinction was drawn between the "the King's two bodies", "natural" and "politic". When the institutional Crown evolved as a legal concept, kingship imparted to it all the natural gifts and endowments of

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continued from p 178

in almost all circumstances unduly restrictive of commercial activity and enterprise, then the principles of tort law should be the exculpating ones. In that consideration the effect of the representation to the world and third parties in particular that advice is being given on behalf of a company may be effective, although there seems no reason why persons acting for a company, albeit in a central position in that company, should be treated in tort law in a way different from the way any other class of persons acting for other parties are treated. This is particularly true for the employees and agents of the company. *(C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, 424-5, per Slade LJ.) To distinguish the "head and brains" of a company from other negligent people would run counter to the trend in company law to make directors more liable for corporate actions, and to the general principles as to exculpation for negligent action. Indeed, the established means of escaping liability seem more amenable to the situation of the one person company than for employees generally. For example, Trevor Ivory could have had his company contract out of liability on his behalf (this was attempted, but was held to be ineffective), or he might have had his company indemnify him for any liability which might accrue as a result of his actions on behalf of the company[2] and taken out appropriate corporate insurance policies.

The mere fact of acting for a company should not be an exception to the law establishing duties of care, at least not without a discussion in depth of the relationship between company law, contract and tort. It is that discussion which is lacking, even deliberately avoided, ([1992] 2 NZLR 517, per Cooke P at 523-524) in the judgments of the Court of Appeal in *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors.* □

1 H A J Ford, *Principles of Company Law* (4th ed) (1986) p 128, n 25a; but see the comment of Hardie Boys J [1992] 2 NZLR 517 at 528.

2 Such an indemnity would not fall foul of s 204 of the Companies Act 1955 because the indemnity would be in respect of his capacity as agent of the company: *Nathan v Kiwi Life and General Mutual Assurance Co Ltd* (1981-3) 1 NZCLC 98,503, 98,506-7.

human personality. The "King's two bodies" also accounted for the unique nature of prerogative power: as that "special pre-eminence, which the King hath, over and above all other persons . . . in right of his regal dignity" (Sir William Blackstone, *Commentaries on the Laws of England* (1765), p 239). Blackstone wrote that the prerogative consisted of "those rights and capacities which the King enjoys alone, in contradistinction to others, and not . . . those which he enjoys with any of his subjects" (ibid). Only as the legal embodiment of government did the law grant the King special prerogatives. There was no need to bequeath natural powers which the King possessed as a free individual.

For Blackstone, a power held in common with the King's subjects ceased to be a Royal prerogative, but was merely a freedom or capacity for action not forbidden by law (ibid. See also Sir William Wade, "Procedure and Prerogative in Public Law" (1985) 101 LQR 180 at 191-193). The Crown in its corporate capacity has the right to sue. *Sutton's Hospital Case* (1613) 10 Co Rep 23a; 77 ER 960 endorsed this right as an incident of legal personality, arising by implication of law. Thus even the humblest of subjects shares the right to sue which removes it from the ambit of Crown prerogative. This "right" is, in truth, a liberty or privilege, and not strictly a power at all. Filing proceedings cannot alter another's legal position, when the proceedings may be withdrawn for the Court may lack jurisdiction.

The Crown enjoys many rights in common with subjects, as part of its freedom to do or refrain from doing acts not prohibited or compelled by law. The Crown, through its servants, may make contracts, convey land and transfer chattels, without need of statute *or* the prerogative. Mathieson's error was in referring only to *powers* – that legal persons, including the Crown, may do only those things the law positively authorises. Having subordinated the Crown's natural capacities thus, Mathieson then asserted that the Crown's powers are of two kinds only – statutory and prerogative – and contrived to demonstrate the legal position. On the above example, the Crown would lack even the capacity to sue, being in nature neither prerogative nor statutory.

C Essence of legal personality

Mathieson reasoned: "The Crown is not to be regarded as if it were a human being. There is no logical reason, therefore, why the Crown should have attributed to it the rights, including the Hohfeldian 'privileges', of a human being (in the absence of statute taking them away)." Mathieson conceded that the Crown was an artificial legal person but that it was not a corporation of any sort. There was no mention of the authorities instanced in Part I of this article which upheld the Crown as a corporation sole or aggregate.

Sutton's Hospital Case (1613) 10 Co Rep 23a, 29b; 77 ER 960, 968 established that the King's office was a corporation sole and that it arose out of the ordinary course of the common law. A corporation's natural capacities were incidents of legal personality. The King's Bench held:

> That when a corporation is duly created, all other incidents are *tacile* annexed. And for direct authority in this point in 22 E 4 Grants 30 it is held by Brian, Chief Justice, and Choke, that corporation is sufficient without the words to implead and to be impleaded, &c and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory, and might well have been left out.

God may be omnipotent, but human beings are not; a fortiori nor are corporations. Artificial legal persons are, ex hypothesi, "incapable of public worship or repairing to a church, or of exercising itself in the duties of piety and true religion" (*Rolloswin Investments Ltd v Chromolit Portugal Cuterlarias e Produtos Metalicos SARL* [1970] 2 All ER 673 at 675 per Mocatta J). While there may be (as Kelsen postulated) no distinction *in law* between "natural" and "legal" persons; bodies corporate cannot perform strictly mortal acts; they cannot pray or blaspheme, kill or procreate, marry or divorce. Such are the disabilities of nature which it was not the policy of the common law to supplement.[2] The corporation sole passes under the same name as the flesh and blood individual, although enjoying perpetual existence. The main purpose of the corporation, observed Dias (*Jurisprudence* (4th ed, 1976), p 344), was to ensure continuity:

> [T]he occupant of the office can acquire property for the benefit of his successors; he may contract to bind or benefit them; and he can sue for injuries to the property while it was in the hands of his predecessor.

The authorities established three requisites: the capacity to hold property, perpetual succession, and a corporation name (*Sutton's Hospital Case,* op cit at 28b, 968-969; *MacKenzie-Kennedy v Air Council* [1927] 2 KB 517 at 533-534; *Land Commissioner v Pillai* [1960] AC 854 at 868, 882). The rights to sue and make contracts devolved from the legal persona. Although *corporate* incidents, attaching to the office or institution, they took nothing away from the human incumbent. The "flesh and blood" was not less sovereign or plenary. True, corporations are typically limited in their objects and activities by their incorporating instrument. The ultra vires doctrine, though now a shadow of its former self, was rigorously invoked for holding the limited liability company to its objects and memorandum of association. Companies were required to specify their objects in the interests of shareholders and creditors and they could, of course, do nothing beyond their objects and powers. However the Crown's "parsonification" was by common law (implied) incorporation without grant or (therefore) limitation of charter, and, like humans, has plenary powers, subject to the general law. The law inflicts disabilities on all legal persons, especially the Crown which is immensely more powerful than private individuals or bodies. The Bill of Rights 1688 (UK), for example, prohibits the Crown suspending or dispensing with the statutes of Parliament (Articles 1-2), or raising taxes or applying public moneys without its consent (Article 4). The policy of the law has been to preserve constitutional principles from executive encroachment.

A more enveloping change was the transformation of the corporation sole into aggregate. The King's Bench in 1613 observed the

appointment of counsel to act without remuneration is no longer feasible, and indeed in many cases would be unfair to counsel. See *R v Stioupu; Re MacKay v Legal Aid Society of Alta* at p 233.

The Court indicated that if a trial Judge were confronted with a situation where legal aid had been refused and was of the opinion that representation was essential to a fair trial, the Judge might, upon being satisfied that the accused lacked the means to pay for a lawyer, stay the proceedings until the necessary funding was provided. This was stated to be a power of the Judge existing even before the advent of the Charter. The Court found support for this proposition also in the decision of the British Columbia Court of Appeal in *R v Ewing* [1974] 5 WWR 232, 18 CCC 2d 356,365 (per Seaton JA). The Court of Appeal felt that it was unnecessary to decide whether the trial Judge would also have the power to *direct* that legal aid pay the fees of counsel. A case involving at least a serious or complex offence or a trial could simply not go ahead until funding was resolved.

Conclusion

There does seem to be a right to criminal legal aid in most cases and it is just that this should be so. Panic reactions to budget overspending should not stand in the way of a criminal defendant's right to legal representation, especially when he or she is from either a subjective or objective point of view facing a serious or complex charge. On the subject of complexity, it ought to be a rare case when a person is, through lack of financial resources, left to represent himself or herself at any pre-trial conference, preliminary hearing, defended hearing or trial.

This is all in keeping with our common law rights as recognised in New Zealand in the Bill of Rights. Canada and the United States are two of the many jurisdictions in the world which have recognised the right for criminal legal aid and New Zealand as a member of a civilised international community would be falling short of its obligations if it traded off fiscal savings for human rights.

In any case, criminal legal aid is in the justice system's own interests. Unrepresented defendants waste time for all those involved in the system and have no or little understanding of the process. When the inefficiencies of not having funded counsel are married with the sense of injustice experienced by participants and onlookers alike at the treatment of unrepresented defendants in our Courts, justice can only be the loser. □

Books

Principles of Civil Procedure

By Andrew Beck

Brooker & Friend Ltd, Wellington, 1992, $84.38. ISBN 08-6472-0823.

Reviewed by the Honourable Mr Justice E W Thomas

Andrew Beck is a worthy successor to Charles Foster. Foster's *Treatise on the Principles and Practice of the Supreme Court Code* was published just on a century ago. It referred to the first Code of Civil Procedure contained in the Schedule to the Supreme Court Act 1882 and, until contradicted, I am prepared to assert that it is the only treatise hitherto written on civil procedure in this country. Of course, it is out of date. Since then practitioners have had the advantage of annotated texts to the Rules; Sim & Cain's *Practice and Procedure*, now in its twelfth edition, and, more recently, the comprehensive *McGechan on Procedure*. Without doubt, these looseleaf volumes will remain valuable aids to the practitioner engaged by choice, whim or circumstance in civil litigation. Beck's *Principles of Civil Procedure* is now an essential addition to his or her polemical armoury.

In the preface to the book Beck outlines his objective. It is to provide a picture of the way in which a claim is brought to trial. While this necessitates an explanation of the status quo, Beck seeks to illustrate the dynamic nature of procedure by examining the reason for particular rules or practices and by exploring trends and possible directions in the law. He observes that the flexibility of procedural rules is one of the aspects which makes a study of procedure interesting and different from a study of more substantive areas of the law. Accordingly, he states his intention of emphasising this flexibility wherever appropriate. In the result, Beck's concern is essentially with principle.

The structure of the book which Beck had adopted promotes this objective. Each chapter or section is introduced with a subheading, such as "principle", "purpose" or "general rule" under which Beck then states the principle or purpose concisely and clearly. He next proceeds to deal with practical questions relating to jurisdictional issues, the documentation required, the form of any application, the nature of the procedure followed, and the like. These tasks are accomplished with equal clarity and economy of language.

I thoroughly endorse Beck's approach. While I am not certain that the more substantive areas of the law to which Beck alludes are any less inherently flexible, his concentration

on the underlying principles and purpose of the rules is wholly laudable. The Courts, I venture to suggest, do not need to be overburdened with cases. A succinct statement of the underlying principle or purpose of a rule will generally suffice to enable the Judge to determine the procedural issue in a manner which will secure a just, speedy and inexpensive resolution. That, after all, is the explicit function of the Rules. Justice between the parties is the primary aim, and it is an aim which is well-served by Beck's approach.

A concrete example is at hand. Within a week of being given *Principles of Civil Procedure* to review, I thought to refer to Beck's text for a concise statement of the relevant principle when deciding an interlocutory application. The question was whether the privilege attaching to a written report had been waived. A senior executive of a pending defendant had discussed the contents and conclusions contained in the report with the solicitor for the plaintiff over the telephone. Beck states the principle in the following terms:

> . . . the question is one of waiver by implication. Mere reference to a document is not generally sufficient to amount to a waiver of privilege; it must be unfair to allow the party to refer to or use the document and still claim privilege. Where there has already been substantial disclosure of the contents of a document, a claim of privilege would normally be unfair and the Court is likely to find an implied waiver. (footnote references omitted)

This statement of principle was sufficient for me to resolve the point — although I leave open the question whether it was resolved correctly.

Focusing on principle means that Beck has not attempted to refer to numerous cases in his text or in footnotes. He specifically renounces any attempt to do so, preferring to use a limited number of cases for illustrative purposes only. I have already extolled this approach. It means, however, that practitioners will occasionally discover that a case which they might expect to find cited in the book is not mentioned. *DFC v Bielby* [1991] 1 NZLR 587 on the question of costs is one obvious example. But the omission of any reference to the odd case or two is inevitable when a simple and uncluttered approach is deliberately adopted by an author. The Court's resolution of procedural issues will not suffer simply because a clear enunciation of the underlying principle or purpose of a rule is preferred to a compendious list of allegedly relevant authorities.

Beck's work is also devoid of long, or any, quotations. The famous dicta of famous Judges which dispense the test to be applied in certain cases are referred to and briefly paraphrased. An example is Beck's reference to Lord Diplock's dictum in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, at 407- 408. In referring to the test for determining whether interim relief should be granted, Beck shortly states:

> The leading decision on the test to be applied is *American Cyanamid Co v Ethicon Ltd* which stated that the applicant must establish a serious question to be tried and the balance of convenience in its favour. This test has been accepted as a useful general statement by the Court of Appeal, although it has been stressed that the final determination must always be where overall justice lies. (footnote references omitted)

No more is required to formulate the test of balance of convenience and justice — to give it its modern formulation. Yet, it stands in stark contrast to the standard submission on the point. Lord Diplock's dictum will be set out in full in the written submission of counsel for the applicant and, probably, counsel for the respondent as well. When reaching it counsel will say; "Well, your Honour must know this dictum off by heart, so there is no need for me to read it". But notwithstanding this fair and acceptable deference to the state of the Court's knowledge, counsel will then proceed to read it, although, it is to be conceded, they will read it very quickly.

Beck has not sought to write a dissertation on the many fascinating issues which arise from a consideration of the law of procedure. Many such questions trouble the mind; the extent to which the adversarial system has been eroded, and should be further eroded, in order to facilitate the just and expeditious dispatch of the Court's business; whether the uniquely English concept of the "continuous trial", thought to derive from trials by jury which was the predominant method of trial in the Common Law Court, should be modified or abandoned; whether the Court should have the capacity to intervene in the conduct of the trial, independently questioning or calling witnesses or the like; whether the rules of Court should authorise compulsory references to other forms of dispute resolution, such as mediation; and the question, when considering rights of appeal, of the need for finality as against the desirability of obtaining the "right" answer. Devoting his book to an account of the principles and practical requirements of civil procedure, Beck does not seek to expand upon these issues. But his treatise nevertheless provides an overview of the subject which is an essential pre-requisite for any reader wishing to address them.

Andrew Beck set out to explain procedure in "simple and clearly understandable language". He also succeeds in this objective. Indeed, at times the simplicity of Beck's style may convey the impression that the subject matter is simpler than it really is. But that is not a fault; it is the mark of a good writer.

Principles of Civil Procedure will be an asset to law students and practitioners alike. It will become, I predict, an essential book in every law library and an essential aid at the elbow of every aspiring law graduate and every practitioner confronted with a task in civil litigation. It will, as well, be of immense assistance to Judges, certainly to this Judge, in coping with the many diverse and significant procedural questions which come daily before the Courts. □

Anthropomorphism rampant: Rounding up executive directors' liability

By David A Wishart, Lecturer in Law, University of Canterbury

Company law is one of the great legal fictions. To treat a group of people acting together for restricted purposes and with limited responsibility as if they constituted one natural person is as unrealistic as the law can get; but in commercial terms company law probably ranks with bankruptcy and insurance as an essential basis of our modern business system. We just take it for granted as a system for sharing losses — or even in some cases for sharing gains. One problem is the company that is in reality a one-person company. The problem that then arises, as in the Trevor Ivory *case, is whether the individual carrying on business in, and behind, the name of the company can be personally liable in negligence when the company has been found to be negligent. In the* Trevor Ivory *case the Court of Appeal, reversing Barker J, held that the person involved could not be liable for the actions of his company, even though he personally was the only one involved. The author is critical of this decision on the basis of authority and of principle.*

As the centenary of *Salomon's Case* approaches it is as well to reflect that it is only one hundred years old. Conceptual problems arising from the absolute nature of the separate legal personality of a company still plague the law. The AIC collapse alone spawned cases in the Court of Appeal and the Privy Council concerning both the duties of appointee directors to their appointors *(Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513) and the definition of those to whom the duties of auditors are owed *(Deloitte Haskins & Sells v National Mutual Life Nominees* (1991) 5 NZCIC 67,418.) In essence the cases were about the way a company and its organs are to be conceptualised in a complicated corporate environment. Similarly, the decision of Barker J in *R v Rada Corporation Ltd (No 2)* [1990] 3 NZLR 453 dealt with "round robin" transactions (apparently legitimising them) and the way statements about the availability of finance are to be perceived in the context of a group of companies.

Yet *Salomon's Case* was about the other end of the spectrum of firms: the "one person company". *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors* [1992] 2 NZLR 517, a decision of the Court of Appeal, reveals that all the consequences of separate legal personality of companies have not been worked through in even this, apparently simpler, situation. The issue facing the Court was whether a person behind and carrying on the activities of a one person company is personally liable in negligence when the company has been found to be negligent.

The writer must, at this early point, confess that he had, prior to reading of the case, innocently thought the situation was simple: if the "one person" owed a duty of care that person was liable. So too might the company be liable, either vicariously or originally on the basis of *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705 and, locally, *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 756, but this, he thought, was a separate question, depending on whether liability for a person's acts could be attributed to the company. No matter what, one began with the negligent human. In *Trevor Ivory Ltd and Trevor Ivory v Anderson & Ors*, however, the Court of Appeal thought otherwise. The Court found the company (Trevor Ivory Ltd) liable and only subsequently asked whether the person behind the company (Trevor Ivory), who actually did the negligent deed, was negligent. The Court held that Trevor Ivory was not liable. He was not liable because he was acting as the company in the sense spoken of by Viscount Haldane in *Lennard's*. The anthropomorphic attribution of the qualities of thought and intention to the company seems to have deprived the person behind the company of another human quality: responsibility for action.

What Trevor Ivory had done was to advise as to the use of Roundup — a powerful herbicide — to remove couch-grass from a raspberry plantation. (It appeared the couch-grass was not a great problem, but the managing owner of the raspberry plantation had a deep-seated personal dislike of it.) Trevor Ivory forgot to tell the managing owner of the raspberry plantation that certain foliage ("green side suckers") on the raspberry plants (or "canes") had to be removed before spraying Roundup in the prescribed way. As a result the foliage was not removed, the herbicide was taken up by the raspberry plants and the crops for next three years were ruined. The raspberry plants eventually had to be replaced with boysenberries. The total loss of the raspberry plantation owners was held to be slightly more than $145,000.

Trevor Ivory Ltd was, as its name suggests, the company in front of Trevor Ivory. It had been set up by Trevor Ivory to be the vehicle for his business of agricultural and horticultural supply and advisory service. He had not set it up for taxation reasons, rather because of

the protection it offered: he had a clear desire to distance himself from personal liability in the inherently risky business of dealing and advising as to agricultural sprays. The Court accepted Trevor Ivory's evidence that he "made it very clear early in the piece that [his] company was the contracting party" with the plantation owners ([1992] 2 NZLR 517 at 531, as quoted by McGechan J.) All invoices were in the name of the company, referring when necessary to Trevor Ivory's personal attendances. On the other hand the managing owner of the raspberry plantation had wanted Trevor Ivory's personal services, and not anyone else's.

The contract under which the advice was given was held by the Court to be between the company and the partnership of plantation owners, one of whom was its manager. Under the terms of the contract a fee of $5,000 per annum was to be paid by the plantation owners and Trevor Ivory Ltd was to be responsible for regular supervision of, and all important decisions relating to the management of the crops. It also was to supply sprays.

The whole Court held that the issue in the case was best resolved by determining whether Trevor Ivory had assumed personal liability. Distinguishing *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, *Fairline Shipping Corporation v Adamson* [1975] QB 180 and a swathe of other cases, the Court found he did not assume personal responsibility. Special facts were needed to establish that and in each of the previous cases where there was liability such special facts could be found, said the Court. Cooke P, without committing himself to any general proposition, stated that if the case had been one as to personal injuries rather than economic loss, he might have been disposed to have found a personal duty of care on the basis of the very obvious risk to health in handling herbicides. ([1992] 2 NZLR 517 at 524.) McGechan and Hardie Boys JJ (at 532 and 528) thought the case marginal.

The clear policy behind the decision was taken by McGechan and Hardie Boys JJ (at 529 and 528) to be as expressed by Slade J in *Spritebrand* [1985] 2 All ER 415, 424: that commercial enterprise and adventure would be deterred by the imposition of onerous potential liabilities. Similarly, Cooke P referred to long established legislative policy in favour of limited liability companies [1992] 2 NZLR 517 at 524.) The Court thus signalled its approval of the limited liability company form as an appropriate vehicle for economic activity. So much is unexceptionable.

The decision, however, goes further than merely asserting the utility of the corporate form. All three members of the Court referred to Trevor Ivory's desire for protection from liability in an inherently risky business as being crucial to the decision (Cooke P at 524, Hardie Boys J at 528 and McGechan J at 532). Yet a desire for protection from liability does not, of course, mean that protection is available in law. Until now "limited liability" has not been taken to be an assertion to the world that responsibility for action does not rest with the actor, rather it has referred to s 211 of the Companies Act 1955, that the liability of a shareholder for a company's debts is limited to unpaid amounts on shares. Separate legal personality implies that each person's responsibility for action is separately assessed. The decision, therefore, extends the meaning of "limited liability" far beyond its erstwhile confines. With all due respect, this extension is not as self-evident as the Court appears to have found it.

Whether limited liability or separate legal personality does indeed imply that the acts of a person acting for a company are not to be taken as the acts of that person, but rather are only the acts of the company was not considered by the Court. The answer was assumed. Cooke P did so in the following passage:

> It is elementary that an incorporated company and any shareholder are separate legal entities, no matter that the shareholder may have absolute control. For New Zealand the leading authority on the point is the decision of the Privy Council in *Lee v Lee's Air Farming Ltd* [1961] NZLR 325; [1961] AC 12. Both Lord Reid and Lord Morris of Borth-y-Gest, who were members of the Board in *Lee's* case (Lord Morris in fact gave the judgment), later joined in affirming in *Tesco Ltd v Nattrass* [1972] AC 153, 170-1, 180, that a person may be identified with a corporation so as to be its embodiment or directing mind and will, not merely its servant, representative, agent or delegate. . . . The reconciliation must be that the *Lee* case looks at questions between the shareholder and his company, whereas the *Tesco* case is concerned with questions between third parties or the outside world and the company, arising for instance as in *Tesco* itself under statutory provisions creating offences. The present is a question of the third party type, and it seems to me that the *Tesco* doctrine assists in deciding it. If a person is identified with a company *vis a vis* third parties, it is reasonable that *prima facie* the company should be the only party liable (at 520.)

Tesco may well deal with the relations between the outside world and the company by identifying what acts are acts of the company, but that is a doctrine enabling the company to be directly liable in tort. With respect, it does not follow from a doctrine extending liability to the company that the company should be the only party liable. That all partners in a partnership are liable in tort for every partner's actions in the ordinary course of business does not imply that the acting partner is not liable. Again, it is true that an agent is not liable on contracts made on behalf of a principal, but the agent does not thereby receive protection from liability for negligent advice. This second example was acknowledged by Hardie Boys J in the following passage, after asserting the *Tesco* (in his case *Lennard's*) analysis:

> To describe a director as an agent of the company can be deceptive. It is a useful description, for a corporation, being an "abstraction" (per Lord Haldane in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705), cannot of itself think, resolve or act, but does so through its directors. In that sense they are certainly agents; but in the popular rather than the

Letters of comfort: Possible avenues of interpretation

By Jayne Francis; Commercial Law Department, University of Auckland

The principles involved in the interpretation of Letters of Comfort are yet to be settled in New Zealand. This article considers the principles involved and discusses possible lines of argument that could be advanced in respect of them. Among other matters discussed are the question of equitable estoppel, the Contractual Remedies Act 1979; and the Fair Trading Act 1986. The distinction between the English judicial attitude to the effect that ambiguous Letters of Comfort should be held to be unenforceable while Australian Courts tend rather to uphold them, is noted. The question of which way New Zealand Courts will go remains to be seen.

Introduction

For the lender of moneys under a loan contract the main concern is to ensure that the borrowing is supported by guarantee. If, however, a guarantee is not available to the lender because the "guarantor" refuses to provide one, a lender may be prepared to accept a letter of comfort in its place. These letters will vary according to the circumstances of the arrangement but they contain a number of common features. These are a statement that the parent company is aware of the loan advance to the subsidiary, a recital of the parent company's intention of retaining its ownership of the subsidiary and a statement of some policy or intention of financial or management support of the subsidiary.[1]

Comfort letters are frequently used in New Zealand yet their standing is unsettled. This paper considers the principles involved in their interpretation and discusses possible lines of argument which may be advanced.

Legal principles — *Kleinwort Benson Ltd*

The starting point of any discussion on letters of comfort within the English judicial system is *Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad* [1988] 1 All ER 714 (QBD); [1989] 1 All ER 785 (CA). In this case Malaysia Mining Corporation Berhad (MMC) incorporated a wholly-owned subsidiary MMC Metals Ltd (MMC Metals). Kleinwort Benson Limited (KB) agreed to advance loan moneys to MMC Metals provided that MMC gave a guarantee to support the borrowing. MMC declined to do this but offered to provide a letter of comfort, which KB accepted. The comfort letter contained the clause:

> It is our policy to ensure that the business of MMC Metals Limited is at all times in a position to meet its liabilities to you under the above arrangements.

Subsequently the loan facility was increased and a further letter of comfort given in similar terms. However with the collapse of the tin market MMC Metals went into liquidation and was unable to repay the loan. KB then called upon MMC to comply with the letter of comfort, but MMC refused.

Upon hearing at first instance the issue seen to be determined was: did the letter of comfort show that the parties intended to enter into legal relations? That is, on an interpretation of the words and the surrounding circumstances at the time of the preliminary discussions, did the clause show that liability for the debt was accepted or did it show that the agreement was merely a "gentleman's agreement" because MMC was not prepared to accept repayment by entering into a guarantee?[2]

Hirst J cited the two main authorities on contractual intention — *Edwards v Skyways* [1964] 1 WLR 349 and *Rose & Frank v Crompton & Bros* [1923] 2 KB 261 and said that the principle laid down by these cases was that there was a presumption of intention to create legal relations in commercial transactions; this could be displaced, but the onus of displacing it was heavy.

His Honour's reasoning went thus: The transaction was a commercial lending transaction which created the presumption that legal relations were intended. MMC sought to displace this on three grounds. First that the words of the clause were ambiguous and thus should be interpreted contra proferentem against the plaintiff. This argument was not accepted as his Honour felt that the letters of comfort were the product of the parties' joint drafting efforts, and there was no ambiguity. Secondly, that the words "it is our policy" did not express a contractual undertaking because that policy could be changed and did not bind the company for the future. His Honour rejected this argument also, finding the words to be "unequivocal and categorical". Thirdly, that the surrounding circumstances, in particular the preliminary negotiations before the issue of the comfort letters, *showed* that the presumption should be displaced. The defendants said that it was MMC's stated policy not to issue guarantees over its subsidiaries, but to grant comfort letters and that if the clause was taken as creating legal relations it would, in effect, be a guarantee. This argument was also rejected. His Honour said that the difference between a comfort letter and a guarantee was that the former could be variously interpreted whereas the latter was unambiguous in ensuring payment in the event of default. Furthermore a guarantee was for a liquidated sum whereas a comfort letter was for unquantified damages.

Hence, at first instance, it was found that the letter of comfort did have contractual status and that the clause was an undertaking to repay the subsidiary's debt in the event of

default. KB was thus entitled to damages, being the principal advanced together with interest.

The decision provoked the criticism that the Court had not taken market custom into account, which should have been as market custom was part of the surrounding circumstances. Until this time the common assumptions of most legal practitioners and market participants were that comfort letters did not intend to create legal obligations but were evidence of good faith on the part of those who signed them, that they indicated the intention of the parent company to maintain the financial stability of its subsidiary but no more than that, that they were designed specifically to avoid the result the case gave and that if sanctions were necessary the market place would impose them by way of loss of goodwill.

Practitioners were advised to include an express statement in letters of comfort to the effect that a legal obligation was not thereby intended if that was the case, to detail precisely the undertaking given (Walker [1988] NZLR 143) and (Bright C and Bright S "Beware the Letter of Comfort" [1988] *New Law Journal* 356) to avoid including items intended to have no contractual effect in the same letter or document as those acknowledged as creating an enforceable agreement.[2]

It was also pointed out[3] that KB obtained compensation for not receiving guarantee security by way of an increased yield of one-eighth per cent on the facility and that MMC specifically wanted to avoid the need to disclose a contingent liability on its balance sheet. However, the decision had in effect encumbered the company with surety obligations without the right of subrogation.

The most obvious legal difficulty apparent however was in His Honour's use of extrinsic evidence. Although the law allows recourse to extrinsic material to ascertain whether there is in fact a contract (*Chitty on Contracts* (25th ed) para 805), this material cannot be used to imply a term into a contract merely because it seems reasonable that such a term was intended. Hirst J's approach was to examine the first two paragraphs; "we hereby confirm that we know . . ." and "we confirm that we will not reduce our current financial interest" and find from this language – and the extrinsic evidence of MMC board approval and reliance by KB on the letter – that there was contractual intention. That far is in accord with the tenets of contract law. But then he used reference to the pre-agreement negotiations to imply a term into the "it is our policy" clause, which is to say that the words were a statement of future policy and not merely a statement of the policy in existence on the day it was made. Contract law does not allow this implication.

Court of Appeal decision

The central point thus raised on appeal ([1989] 1 WLR 379) was whether the "it is our policy" clause was a contractual promise by MMC of future liability for the debt of MMC Metals towards KB. Ralph Gibson LJ held that the clause contained a statement of present fact and not a promise as to the company's future position.

> In my judgment [MMC] made a statement as to what their policy was, and did not in . . . the comfort letter expressly promise that such policy would be continued in the future. It is impossible to make up for the lack of express promise by implying such a promise . . .

His Honour held that it could not be said that the words "were intended to have any effect between the parties other than in accordance with the express words used." In his view it was clear that the clause did not contain a contractual promise as to the future policy of MMC but was a statement of present intention. There were a number of reasons why. First the language used in the "it is our policy" clause contrasted with the language of the other clauses, in that the other clauses were clearly promissory. Secondly, as a matter of commercial practice a letter of comfort was assumed to give rise only to a moral obligation. Thirdly, the negotiations leading up to the insertion of the clause showed that MMC had refused to provide a guarantee for the debts of its subsidiary. (His Honour admitting this evidence on the reasoning in *Prenn v Simmonds* [1971] 1 WLR 1381.)

In concluding thus his Honour discussed Hirst J's use of *Edwards v Skyways Ltd* (supra) and said that *Edwards* was inapplicable to the case. He said that in *Edwards*

> the company thus failed to show that what was otherwise admittedly a promise, supported by consideration, was to be denied legal effect because of the common intention of the parties that it should not have such effect and accordingly the company failed to displace the presumption.

His Honour said this was a different issue from the *Kleinwort* case, which was

> whether, given that the comfort letter was intended to express the legal relationship between the parties, the language of [the clause] does or does not contain a contractual promise.

It was only if a contract was found to exist that the intention of the parties as to the creation of legal relations would come into play to negative liability. Thus, in his view, the question was not whether the words were to be taken as intended to have contractual force, but what they actually meant.

> [T]he concept of a comfort letter, to which the parties had resort when the defendants refused to assume joint and several liability or to give a guarantee, was known by both sides at least to extend to or include a document under which the defendants would give comfort to the plaintiffs by assuming, not a legal liability to ensure repayment of the liabilities of its subsidiary, but a moral responsibility only. (*Kleinwort Benson* [1989] 1 All ER 785 (CA) at 795.)

The Court of Appeal's decision on this issue questions the relationship between certainty of terms and intention to create legal relations. It also throws doubt on the role of the presumption of intention to create legal relations in commercial agreements. The Court of Appeal

decided that the parties intended to create a certain but unenforceable moral obligation. It did not seek to ascertain if there had been a rebuttal of the presumption of intention. This contradicts the decision of the House of Lords in *Rose and Frank Co v J R Crompton and Brothers Ltd* (supra) which states that the presumption in commercial agreements is so strong that an intention not to make a binding contract must be expressly indicated. By distinguishing *Edwards v Skyways* as a case of a promise being supported by consideration it limits raising the presumption to situations where there is a certain contractual promise supported by consideration, that is to situations where intention is almost certain to be present.[4] This, it is suggested, is to emasculate it. The presumption of intention should be the primary factor followed by its possible rebuttal.

The Australian approach

The Australian approach to this issue is similar to Hirst J's in *Kleinwort*. In *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502 Rogers CJ, in seeing the bank's claim first as one which turned on the existence of an intention to create legal obligations and secondly on whether the terms of the letter were sufficiently promissory in nature to be contractual, said that the English Court of Appeal subjected "the letters to minute textual analysis" and found it "inimical to the effective administration of justice in commercial disputes that a Court should use a finely tuned linguistic fork" in its interpretation of the intention. Hence the focus of the judgment, as in Hirst J's decision, was on whether the statements were promissory and to determine this the background of the surrounding circumstances were taken into account. His Honour said:

> There should be no room in the proper flow of commerce for some purgatory where statements made by businessmen after hard bargaining and made to induce another business person to enter into a business transaction would, without any express statement to that effect, reside in a twilight zone of merely honourable engagement. (*Banque Brussels*, supra)

The statements were analysed on the basis of a different test than that applied by the English Court of Appeal in *Kleinwort*. His Honour said that a statement was prima facie promissory if it was made for the purpose of inducing the other party to act upon it and if it caused the other party to act upon it. This alone, however, was insufficient for the bank to prove that it would not have entered into the contract.

In *Capita Financial Group Ltd v Rothwells Ltd* (unreported, 13 October 1989) two letters were involved, one given by Capita and one by Rothwells. Each one irrevocably undertook to make financial contributions or arrange financial, accommodation when required to maintain the solvency of the principal debtor. Obviously of stronger wording than *Kleinwort*, Giles J concluded that legal relations were intended. His Honour referred to an earlier case which stated that if the Court "comes to the conclusion that the parties intended to make a contract, it will, if possible, give effect to their intention no matter what difficulties of construction arise." *(York Air Conditioning and Refrigeration (Asia) Pty Ltd v The Commonwealth* [1949] 80 CLR 11 at 26.) This statement encapsulates the approach of the Australian Courts.

What is the attitude of the New Zealand Courts to letters of comfort?

There is little good authority in New Zealand on the topic, the decisions we have being pursuant to summary judgment applications. However, the approach appears to be to apply the Court of Appeal reasoning in *Kleinwort* and deny that the parties intended to create legal relations.

In *Genos Developments Ltd v Cornish Jenner & Christie Ltd* (unreported, High Court, Auckland, 10 July 1990, CP 556/90) Master Towle considered the effect of a letter of comfort which had been given by a company to a landlord to support the tenancy obligations of one of its subsidiary companies. Cornish Jenner and Christie Ltd was a wholly owed subsidiary of Holdcorp Group Ltd and a tenant under a commercial lease. The landlord had requested a guarantee from Holdcorp which it declined to provide, giving a comfort letter instead which said:

> [HG's] policy is to ensure that its subsidiaries meet their financial obligations and to this end you can be assured that while [CJC] is a subsidiary of [HG] we will ensure that it meets its obligations under the above lease.

CJC went into liquidation with rent and outgoings outstanding. When the landlord sought to recover the arrears from HG the company denied liability on the grounds (as in *Kleinwort*) that the letter merely stated the policy of the time and it was not an undertaking that the policy would not change in the future. Master Towle therefore held that the parties never intended to create legal relations and that the letter was not intended to be a binding promise as to the future of the subsidiary company.

In *Bank of New Zealand v Ginivan* (1989) 5 NZCLC 66,103; [1991] 1 NZLR 178 (CA) a letter given by the Irish parent of a New Zealand company said:

> Our policy is that this company will conduct its affairs in a responsible manner, maintain a sound financial condition, and meet its obligations promptly and will use "our best endeavours" to see that the company continues to do so.

The point was argued in relation to a possible defence to a guarantee. The defendant said he had only given his personal guarantee because he believed that the letter of comfort given by the Irish parent was accepted by the bank as a guarantee and, in the absence of that recourse being available to the bank, he could not be pursued personally under his own guarantee.

Upon summary judgment application it was held, again applying *Kleinwort*, that the letter of comfort did not intend to create a legal relationship and this was known to the defendant who understood the nature and purpose of the guarantee he had given. On appeal, the Court of Appeal dismissed the action, holding inter

alia that there was no implied representation that the bank would take action against the parent company first.

Equitable estoppel

In *Kleinwort* the bank relied on the letter of comfort before providing its loan. If this is the case, is it arguable that this performance and degee of reliance provides sufficient basis for an equitable estoppel?

This issue has been successfully claimed by a plaintiff in the Australian Courts. In *Banque Brussels Lambert S A v Australian National Industries Ltd* (1989) 21 NSWLR 502 the Supreme Court of New South Wales held that the defendant was estopped from denying the truth of the statements in the letter of comfort and from asserting that the promises were not a binding legal obligation. The facts of the case were similar to *Kleinwort*. The defendant company owned forty five percent of the issued capital of the holding company which in turn wholly owned the borrower. The defendant company refused to give a guarantee as a condition of a loan advance, so the bank required a letter of comfort instead, which the defendant company gave. The letter stated that it was not the defendant's intention to reduce its shareholding in the borrower and that it would provide the bank with 90 days' notice of any decision to dispose of any shareholding. The letter also said that the defendants:

> . . . take this opportunity to confirm that it is our practice to ensure that [our affiliate] will at all times be in a position to meet its financial obligations as they fall due.

These financial obligations were to include repayment of all outstanding loans made within thirty days. Rogers J found on the evidence that the defendant knew that the plaintiff regarded the obligations as binding. In these circumstances, it was held to be unconscionable for the defendant to claim otherwise.

It is usual for a parent company giving a comfort letter to confirm either that it approves of the subsidiary entering into the loan arrangement or, at least, that it is aware of the terms and conditions. If this is the case the plaintiff can show the parent's knowledge of its reliance on the comfort letter before performance by way of advancement of the facility is made. A conceivable problem with such proof of reliance would be, for example, if a bank advanced moneys in excess of what was specified in the comfort letter. But in general, if there is evidence of reliance and performance there is the possibility of a successful plea of estoppel.

Contractual Remedies Act 1979

In New Zealand, if the statements in a letter of comfort are held to be promissory and legal obligations intended, then the Contractual Remedies Act 1979 will apply to all statements made with the intention of inducing contractual relations. So, under s 6, if a pre-contractual statement amounts to a representation as to the fact of a parent company's intention in relation to the subsidiary at the time the letter was given, it may be actionable, even if innocent.

Further, s 6 expressly bars the possibility of a concurrent tortious plea of negligent misstatement in the event of a contractual relationship being found. If however no contract is said to arise, is negligence liability a possible alternative cause of action?

Negligence

Glendermid Leathers Ltd v Pittsburg National Seldon & Co Ltd (unreported, High Court, Dunedin, 23 October 1986, A 8/84) concerned the liability of a merchant bank for statements in a telex message intended to reassure its client's creditors. The plaintiff supplied leather to a footwear company in financial trouble in reliance on a telexed letter of comfort from the merchant bank. The footwear company was later placed in receivership and the question was whether the merchant bank owed creditors a duty of care in forwarding the telex, in the light of known facts.

Williamson J held that the bank was negligent and the plaintiff suffered loss as a result. His Honour recognised that it was a novel situation for a duty of care to be imposed and adopted the twofold approach of *Anns v Merton London Borough Council* [1978] 2 AC 728. (The current debate on the *Anns v Caparo* approach is beyond the scope of this paper.) A factor considered by his Honour was that the defendant bank was, like other merchant banks, in the business of assessing companies' ability to trade. Consequently it was reasonable to conclude that others in the commercial community would rely upon the defendant merchant bank as possessing expertise in assessing the financial condition of commercial entities. It was also relevant that the defendant bank knew, or should have known, that the plaintiff would place reliance upon the telexed letter of comfort.

These are both factors common to *Kleinwort* upon which a duty could be found. But what was the extent of the reliance? This, it is submitted, is the very problem the contractual interpretation attempts to grapple with. Was the reliance to the extent of enforcing a legal obligation or was it merely an informal reliance on statements in a letter or something in between? In *Glendermid* it was held that the reliance on the part of the creditors was to continue their relationship with the debtor and this was one of the purposes in sending the telex. In short, there was consensus. This, it is suggested, is distinguishable from the *Kleinwort* situation where it was the parties intention *which was being litigated.* The bank claimed that it was a promise as to future policy and therefore there could be reliance, whereas the company claimed that it was a statement of present intention only and there could be no reliance on future conduct. The extent or *fact* of reliance was thus the conflicting issue. Hence, if it is found, as the Court of Appeal did in *Kleinwort*, that the reliance was informal as there was no intention to create legal relations, it would not be reconcilable to find a tortious duty of care which, in effect, contradicts the contractual assessment, and which would lead to tortious damages being awarded, which is to say placing the plaintiff in as good a position as it was in before the promise was made – in other words getting back the money advanced, the same situation as obtaining a guarantee.

The question also arises, if a tortious cause of action is pursued,

as to the assumption of responsibility under the *Hedley Byrne* (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575; [1964] AC 465) rule. In circumstances such as *Kleinwort* the plaintiff bank was a sophisticated and knowledgeable commercial enterprise which must have known the risk of dealing with an undercapitalised subsidiary and had obtained compensation which reflected that risk. To what extent then can MMC be said to have assumed responsibility for that risk? (or is it that the issue is approachable by way of contributory negligence principles?)

Fair Trading Act 1986

Another possible cause of action which has not yet been argued in New Zealand is breach of s 9 of the Fair Trading Act 1986. Is this viable?

In Australia the issue arose in *Concrete Constructions v Nelson* [1990] 64 ALJR 293 at 294. In this case the High Court said, of the relevant Australian provision that:

> While the cases make it plain that consumer protection lies at the heart of the legislative purpose . . . the precise boundaries of the territory within which the section operates remains undetermined.

Section 9 provides that a person shall not, in trade, engage in conduct which is likely to mislead or deceive. So the circumstances in which a letter of comfort may conceivably be caught by the section is when it is given in a situation in which it is not likely to be intended or honoured. It would also be necessary for the lender to place some reliance on the letter, even if acknowledging that it was not a guarantee or giving rise to contractual liability. This reliance would provide the evidential basis to show that the lender had been misled or deceived.

There is a paucity of authority on the issue, but a recent judgment of the Federal Court of Australia is illustrative. In *Helco Pty Limited & Ors v O'Haire & Anor* (1991) ATPR 41-099 solicitors acted for the purchaser of a business formerly owned by the appellants. During negotiations for the purchase the appellants required the solicitors to send a letter stating that the solicitors knew that the purchasers had sufficient assets to cover their personal guarantees. The comfort letter was sent. However the purchasers failed to supply the balance of the purchase price and became bankrupt. The appellants then took action against the solicitors, claiming misleading or deceptive conduct in sending the letter. They argued that the representation was made without any regard to its correctness, that adequate inquiries had not been made of the guarantors and that the respondents ought to have known that the representation was untrue.

The claim failed, the Judge saying:

> I believe that the letter was in fact no more than an assurance . . . that the purchasers should feel content that the risk of non payment . . . was as minimal as the [solicitors] knew from what the guarantors had disclosed to him and from other knowledge he had. (at 52, 571.)

The element of *intentional* misleading or deceit was absent and thought by the Court to be necessary for liability under the section.

The distinction made between a guarantee and a letter of comfort

It will be recalled that in *Kleinwort* Hirst J distinguished between a guarantee and a letter of comfort, saying that while a guarantee was unambiguous in ensuring payment, a letter of comfort could be variously interpreted. An analysis of this distinction was given no weight in the Court of Appeal possibly because the Court of Appeal recognised that in the circumstances of the case the amount would be the same because the guarantee provided for a continuing liability on the part of the guarantor. Yet it is possible that herein lies justification for the first instance decision and the Australian approach of finding contractual consensus.

If one takes as a given that a comfort letter is a half-way house between a gentleman's agreement and a complete guarantee assurance there is no reason to deny contractual consensus on the grounds that what may result is, in effect, a guarantee. Causation is relevant. If the parent's undertaking is only to maintain its present involvement in the subsidiary it is unlikely that a damages award would equate with the sum in default because the default could not be attributed entirely to the parent company's failure to maintain its participation in the subsidiary.

In *Banque Brussels*, supra, in relation to quantum, Rogers LJ said:

> [I]t is not suggested that the letter makes [the defendant] liable for the debt of Spedley conditioned merely on non-payment by Spedley. The statements made in the letter are more remote from the liability of Spedley to repay the facility. By reason of this, a failure to adhere to the statements made will, at best, give rise merely to a claim for damages and throw up considerable questions of causation.

On the other hand, if the parent company's obligation is to provide its subsidiary with the financial means to meet its obligations there is a direct causal link between the parent company's breach and the subsidiary's default.

What then is the difference between the effect of a guarantee and breach of an obligation such as the latter one? It is, it is suggested, in damages assessment. If the subsidiary could repay the sum in a reasonable period damages would equal loss of interest until such time as the loan advance is due for renewal. At that stage damages would represent income lost to the bank through being unable, if at all, to use the money in an alternative way. If, however, the subsidiary could not repay the loan it is submitted that there are two courses open to the Court. One is to eventually make an order for payment by the parent of the sum in default. The other is to apportion damages between the parties.

On what basis does a Court have jurisdiction to apportion contractual damages? If one proceeds on the assumption that a bank is under a duty at all times to

safeguard its interests and its interest was to obtain a guarantee then it is arguable that there has been a failure to take care by the bank. The application of contributory negligence to breach of contract is unsettled in New Zealand; (discussion of which is beyond the scope of this paper) dispute relating to categories two and three is enunciated in *Forsikrings Vesta v Butcher* [1986] 2 All ER 4889 at 508. These categories are:

1 Where the defendant's liability arises from some contractual provision which does not depend on negligence on the defendant's part.

2 Where the defendant's liability arises from a contractual obligation to take care but does not correspond to a common law duty to take care which would exist independently of the contract.

3 Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

The category with which we are concerned is category one. No authority thus far has laid down a general right to apportion in contract when there is a failure to take care by the plaintiff. However, the Law Commission on the Apportionment of Civil Liability[5] has recommended a "Civil Liability and Contribution Act" which allows category one apportionment which is to say when loss suffered by the wronged[6] is "attributable as between a wronged person who has failed to act with due regard for that person's own interest and a wrongdoer."[7]

The Commission states:

> Detailed rules about the matters which a Court should take into account would not, we think, be very helpful . . . It seems more appropriate for the Courts to have a general discretion to apportion damages where that is appropriate on the facts of the case, leaving the Courts to make decisions as they see best. (p 55, Law Commission Preliminary Paper 19.)

This is the approach of French law, in which comfort letters have been the subject of legal interpretation for ten years. In French law if the obligation is interpreted as one for which the parent should substitute itself the parent may raise the defence or counterclaim against the creditor for negligent advancement of credit. (Davidson, Wohl and Daniel "Comfort Letters under French, English and American Law" [1992] JBFLP 3.)

Although there is no legal precedent for the apportionment of damages in New Zealand in this way, and in fact common law stands against it, it is in accord with the commercial reality in which letters of comfort are given, that is assumed shared distribution of risk. The dichotomy between commercial reality and the legal confines of the law of contract is the essential problem. As it stands, if the obligation is expressed to be to financially support the subsidiary in relation to its debt, whether or not to find contractual intention is to impose a total victory for either party in terms of placing the entire risk burden on the other. (Clark, Case and Comment, *Kleinwort Benson* (1990) 69 CBR 753.)

Conclusion

While dependent on the language of the individual letter of comfort and differing in approach, both the English and Australian Courts have applied traditional analysis and concepts from the law of contract, tortious principles and liability under trade practices legislation being recent emergents. The English Court of Appeal's attitude seems to be that sophisticated commercial parties are involved which generally have no difficulty in showing an intention to be legally bound. Hence, when the comfort letter is ambiguous there should be a finding of unenforceability. The Australian Courts, however, look more at the commercial circumstances in which letters of comfort are given and tend to uphold them, causation being a determinative in the distinction between a guarantee and the obligation(s) undertaken. Which way the New Zealand Courts will go remains to be seen. In the interim the best advice one could give a New Zealand client is that if a letter is not intended to create binding legal relations it should say so. As Clark (supra) says in his case note:

> Ethical questions apart, the lesson of *[Kleinwort]* is that woolliness and deliberate equivocation should be left to diplomats. In the real world of commercial relations they provide cold comfort. □

1 Fisher "Comfort Letters and Their Legal Status" [1988] 5 JIBL 215.
2 Tettenborn [1988] *The Cambridge Law Journal* 346 and 347. In his Case and Comment, he is the lone voice in the wilderness saying . . . "his judgment is in tune with the need for pretty absolute certainty in cases of this sort . . . [H]is Lordship realised that any more limited interpretation of the words he had to deal with would have rendered them practically nugatory."
3 Gulson F T "Letters of Comfort: they may hide contingent liabilities" (1988) *Law Society Journal* p 40.
4 Brown I. "The Letter of Comfort: Placebo or Promise" (1990) JBL 281.
5 Preliminary Paper 19. Law Commission. "Apportionment of Civil Liability." A discussion paper. March 1992.
6 Defined as "a person who suffers loss" p 80.
7 Defined as "a person whose acts or omissions give rise, wholly or partly to a loss" p 80.

Innocence?

When did the presumption of innocence begin? It seems to have happened in England, for the law of other countries seems to presume guilt. True, we have whittled away at our own proudly-proclaimed rule until, today, a list of its exceptions would make a big, fat book – it's 150 years since the statutes began using the phrase "the proof whereof shall lie upon such person" (meaning the person suspected or accused). Soon they will have to move over, for a gleam in the eyes of our legislators suggests that, if someone should tape-record your telephone conversation with a girl friend, everyone will accept that that is what it is, especially if you are a prince or princess. Only in a court of law, perhaps, will you get so much as a chance to prove that it is not, that it is a fabrication. How would you prove that?

C H Rolph
New Law Journal
5 February 1993

Books

History of the Justices of the Peace

By Sir Thomas Skyrme
Barry Rose, Chichester, 1991, 3 vols

Reviewed by Gail Jansen, Barrister and Solicitor, Wellington

Justices of the Peace have played an important but rarely appreciated role throughout their 800-year-long history. Developed initially to preserve order during exceptional times of crisis, the office of Justice of the Peace expanded to meet new needs, although the functions and powers of the Justices fluctuated with the changing political and social climate. This long and fascinating history has been extensively researched by Sir Thomas Skyrme and is now presented in his new work, *History of the Justices of the Peace*, a comprehensively written text which describes in detail the lives and history of the Justices.

The focus is on the more human aspects of the Justices, including detail of their close associations with the communities from which they came and within which they applied the law. Without glossing over their faults and failings Sir Thomas Skyrme has described with compassion and enthusiasm their activities, including in his work many anecdotes to bring alive the activities of the Justices – which ranged from convicting and sentencing criminals to reforming prisons and administering the poor law.

Sir Thomas is uniquely qualified to write a history of the Justices of the Peace. Called to the Bar by the Inner Temple in 1935, he practised in London and on the Western Circuit. In the second world war he was seriously injured and was unable to return to his practice. At that time he was invited to serve as a secretary to the Lord Chancellor, and in that role he became involved in the appointment and removal of Justices of the Peace. The Royal Commission on Justices of the Peace was established soon afterwards and for the next thirty years Sir Thomas, as Secretary of Commissions, was responsible for all English and Welsh Justices and, for a shorter time, for Justices in Scotland and Northern Ireland. He was involved in all the variations and innovations in the United Kingdom magisterial system during that time and, soon after assuming the office of Secretary, was appointed as a magistrate. He served as a Justice for forty years before being required to retire under the age limit he himself had been instrumental in introducing. Sir Thomas also served as Chairman of both Petty Sessions and Quarter Sessions, as Chairman of the Council of the Magistrates' Association of England and Wales and as President of the Commonwealth Magistrates' and Judges' Association.

The history of Justices of the Peace first caught the author's interest while he was an Oxford undergraduate in the early 1930s. He discovered that little original research on the subject had been done and that the only detailed examinations related to the period before the reign of Elizabeth. Most subsequent works mentioned the history of the Justices of Peace merely as a secondary matter beside other main issues, although American scholars had partly filled the lacuna with works which concentrated on limited periods of the Justices' history. There was a clear need for a comprehensive text on the entire history of the Justices of the Peace.

Once he began writing, Sir Thomas discovered that there was a wealth of documents and manuscripts scattered throughout the United Kingdom, both in County Record Offices and in private collections. There was no national register of documents, thus research projects became a major undertaking. As there was more material than could be assimilated by Sir Thomas, even with assistance, he concentrated on essential matters and on seeking an explanation of the many diverse factors which influenced the formation and development of the system.

The research undertaken by Sir Thomas extended beyond England. The office of Justice of the Peace was extended from England, first to Wales in the 16th century, and then to Ireland and Scotland. As England extended its territories the office of Justices of the Peace travelled into the Commonwealth. Each country developed its own system based on the English model, but in most jurisdictions a more limited lay justice system arose. Sir Thomas traces the development of the office of Justice of the Peace in other countries, highlighting the effects of different cultures and attitudes on the development of a judicial system. Given the extensive amount of information, Sir Thomas was not able to do more than discuss in general terms the office of the Justices in these other jurisdictions. In the chapter on New Zealand, he dealt briefly with the problems faced by the first Justice, Thomas Kendall, who was appointed in 1814 in a colony with no established government. Courts of Justice were established under a charter dated November 16, 1840 and in these early years the Justices played a prominent part in both the judiciary and government. The changing status of the Justices and their jurisdiction in New Zealand is also briefly traversed giving an interesting glimpse of our early history.

The *History of the Justices of the Peace* is written in a clear, concise style and will be easily comprehensible and of great interest to lay historians as well as members of the legal profession. The footnotes are, however, disappointingly unclear in some cases and there is no list of abbreviations to help decode them. The main focus of Sir Thomas' work is the office of Justices in England; the chapters on other jurisdictions are rather limited and could be expanded. But given the fact that the work extends to three volumes, it is perhaps only to be expected that some areas of the subject could only be dealt with generally.

Attractively presented in a boxed set of three volumes, Sir Thomas Skyrme's the *History of the Justices of the Peace* reflects its author's enthusiasm for his subject and provides a fascinating historical insight into a part of the legal system that is often overlooked and unappreciated. □

Our market forces future?
The diary of Francis James McGillivray

(Reprinted with permission from Solicitors Journal, *2 October 1992)*

Another episode in the life of an assistant recorder finds our hero on a nice little earner

Saturday 22 August I receive a personal letter from the Lord Chancellor. He is very impressed with my proposals to re-organise the Crown Court. As a fellow Scot he recognises the substantial savings I can achieve and indeed the money the Crown Court can earn. Bogchester Crown Court is to implement my scheme for a trial period starting in a month.

Monday 21 September The magnificent Georgian building that was Bogchester Crown Court and its cells have been leased to a Japanese television company to film vulgar and humiliating games shows. The LCD earns £10,000 per day. The Crown Court is now housed in the redundant first floor offices of the local Job Centre. I only need a small room. It is sparsely furnished with a desk, chair and computer terminal/video screen. I have been allocated 30 cases. In accordance with the Judicial Appointments Payments and Recoupments Regulations 1992 my sitting fees as an Assistant Recorder are geared to my sentences: 3% of the gross fines and £5 per month of imprisonment subject to a claw back provision of £1 per month of remission earned by the prisoner and 100% of fines not paid. High Court Judges are paid the same commission but can earn more because they try heavier cases. A life sentence earns the red Judge £600 and no recoupment.

9.30 am (A whole hour earlier than judges normally sit). Video link switched on. To save the expense of bringing prisoners from prison I deal with them whilst they are still in their cells. They are conveniently labelled with their case numbers. A prison officer holds a camcorder. Through the voice link I direct the camera away from the slopping out bucket and towards the prisoner. I key in the prisoner's case number. A computer display shows the charge and a written summary of the prosecution and defence cases (thus saving a fortune on legal aid and CPS fees). There is a 14 line pre-sentence report and the latest antecedents from the police national computer. The screen also gives me the sentencing parameters set by the Lord Chief Justice. I activate a green light on the camcorder which allows the prisoner to address me personally. One minute later the light changes to red. I sentence him. He gets nine months and my bank account is automatically credited with £45 less tax and national insurance. (I tried to persuade the LCD to pay in a more stable currency like the rouble or lira but it refused).

12.30 pm Morning session completed. I am £400 the richer. The state has earned £9,000 in fines. Because I've only used 46 of my 50 months prison budget allowance for the day I earn a further performance bonus.

Tuesday 22 September I hear bail applications – based on points eg +5 for married men, −5 for single women with a further −1 for each dependent child; +5 for householders, −5 for lodgers, +5 for employer persons, −5 for the unemployed with a further −5 if running a Ford Sierra Cosworth or BMW, −10 for each gold sovereign ring worn by the defendant, −25 = no bail, −20 to +10 equals conditional bail, +15 = unconditional bail. I resent suggestions that my proposals alter bail in favour of white middle-class men. It's always been like that. I can tag prisoners with satellite tracking devices which emit an electric shock and an audible warning to passers-by should the defendant stray beyond his bail conditions.

Wednesday 23 September Six trials are listed for the day. Evidence is summarised by prosecution and defence counsel who present cases via a video link from their chambers. The trials are televised. I receive 1% of TV royalties. The jury stay at home and are selected at random from lists prepared by Special Branch. They record their verdicts via "Minitel" terminals. The trials are sponsored by the well-known convenience pudding manufacturers "Just Desserts".

If a person is subsequently acquitted by the joint Home Office/Rough Justice Board of Appeal I have to refund twice my £100 per trial fee, so there is an incentive to be fair.

Thursday 24 September I've disposed of the business which usually take three Crown Court Judges two weeks. I'm entitled either to take today off with a bonus gratuity or earn a further fee as a freelance HM Inspector of Schools.

Friday 25 September. 10 pm Imogen, my wife, digs me in the ribs. I've dozed off whilst watching the Bogchester Amateur Dramatic Society's ambitious attempt at Shakespeare. The local poll tax bailiff is playing Bottom. "I have had a dream – past the wit of man to say what dream it was. Man is but an ass, if he go about to expound this dream . . ." □