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Monoculturalism

This editorial was originally broadcast, in an abbreviated form to fit the time limits, on the "Sunday Supplement" programme on National Radio on 12 December 1993.

November 1993 was a most interesting, indeed a most exciting month. And December went the same way. Politics of course has always provided entertainment as well as serious concern. It is beginning to look, though, as if politics may be destined to become the last of the legal blood-sports, that is if the blood spilt and the bad blood created inside the two major parties in the last couple of months is anything to go by.

The amount of *ink* spilt on those political fights was even greater than the *blood* spilt. But there is more to life than politics. New Zealand society embraces wider issues and deeper problems than those that obsess politicians, like who will sit in which Beehive office next month.

A serious topic that has been with us for some time, and is likely to be with us throughout 1994, is what is conveniently described as race relations. I do not mean just a particular problem, but rather the terms in which part of the discussion about race and ethnic origins is conducted. There is a great deal of misunderstanding about the words "monocultural", "bicultural" and "multicultural". These are usually put in opposition to one another. But they should be seen as complementary, with each having its own validity when properly understood.

"Monoculturalism" is usually used as a term of abuse. It should not be. Any society can only be a society, in one of two different ways. Either there is a shared value system, at least in certain basic essentials, or else there has to be a police state. One has only to recall the tragic situation in Northern Ireland. The difference is between shared values or imposed conformity.

The basic values that must be shared in New Zealand society are an acceptance of democracy, an understanding of the importance of the rule of law, and of course a commitment to the concept of tolerance itself. Without an acceptance of tolerance on the part of all of us, there could be no place for biculturalism or multiculturalism. It is only because we can all share a common value system, at least to some considerable degree, that there is room for diversity at all; because tolerance has to be one of the values that is generally accepted.

Multiculturalism is a serious issue for a large number of groups in our society. I recently took part in a discussion at the annual conference of the New Zealand Federation of Ethnic Councils of New Zealand. There were a very large number of people attending that conference and they represented a wide spectrum of ethnic, racial and national backgrounds. The number of people living in this country who were born outside New Zealand is generally overlooked. It is in excess of 600,000 people. This means that while there is a large group that can relate to England as Home, there are now very substantial groups of people at first generation, or even at second generation, who have a consciousness of family ties to other countries and other cultures.

To a very considerable extent multiculturalism is built into our very society. This inevitably means that there are some tensions that exist over and above the issues raised by the indigenous people of New Zealand – the Maori. That there are tensions is inevitable; but they must not be allowed to become rigid divisions.

The issue is not one that is unique to New Zealand. In a recent book called *The Disuniting of America*, the great American historian Arthur Schlesinger expressed some concerns about the divisions occurring in that country. He said that while the American synthesis has an inevitable Anglo-Saxon colouration it is no longer an exercise in Anglo-Saxon domination. This is also true of New Zealand as it is today. Arthur Schlesinger wrote that the United States embodied ideals that transcended ethnic, racial, religious and political lines. He saw it as an experiment in creating a common identity for people of diverse races, religions, languages and cultures. The concern he expressed was that the experiment would continue to succeed only so long as Americans continued to believe in a common goal. The alternative, he sadly said, could be disintegration of the national community, the creation of an American equivalent of apartheid, of tribalisation, and as we all know it now, Balkanisation.

Michael Novak, the American scholar and commentator has written an essay about the development in the United States of what he calls "the pluralistic personality", and which he says provides "an important measure of a civilised reconciliation of unity and diversity". He sees three significant principles at work. The first is that membership of an ethnic group has not been a basis for territorial sovereignty or of political

exclusion. (Parenthetically I might comment I presume he is referring to constitutional theory and present political commitment rather than to the historical experience of Indians and Blacks.) "Political rights inhere in individuals", he says "not in ethnic groups".

The second principle he notes is that no one is coerced into identification with an ethnic group. It is for each individual to make as much, or as little, of belonging to a particular group as they please. And the third principle he sees flowing from the second is the right of the members of ethnic groups to organise voluntary associations for cultural, linguistic, economic or other purposes.

As far as this analysis goes there are two points to be emphasised. First it does not exclude political action by a group. What it means is that the group, in so far as it is active does so as a matter of choice. Secondly there is no formal legal division by race. Here in New Zealand the matter is more complicated, and may become even more so under MMP. We have, and have long had separate racial representation in Parliament and the four Maori seats with the separate Maori electoral roll. But we have made this a matter of choice for the individual and not of compulsion by the provision that those of Maori descent — any degree of Maori descent — can choose for themselves whether to go on the Maori roll or the general roll. It is a simplistic and misleading attitude to take to suggest it is somehow undemocratic for there to be a separate Maori roll at this stage of our development. It is often seen as a compromise; but if so it was a necessary historical compromise, and it has worked so far if not always as well as might be hoped.

The important point about this arrangement is that as we have it now it is voluntary and is based on individual choice. It is not an enforced separation, and those who made comparisons with the system of apartheid, either to justify apartheid or to criticise the New Zealand arrangement miss the essential difference that one is imposed and the other chosen. It is the individual New Zealand citizen who makes the choice. It is not made for him by the ethnic group from which he is descended, nor by his being arbitrarily categorised as a member of that group and therefore obliged to accept some limitation on his rights as a citizen.

A shared acceptance and commitment to the idea of toleration and of diversity, of multiculturalism, is therefore something that we in New Zealand must all have in common. This still leaves the question of the meaning of the term "biculturalism" as it is applicable in the New Zealand context. Maori culture has no other place that it can call home. This is the real meaning and importance of the Maori being indigenous people; and, of course, 1993 has been the year of the indigenous people. Maori culture has a unique and special place in New Zealand society that must be recognised by all of us and seen as being a particular value. To that extent biculturalism is an essential part of our distinctive New Zealand way of life.

New Zealand is, as much as the United States, a diverse society; and each of the ethnic groups — and particularly the Maori — have something special to add to the sum total of what goes to make up New Zealand society. It would be unfortunate if our society became divided and divisive on questions of race or ethnic origin. There is for instance no place for a separate Maori Parliament, or separate Maori laws. There must be, no matter what our backgrounds might happen to be, a common acceptance of the values of democracy, of tolerance and of the rule of law.

P J Downey

Fellowships at Institute of Advanced Legal Studies

The Institute of Advanced Legal Studies, part of the University of London, was established in 1947 to provide a focal point for legal research in the United Kingdom. The main asset of the Institute is the library which now includes over 200,000 items, a number of which, particularly foreign periodicals, are not available elsewhere in the United Kingdom.

As well as acting as the major library resource and working environment for postgraduate law students of the University of London, the Institute also plays an important role in the fields of legal research and the development of academic-professional links by means of a programme of research projects, workshops, inter-disciplinary study groups and postgraduate seminars and lectures. In the area of professional legal education the Institute organises an international programme of legal skills training courses.

Applications are invited in respect of the 1994-95 session (ie October 1994 to mid-September 1995) for two Fellowship Schemes at the Institute.

The **Visiting Fellowships** are designed for established academic or practising lawyers who wish to undertake research within fields covered by or adjacent to the Institute's own research programmes in legal implementation; legal aspects of the Single European Market; company law; legal skills identification and evaluation, legal information. Applications to work in other fields will also be given serious consideration.

The same criteria apply to the **Inns of Court Fellowship** for which appliants will also need to show that the link with Judges and barristers afforded by the privileges of the Fellowship would be of demonstrable benefit.

No stipend attaches to either Fellowship but holders will enjoy a variety of benefits at the Institute such as office space and free telephone, mail, photocopying and computing facilities. The Inns of Court Fellow will also enjoy free occupation of a flat at Middle Temple.

Further information on both schemes may be obtained from the Administrative Secretary, Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR. (Telephone 44 71 637 1731; fax 44 71 580 9613). The closing date for applications is *31 January 1994.*

Multiculturalism and alleged "Anglo" enemies

On 8 November 1983, a little over 10 years ago, Justice Kirby, now President of the Court of Appeal of New South Wales and Chairman of the Executive Committee of the International commission of Jurists spoke to the Royal Commonwealth Society in Sydney. Justice Kirby took issue, strongly, with a remark by Professor Donald Horne that the "Anglos", as he had labelled them, were the principal enemies of multiculturalism. While Justice Kirby's remarks referred specifically to the Australian social and political context they have continued relevance to the New Zealand situation of today. What follows are some extracts from the 1983 address. Justice Kirby commented that he believed Donald Horne to be seriously wrong, and then proceeded to explain why he thought that.

Furthermore, if a tension is artificially whipped up between those who value the continuing British element in Australian life, and the ideal of multiculturalism, we will run the real risk of destroying the multi-partisan support which exists for multiculturalism at least at the Federal level. That would be a national tragedy. The effort to get a more tolerant society began with Mr Gorton. It was encouraged by Senator Chipp. It was continued by Mr Whitlam. And it was entrenched by Mr Fraser. It is the policy of Mr Hawke's government. But it would be mischievous and misguided to suggest, as Professor Horne does, that people from the British Isles are just another ethnic group in Australia. More than 70% of Australians trace their origins to that source. It is fatuous nonsense to ignore that reality or to suggest that we should suddenly become embarrassed or ashamed about it. To talk of Anglo "enemies" will undermine the brilliant idea that is at the heart of multiculturalism. This is an idea of tolerance – that our society in Australia is sufficiently mature to permit people, in the one community, to be themselves and not to suppress their linguistic and cultural origins.

I know of no non English-speaking country that accepts these principles. The English-speaking world, with institutions derived from Britain, is in the vanguard of the movement for tolerance. It does the cause of cultural diversity a disservice to think we advance those from other ethnic groups by denigrating, insulting or belittling the unique, indispensable and central contribution to Australian life of people from the British Isles – in which I include Ireland . . .

I have myself raised the issue of why migrants and the children of migrants are not entering the law in numbers reflecting their growth in the community. Recently I was asked by someone in the Defence Forces : Why do we not attract people of non-Anglo ethnic backgrounds? Perhaps it is the Britishness of the law and of the Forces which puts some people of ethnic background off. But the answer is for so-called "ethnic" Australians to join and to participate. Only in this way will institutions adapt and be changed. At least our institutions can be changed. It is to the permanent credit of Britain that its people aspired to, and by long constitutional struggle achieved, political institutions of orderly change. Let it never be forgotten that after the Second World War, many people came to this country from war-ravaged Europe precisely because we could offer them the stability of British-type Parliaments, the independence of British-type Judges and the respect for individual rights which is the fundamental distinguishing feature of English-speaking societies . . . .

Donald Horne's views have, I am afraid, a distinctly old-fashioned ring about them. They harken back to the ill-begotten days of narrow nationalism – the scourge of the early part of the 20th century. I have no time for those who think we must promote our own Australian "nationalism" by denigrating our British links. In fact, I believe we must be very cautious about beating the drum of nationalist fervour. If the 20th century has learned anything, it should be that the narrow divisions of parochial nationalism have caused pain and grief beyond measure. In the nuclear age, nationalism of the kind Donald Horne seeks, is positively old-fashioned. We do better to establish international perspectives. Our quest for links with Pacific neighbours and regional friends is obviously desirable. But we should not throw away the links we have in the Commonwealth of Nations.

Within the past few months I have participated in practical Commonwealth meetings where lawyers, doctors and others have got together to exchange experience in a common language, against a background of common institutions, common bureaucratic methods and, to a large measure, common ideals. No doubt Donald Horne would decry this as "Anglo enemy nonsense". Well, I say : I am as multicultural as the next Australian. Multiculturalism means tolerance. And it means realism. The so-called "Anglos" remain at the core of Australian national life. We do not advance Australia by ignoring our history, overlooking our majority population and denigrating fine institutions inherited from Britain. The Anglos are not the enemy. The enemy is narrow and British nationalism, divisive commentary and unrealistic rejection of Australian reality.

Furthermore it is wrong to suggest the "Anglos" are conservative. They have been more socially egalitarian than most societies this century. Our Labor Party derives many of its ideas from the British counterpart. The Prime Minister and other members of the Cabinet were educated at Oxford – just as Nehru and others were educated at Cambridge. England has sent out the message of reform. We belittle ourselves when we belittle the Anglos.

Case and Comment

Standard of professional care

Rogers v Whitaker (1992) Aust Torts Reporter 81-189

To some extent doctors, alone among professional persons, have enjoyed a unique position when a Court has been required to determine whether the appropriate standard of care has been met in an action brought by a plaintiff alleging medical negligence. The test which is applied in England – the *Bolam* test – is that standard accepted as proper by a responsible section of the medical profession notwithstanding that there is an equally responsible section of the profession which takes a contrary view (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. That is, professional practice, rather than the Court, has set the standard.

Yet for solicitors, engineers, architects and the like, while the standard of the profession may be persuasive evidence as to whether or not the appropriate standard has been attained, the Court reserves to itself the right to decide whether that standard itself is adequate; "for the Court must retain its own freedom to conclude that the general practice of a particular profession falls below the standard required by the law." (*McLaren Maycroft & Co v Fletcher Development & Co* [1973] 2 NZLR 100 at 108 per Richmond J).

In England the *Bolam* test applies to diagnosis, prognosis and appraisal of the patient's condition, (*Sidaway v Governors of Bethlem Royal Hospital* [1985] 1 AC 871) and extends to deciding whether or not life sustaining treatment should continue (*Airedale National Health v Bland* [1993] 2 WLR 316). Moreover any question of the doctor's duty to disclose risks of treatment is, as epitomised by the conservative judgments of the majority in the *Sidaway* decision, firmly anchored in the *Bolam* test. That is it is not the patient's right of self determination which is the focus of the question for the Court but the duty of the doctor as determined by the medical profession. In Canada, however, the Court tends to speak of the patient's right to informed consent, and as a result the doctor's duty is measured in terms of what the patient has a legitimate right to expect rather than what professional medical judgment might decide (*Reibl v Hughes* [1980] 2 SCR 880). Lord Scarman, in the dissenting decision in *Sidaway,* would have adopted a similar approach.

This question has not been the focus of judicial consideration to any great extent in New Zealand. The accident compensation legislation, in particular the 1972 and 1982 Acts, has meant that the focus for the Court was on whether or not a personal injury by accident (which included medical misadventure) had been sustained rather than on what information had to be disclosed by the doctor in order for that doctor to meet a required standard. The new legislation with its definition of medical error (s 5(1)), and its requirement that where medical misadventure is attributable to negligence the matter should be referred to the appropriate disciplinary body (s 5(10)) may change this.

The leading New Zealand case *Smith v Auckland Hospital Board* [1965] NZLR 191 looked at a very narrow question. The decision imposed a duty on a doctor to answer a specific question asked by a patient with due care and skill where the patient, to the knowledge of the doctor, intended to rely on that answer in making a decision as to treatment. The Accident Compensation Appeal Authority did have occasions to consider the appropriate standard of care in the provision of information. In *H v ACC* [1990] NZAR 289 it considered that the *Bolam* test, as exemplified by the *Sidaway* decision, although technically not binding on New Zealand Courts, expressed the law. However recently the High Court of Australia in *Rogers v Whitaker* had occasion to consider the appropriate standard of care for a doctor practising in Australia. *Sidaway* was not applied. The question must now be whether we in New Zealand follow the Australian or the English approach.

The facts

Mrs Whitaker was a patient of Mr Rogers, an ophthalmic surgeon. She had been almost totally blind in her right eye since a penetrating injury to it at the age of nine. Nearly forty years later, in preparation for a return to the paid work force she decided to have an eye examination. She was referred to Mr Rogers who advised that an operation on her right eye would not only improve its appearance but would probably restore almost complete sight to the eye. She was concerned about any unintentional interference with her "good" left eye, and had even asked whether something could be put over it during the operation to make sure that nothing untoward happened to it. The trial Judge found that she had "incessantly" questioned the surgeon as to possible complications in the procedure. She did not however ask a specific question as to whether the operation on her right eye could affect her left eye. She underwent the operation which did not restore sight in any degree to her right eye but, worse, she ultimately lost all sight to her left eye.

It was acknowledged that the operation itself had been conducted with the required standard of skill and care. Mrs Whitaker based her claim on the fact that Mr Rogers had failed to warn her that, as a result of surgery on her right eye, she might develop a condition known as sympathetic ophthalmia in her left eye. Evidence at the trial was that this condition occurred once in approximately 14,000 such procedures, although there was evidence that the risk was slightly

higher when there had been, as here, an earlier penetrating injury to the eye operated upon.

The standard of care

Reputable medical practitioners gave evidence before the primary Judge that in the circumstances of the case they would not have warned Mrs Whitaker of the possibility of sympathetic ophthalmia developing. However there was also evidence of equally reputable medical practitioners that they would have given a warning. The *Bolam* principle was thus squarely in issue. The principal judgment of the Court was delivered by Mason CJ, Brennan, Dawson, Toohey and McHugh JJ, while Gaudron J delivered a separate but largely concurring opinion. The majority pointed out that in Australia the *Bolam* principle had been largely discarded, in particular the Courts had rejected any application of that principle to non-disclosure of risk and the provision of advice or information to a patient (at 61,676-61,677).

> In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade. Even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the *Bolam* principle has not always been applied. Further, and more importantly, particularly in the field of non-disclosure of risk and the provision of advice and information the *Bolam* principle has been discarded and, instead, the courts have adopted the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care, after giving weight to "the paramount consideration that a person is entitled to make his own decisions about his life".

The majority examined the doctor/patient relationship. This compelled the conclusion that the duty involved in the provision of information and advice required an evaluation of different factors than that involved in diagnosis and treatment. Specifically in diagnosis and treatment the patient's input was limited to a narration of symptoms and relevant history. The doctor then provided diagnosis or treatment according to his or her level of skill, and whether this was in accordance with the appropriate standard of care was a question the resolution of which would require input from responsible medical opinion. As a result when evaluating whether there had been a breach of a doctor's duty in diagnosis and treatment, medical opinion would have an influential and, indeed, often a decisive role to play.

However the majority thought the provision of information and advice was a different matter. They noted that all medical treatment was preceded by the patient's right to choose whether or not to undergo it. This meant that, in reality, any choice by the patient became meaningless unless it was made on the basis of the relevant information which only the medical practitioner knew. It would therefore be illogical if the information given to the patient was to be determined from the perspective of the medical practitioner or the medical profession alone.

The majority considered that, except for those cases of nervous, disturbed or volatile persons where providing all relevant information could harm the patient, there was no special skill involved in disclosing that information. Rather any skill lay in communicating the information to the patient in terms which the patient herself could understand. There was therefore, subject to the therapeutic privilege, a duty imposed on a doctor to warn a patient of a material risk inherent in proposed treatment.

> [A] risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

And here, where sympathetic ophthalmia was the only danger which could render both eyes sightless, and where the patient had incessantly questioned her doctor as to any possible complications, and where the patient was to the doctor's knowledge apprehensive about accidental damage to the left eye, then it was incumbent upon the doctor to warn of its risk. Indeed in the majority's opinion the inadequacies of the *Bolam* principle were demonstrated by the evidence that a body of opinion in the medical profession thought that sympathetic ophthalmia should only have been mentioned if the patient had specifically asked about the possibility of the left eye being affected by the operation on the right eye; that is under *Bolam* the doctor only had a duty to disclose if the patient was sufficiently learned to ask the right question.

Gaudron J while acknowledging that the evidence of medical practitioners in diagnosis and treatment was of considerable significance said nonetheless that the *Bolam* principle could not be used as a basis for limiting liability. It could, he thought, have some utility as a rule of thumb but other than that it served no useful purpose. As regards diagnosis and treatment he thought there was simply no occasion to consider the practice of medical practitioners in determining what information should be supplied.

Comment

The approach of the Australian High Courts in *Rogers v Whitaker* is to be preferred to that of the House of Lords. It is anomalous that, alone among the various professions, the medical profession itself determines whether a member has breached the standard of care. That question is clearly one that must be the preserve of a Court of law. Greater knowledge and the development of new technology may require a change in the standard of a profession. It must be possible for a Court to examine the practice of a profession and, where the occasion demands it, find the practice wanting, for it is in this way

that the standards of the profession can improve. And a further factor which must tell in favour of that approach is s 11 of the New Zealand Bill of Rights Act 1990; "Everyone has the right to refuse to undergo medical treatment". Clearly where a patient is considering whether to undergo treatment he or she will need to have full knowledge of the risks inherent in that treatment, because it is only then that the question of treatment can be evaluated and the right exercised.

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Recovery for costs incurred by receivers

McCarty v ANZ Banking Group (New Zealand) Ltd [1993] BCL 560

In 1993 the Privy Council brought down a decision on the liability of receivers for negligence: *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513. In a recent decision Thomas J has ruled on another matter close to the hearts of receivers and their appointors – the ability of the appointors to recover from the borrowers and/or the guarantors for costs and liabilities incurred by the receivers during the course of a receivership.

In this case a closely held company, Benchmark Jewellery (NZ) Ltd, obtained an overdraft facility from the ANZ Bank, secured with the usual mortgage debenture, together with a guarantee from Mr and Mrs McCarty who also provided a mortgage over their family home to support the guarantee. The company was subsequently put into receivership, with the Bank providing the usual indemnity to the receivers for their costs and liabilities. During the course of the receivership the company was placed in liquidation and the Official Assignee was appointed liquidator. The Official Assignee, after an examination of the performance of the receivers, in July 1992 obtained leave to commence proceedings in the name of the company against the receivers alleging they had been negligent in realising assets. (Whether that action will be continued in the light of the *Downsview* decision remains to be seen.)

The issue to be decided by Thomas J was whether or not the mortgagor and/or the guarantors were liable to the Bank in respect of the costs associated with the receivers defending the action commenced by the Official Assignee in the company's name. It was accepted that the Bank was clearly liable to the receivers as it had provided them with a wide indemnity.

In March 1992 the Bank had advised the mortgagors and guarantors that the outstanding liability was around $69,000. When the guarantors requested a settlement statement in June 1992 the Bank's solicitors advised that a settlement figure could not be provided in order to discharge the mortgage over their home as the solicitors maintained that the Bank was entitled to be indemnified for the legal fees the receivers would incur in defending the action commenced against them and therefore the contingent liabilities under the mortgage could not be quantified. However the Bank later confirmed that the current amount outstanding as at 12 June 1992 was $79,494.89. Mr and Mrs McCarty tendered this sum conditional upon the release of the security documents for the company and themselves as guarantors. The Bank refused the offer and Mr and Mrs McCarty sought declarations that they were entitled to a release of the mortgage in that they had discharged (or were in a position to discharge) the liability which they had secured.

The mortgage debenture contained the usual widely drawn provisions holding the mortgagor liable for all costs incurred by the Bank (and its receivers) in enforcing the securities and exercising the powers under the mortgage debenture.

Thomas J found that the mortgagors were not liable for the costs of the receivers in defending an action brought against them by the company on four grounds.

The first ground was based on an examination of the provisions of the mortgage debenture. Thomas J construed the terms of the mortgage debenture strictly in finding there was no basis for the Bank's claim to an indemnity for the receiver's costs in defending the action. In particular he found the following:

(1) That in clause 25 of the mortgage debenture the phrase: ". . . the Bank and every Receiver . . . shall be entitled to be indemnified out of the mortgaged premises in respect of all the liabilities and expenses incurred by them it or him in the **execution or purported execution of the powers authorities discretions vested in them it or him pursuant to these presents** . . ." (emphasis added) was not of assistance since the Bank could not point to **a power, authority or discretion under the mortgage debenture** which it was executing or purporting to execute. In his view the costs in question were "too far removed from the default [of the mortgagors] to fall within the wording of the charge".

(2) His Honour came to the same conclusion in relation to cl 11 which provided: "All moneys which the Bank may pay or expend under **any power or authority** herein contained or implied . . . shall be moneys hereby secured" as the phrase does not apply unless the moneys were expended under a "power or authority" (emphasis added).

(3) Counsel for the Bank also tried to rely upon the second part of cl 11 which provided "or in consequence of any default that may be made by the Mortgagor . . . and all costs . . . charges and expenses already or hereafter incurred by the Bank . . . for the purpose of giving effect to the security created by these presents . . . shall be moneys hereby secured". Thomas J rejected this argument on a similar basis to those above – the wording of the clause was "not directed at legal cost relating to a defence by the Bank or receivers in an action brought by the company itself against the receivers.".

(4) Two further attempts by counsel for the Bank to rely upon the widely drawn terms of cl 25 (which contained the phrases: "including liabilities and expenses consequent on any mistake oversight error of judgment forgetfulness or want of prudence on the part of the Bank . . . (unless the same amount to wilful or gross negligence)" and ". . . against all actions proceedings costs and demands in respect of any matter or thing done or omitted . . . relating to the mortgaged premises

. . .") were equally unsuccessful as Thomas J repeated his finding that the wording of this clause was not directed at legal costs incurred in defending an action by the company against the Bank's receivers when the liability for the costs arise out of the indemnity given by the Bank.

The second ground relied upon by Thomas J related to the practice of the Bank giving an indemnity to the receivers. As the company was suing the receivers (and had expressly abandoned any claim against the Bank) it would not ordinarily be liable for the costs of the receivers in defending proceedings brought against them but the existence of the indemnity made the company potentially liable for those same costs. While he recognised that this was a widespread practice, he held it was a voluntary act on the part of the Bank which he accepted would be appropriate in relation to a claim by a third party against the receiver. However in relation to a claim by the company itself against the receivers he held it was "singularly inappropriate" for there to be an indemnity and he could not "accept that the mortgage debenture was intended to secure such costs".

The third ground was based again upon a construction of the mortgage debenture. Thomas J rejected the argument that the (common) clause which provides for the appointment of the receiver as an agent of the mortgagor and that "the Mortgagor alone shall be responsible for his [the receiver's] acts and defaults" could be a basis for the Bank's claim. He held it would be incongruous for the words to be construed so as to make the mortgagor liable since the company would not be able to sue the "receivers without at the same time accepting that it would be responsible for any damages which ensued if it was successful in establishing liability on the part of the receiver.". As he pointed out, if the Bank could seek an indemnity from the mortgagor for such costs, any action "by the company against the receivers would be self-defeating and futile, even where the receivers had not (sic) been wilfully or grossly negligent" as contemplated in cl 25. Although Thomas J based this point upon a construction of the mortgage debenture his reasoning comes close to a finding against the enforceability of such an indemnity upon policy grounds — if the mortgagor was forced to indemnify the Bank then the mortgagor had no means of taking action to protect itself against the actions of a receiver.

The fourth ground related to the receivers as the company's agents. When an action was taken by the company against the receivers it was in effect holding its agents to account. His Honour found it "somewhat awkward to suggest that it is intended that the principal be liable for its agent's costs in defending such a proceeding". Overall he was satisfied that "none of the clauses were intended to preclude the company as principal from holding the receivers as its agents to account.".

In concluding his judgment in relation to the company's liability for the costs of the litigation he was of the view that the mortgage debenture when read as a whole did not contemplate the mortgagor being so liable, but rather was restricted to the Bank's liabilities and expenses in respect of third parties (including the realisation of assets). Thomas J put the liability for a receiver negligently realising assets or breaching a fiduciary duty in a different category with the result that, in such an instance, the Bank and receiver were in the position of a mortgagee in possession and they were essentially sued in that capacity.

Thomas J's view of the effect of the provisions in question has support from an Australian decision, which, although not referred to in Thomas J's judgment dealt with a similar point. *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820 involved in that case the receivers were attempting to rely upon the indemnity/exception clauses to avoid liability for the losses caused by their breach of duty, not just their costs in defending an action (at 843.) Like Thomas J, Needham J construed the indemnity clauses against the receivers and also accepted the argument of the plaintiff company that an indemnity was only available in relation to "actions by or liabilities arising to third parties". (at 845 and 846.)

The Guarantee

The guarantee contained the usual clause which provided that the guarantors were to be treated as the principal debtors. The Bank attempted to rely upon this clause in order to hold the guarantors liable for the costs associated with the litigation. Thomas J rejected this argument on the basis that the relevant clause only applied to an "existing" indebtedness or liability to the Bank which was not recoverable for the reasons specified in the clause (such as legal limitation, disability or incapacity). In his view the clause did not create an obligation to pay on its own and since there was no "existing" indebtedness or liability owed by the company to the Bank (in relation to the litigation costs) the relevant clause had no application.

Conclusion

Security documents such as mortgage debentures have a long history of containing widely drawn, all encompassing (and obscure) provisions designed to cover all contingencies and to ensure that the lender is repaid in full after all costs associated with the transaction have been recovered. Thomas J's decision has shown that the terms of these documents are not as extensive as the drafters would have wished. In particular the reference in a debenture to the receiver being appointed by the mortgagor as *its* agent. (In *Expo International Pty Ltd v Chant* (at 827-828) Needham J discusses the agency relationship of the receiver and the company and notes the limited and special character of the relationship.) Thomas J's narrow construction of the debenture is clearly based upon a policy decision — he is obviously of the view that the indemnity claimed was clearly inappropriate and that the receiver and the Bank should not be able to rely upon such an indemnity or stifle an action by recourse to this device. Although Thomas J justifies his conclusions on the basis of a construction of the security documents it would take a very clear and well defined provision to overcome his view of the inappropriateness of such an indemnity.

Guarantee documents, as well as the mortgage debenture, may need to be reviewed by drafters. If the mortgage debenture can be redrafted to ensure the bank can recover its costs then the guarantee

as currently drawn would be adequate. However to avoid the narrow construction placed upon the liability of a guarantor "as a principal debtor" then the guarantee would also have to be revisited.

Those acting for borrowers or guarantors would also be encouraged by this decision to examine the content of demands made by lenders and receivers. Most security documents will be widely drawn, but as Thomas J has shown, they are not as extensive as mortgagees would wish. On a strict interpretation of the document it may be possible for mortgagors/guarantors to resist demands made, although Thomas J's decision would limit this to claims by *the company* against the lender or receiver and would not interfere with claims made by *a third party* against the company while in receivership or against the receiver or lender. In addition those acting for borrowers or guarantors at the time of entering into a loan contract would be wise to ensure that the security documents do not prevent the mortgagors/guarantors from resisting a claim for a similar indemnity.

Peter Fitzsimons
University of Waikato

1 In particular clause 23 of the debenture referred to in that case was exactly the same as clause 25 (which is not altogether surprising as the mortgagee in the Australian case was the Australian and New Zealand Banking Group Limited and in this case the mortgagee was the ANZ Banking Group (New Zealand) Limited).

Mortgagee sales — expenditure of funds by mortgagee

Nathan Securities Limited and Nathan Finance Limited v Stavefield Holdings No 29 Ltd [1993] BCL 1279

When Bruce Stewart and I co-presented the NZLS seminar on mortgagee sales in 1991, we commented that there may be circumstances where a mortgagee should expend money in the sale process to fulfil the mortgagee's obligation to obtain the best price reasonably obtainable for the property in the circumstances. This proposition, albeit in exceptional circumstances, has been accepted by the Court of Appeal in *Nathan Securities Limited and Nathan Finance Limited v Stavefield Holdings No 29 Limited* [1993] BCL 1279.

The facts were somewhat complex. The mortgagor had negotiated an agreement to lease with M. At the same time the mortgagor had agreed to grant to C a right of way over part of the property and to sell part of the property to C as a boundary adjustment. Initially, it may have been the case that M was aware only of the prospective right of way. Nathans was advised of the prospective right of way and boundary adjustment after it had agreed to provide finance to the mortgagor. The tenant may have learned of the boundary adjustment only a short time later.

The mortgagor entered into an agreement with S to acquire a small parcel of adjoining land which the mortgagor intended to onsell to C as the boundary adjustment. The price of S's land was $12,500 and Nathans agreed to provide the finance. The contract for the purchase of S's land was conditional on satisfactory leasing arrangements being entered into between the mortgagor and M.

Eventually, M executed the lease but in escrow (because M had certain requirements which had not been met). By this time, the mortgagor had defaulted and Nathans wished to ensure that the lease with M, the purchase of the land from S and all other related matters were completed.

However, for reasons which are not entirely clear, Nathans then had a change of heart and commenced negotiating directly with M in the hope that M would purchase rather than take a lease of the property. In due course, Nathans entered into an agreement to sell the land to an associated company of M for $420,000. A short time thereafter, the mortgagor received an offer of $620,000 on the basis of M having a 12 year lease. There was no suggestion that this was not a genuine offer.

The Court accepted that there was clear evidence that, had Nathans pursued negotiations with M and advanced $12,500 to the mortgagor to enable the land from S to be purchased, the property could have been sold for substantially more than it was. Consequently, it was held that Nathans had breached its duty to the mortgagor to obtain the best price reasonably obtainable in the circumstances and the amount of damages which had been awarded to the mortgagor in the High Court were increased.

As indicated, the primary significance of the case is that the Court accepted that the mortgagee had a duty to expend funds to fulfil its duty to obtain the best price reasonably obtainable for the property in the circumstances. It was accepted that exceptional circumstances were involved. In particular, Nathans had already agreed to advance the funds necessary to purchase the land from S.

It seems to me to be appropriate that an institutional mortgagee (in particular) should be required to expend funds to fulfil its duty provided that it is beyond doubt that the expenditure will result in the property being sold for a significantly better price (which, of course, would also have to cover the additional expenditure) than it would have been otherwise. Thus, in my view, Nathans would have been under a duty in the present case to expend the funds required to purchase the land from S even if Nathans had not previously agreed to advance those funds to the mortgagor.

Conversely, I consider that it would be to place too great a burden on a mortgagee to require the mortgagee to expend further funds where it is less than certain that this would result in the mortgaged property being sold for a significantly better price than would have otherwise been the case. It is axiomatic that a mortgagee is entitled to protect its interests first and that a mortgagee is not the insurer of the mortgagor. A mortgagee should not be required to place further funds at risk, even a small risk.

Another matter of interest in relation to the present case is that the Court of Appeal did not discuss *Downsview Nominees Ltd v First City Corporation Limited* [1993] 1 NZLR 513. This is not particularly surprising as *Downsview* would seem to have settled general law duty questions in relation to mortgagees and receivers as Hardie Boys J (who delivered the Court's judgment in the present case) seemed to accept when he referred to Nathans' "obligation of good faith".

Steven Dukeson
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Correspondence

Dear Sir

Pro-arbitration — in reply to "When 'with' means 'without' " [1993] NZLJ 383

Our judiciary has taken a pro-arbitration stance, exemplified by the judgments; *United Sharebrokers Ltd v Landsborough Estates Ltd & Others* (Christchurch CP 298/89, Judgment, 18 May 1990, reported in *NZV* September 1990, Tipping J) and *Smale & Brookbanks v Illingworth & Anderson and Fletcher Homes Ltd* (Auckland No 1623/92, Judgment 18 December 1992, Thorp J), and should be applauded.

In a recent article ("When 'with' means 'without' " [1993] NZLJ 383) Derek Firth criticised these two decisions of the High Court for finding that the reasons of the arbitrators were not incorporated into their awards although the submissions to arbitration had stated that the determinations should be given "with" reasons. On the surface this may look like justified criticism, however, a deeper look at the two judgments reveals that neither Tipping J nor Thorp J have strained the natural meaning of "with". The issue was not whether reasons had been given: in both cases written reasons were given; the issue was whether these reasons formed part of the award and thus allowed the award to be challenged by the dissatisfied party.

The judgments are the logical progression from the earlier decisions of *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257 and *Manukau City Council v Fletcher Main Line Ltd* [1982] 2 NZLR 142 (both of these cases were mentioned in Derek Firth's article). The issue in both these cases was similar to the issue in the cases presently in question, namely, whether the arbitrator's reasons (or High Court's reasons, in *Manukau City Council*, which was followed by the arbitrators) for the award were sufficiently incorporated into the award for the award to be challenged by a Court for error of law on the face of the award. In neither case was it found that the reasons were sufficiently incorporated. It would not seem unrealistic after these two cases to expect drafters of arbitration submissions to clearly indicate not only that written reasons be given but whether or not they should form part of the award. However, this remaining ambiguity may have been desired.

There are many examples in contract law of Judges being unwilling, for policy reasons, to give effect to clauses unless the parties have made their intention explicit. An example of this is "pay when paid" clauses (*Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd,* High Court, Auckland, CP 1524/90, Master Towle, 4 October 1991). We should not ignore the policy reasons behind the decisions of Tipping J and Thorp J.

In order for arbitrations to be a viable alternative to litigation the arbitration award needs to be final in the majority of disputes. If provision for challenging the award is made in the ordinary course of a submission to arbitration then arbitration is ineffective as a means of dispute resolution. Arbitration is in danger of being viewed merely as a "dry-run" for litigation. The cheaper option would be to litigate initially rather than incur the costs of arbitration when the award may very well face a challenge from the dissatisfied party.

If the parties to a dispute are unwilling to abide by an imposed decision then negotiation or mediation followed by litigation would be preferable to arbitration followed by litigation.

To require that submissions to arbitration explicitly state that; "written reasons are to be incorporated into the arbitrator's determination" is not too great a burden to impose on parties that want arbitration to be only a "dry-run". These decisions were indeed "pragmatic and commercial" and it is hoped that this view will prevail in all circumstances where an award is challenged and thus ensure the survival of arbitration as a viable alternative to litigation.

Kelly Stein

[Footnote: While the Arbitration Bill presently before Parliament, based on the UNCITRAL Model Law, provides for the arbitral tribunal to give reasons for its award it also restricts the grounds upon which the award may be challenged in a Court, thus, making arbitration a viable option to litigation again.]

A Sketch from the Blue Train

Non-discrimination and freedom of expression: the New Zealand contribution

By Rt Hon Sir Robin Cooke, President of the Court of Appeal of New Zealand

This paper is the result of the participation by Sir Robin Cooke in a Judicial Colloquium on the Domestic Application of International Human Rights Norms that was held in Bloemfontein, South Africa in September 1993. As the author notes, it was written on a train journey from Johannesburg to Cape Town. It was written on request, after the Colloquium had been held, to set down the essentials of the contribution he had made to the discussions during the Colloquium. The paper will also appear in due course in the Commonwealth Law Bulletin *published by the Commonwealth Secretariat in the formal report on the proceedings of the Colloquium. The paper considers inter alia the Bill of Rights Act 1990 and the cases applying the Act that had been decided up to the time it was written.*

The human rights scene in New Zealand seethes with activity. International instruments, including but not confined to those which the state has ratified, influence the interpretation and development of the domestic law. International jurisprudence from a wide range of countries is consulted and borrowed from by the Courts, as is appropriate in a small country willing to learn from precedents established in larger jurisdictions. As well there have been distinctive legislative and judicial developments, perhaps most particularly in the field of race relations. Having been asked by the Colloquium organisers to commit my offerings to paper, I will attempt a sketch of some salient features of the scene. The caveat must be entered that the current President of a Court which is decidedly in medias res ("part of the action" for those who prefer a contemporary phrase) must be circumspect in writing about controversial matters and unsettled questions. The title reflects the fact that most of what follows was written without recourse to a library on an agreeable train journey from Johannesburg to Cape Town. Accuracy in detail is therefore not warranted.

Freedom of expression and a Bill of Rights

For more than forty years, since the abolition by unchallenged statute of the Upper House (the Legislative Council), New Zealand has had a unicameral legislature. Parliament consists of the Queen and the House of Representatives. The royal functions have been delegated to a Governor-General appointed on the advice of the Government of the day. In practice the Government has been the successful party in the most recent triennial general election and a two-party contest has been the pattern. There is full adult suffrage, women having been accorded the vote as long ago as 1893: centennial celebrations are underway. A referendum is about to be held on whether proportional representation should be introduced, in order better to provide for minority group representation! The only specific minority representation at present is provided by four Maori seats, for which persons may register as electors. Maori can and do, however, vote and stand for election in other seats, and some have succeeded. The Speaker of the House is the first Maori to have held that office. Black Rod is also a Maori.

In 1990 Parliament enacted by ordinary statute a Bill of Rights. The New Zealand Bill of Rights Act 1990 is not entrenched nor declared to be supreme law. Soundings of public opinion had been thought to show that the community was not ready for those more thoroughgoing changes. The effect of s 4 of the 1990 Act is that ordinary enactments may override the rights and freedoms affirmed in the Bill of Rights, but the effect of s 6 is that this will only occur if the legislation is sufficiently explicit:

> **6. Interpretation consistent with Bill of Rights to be preferred** – Wherever an enactment can be given a meaning that is consistent with this Bill of Rights, that meaning shall be preferred to any other meaning.

Note the words "can" and "shall" which make s 6 a key and strong section. "Can" has been held not to cover strained interpretations: the possibility must be reasonably open. Still, the section places in the hands of the Courts a weapon of justice of an effective nature and reach. At the same time, by laying down a rule of interpretation it satisfies the dogma of the sovereignty of Parliament, so dear to Diceyans.

The latter may be a dying breed, but that is another story.

The practical operation of s 6 may be illustrated by contrasting decisions concerning the breath and blood-alcohol testing of motorists. The provisions of the Transport Act authorising these procedures contain no reference to the Bill of Rights. By s 23(1)(b) of the Bill of Rights, everyone who is arrested or who is detained under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right. The Transport Act provides for a roadside breath screening test; if it is positive, the driver is required to undergo at a police station an evidential breath test or a blood test, which may form the basis of a prosecution. It has been held that the operating requirements of this legislative scheme are inconsistent with, and therefore exclude, s 23(1)(b) at the preliminary roadside stage. But the decision has been otherwise at the police station stage. Before any evidential test is administered the driver must be told of his or her right to legal advice and must be given a reasonable opportunity (telephone consultation is usually enough) of exercising that right. Despite initial misgivings on the part of the prosecuting authorities, the Courts have been told that this law is now working well; often legal advice reassures the driver and leads to cooperation, yet it is also, of course, a safeguard against abuse of police powers.

By s 3, the New Zealand Bill of Rights Act applies to those who perform public functions, including naturally the judicial branch of the government of New Zealand (as the Courts are described in the section), so the Act necessarily applies in the evolution of the common law. It may require occasional modification of hitherto established common law rules; for, although the Bill of Rights can be overridden by a sufficiently explicit statute, it cannot be overridden by the common law. More importantly, the Bill of Rights may be of prime influence in the shaping of the common law in areas hitherto grey or unexplored. Where any of the rights and freedoms affirmed in Part II and referred to in s 2 are relevant, the developing common law must be moulded so as to give effect to them. The rights and freedoms are generally declared in terms familiar in international instruments, as is to be expected from the long title of the Act. It is an Act:

> (a) to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

It would be out of place to detail the rights and freedoms here. Suffice it to mention some of particular significance. Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment; and the right not to be subjected to medical or scientific experimentation without consent. As to the subjects of this Colloquium the directly relevant provisions are in ss 14 and 19:

> 14. **Freedom of expression** — Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
>
> 19. **Freedom from discrimination** —
> (1) Everyone has the right to freedom from discrimination on the grounds of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

Before returning to those provisions I will continue to note briefly some of the other rights and freedoms.

Some rights and freedoms

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise; and the right not to be arbitrarily arrested or detained. The expressions "unreasonable" and "arbitrarily" have been the subject of debate in the Courts. Can a search — for example, a search of a motor car resulting in the discovery of illicit drugs — be reasonable if it is not lawful? Canadian Supreme Court decisions seem to indicate the answer No. We have learned much from Canada, whose Charter is indeed the document that had the greatest direct influence on the wording of our Bill of Rights. But so far a majority of the New Zealand Court of Appeal have not been prepared to accept the Canadian answer to the question.

So far, the New Zealand cases point to a rather less categorical answer. There may be special circumstances wherein an unlawful search is nevertheless reasonable, as when a police officer catches a glimpse of a partly concealed corpse in a vehicle which he may have no apparent power to search. But at best such cases must surely be rare. To say that the police may reasonably act unlawfully is to set foot on a slippery slope. An alternative solution is to accept that a search is in breach of s 23(1)(b) of the Bill of Rights yet to allow the results to be admitted in evidence. The New Zealand Courts, not having to wrestle with the Canadian Charter test relating to the bringing of justice into disrepute, have evolved a straightforward rule. Prima facie, evidence obtained as the result of a breach of the Bill of Rights should be excluded. Again, only in special circumstances would its admission be fair and right.

The rights of persons arrested or detained under any enactment have already been touched on. The reference "under any enactment" was inserted in the Act to emphasise that in New Zealand there are no common law powers of official detention. The affirmed rights include the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful. Rather curiously, this combination of provisions has caused or permitted some Judges to suggest that some kinds of unlawful public detention, such as detention of a mere suspect for interrogation, are outside the scope of s 23(1)(b) of the

Bill of Rights. The suggestion is that this is not covered because it is neither a formal arrest nor a formal detention under an enactment. If one believes that unlawful detention by the police, purportedly acting in accordance with their powers, is the very kind of thing which a Bill of Rights is intended to guard against, one cannot be attracted to that reasoning. But at least, s 22, affirming the right not to be arbitrarily arrested or detained, has not been subjected to any restrictive interpretation.

The rights of persons charged with offences are set out at some length. In the main they are on obvious lines. It may be of some interest in South Africa to note that the New Zealand provisions include the right, except in military law offences, to the benefit of a trial by jury when the penalty is imprisonment for more than three months. In any event there is a right to a fair and public hearing before an independent and impartial Court; a right not to be compelled to be a witness or to confess guilt; and a right of appeal against conviction and sentence. Natural justice must be accorded by any tribunal or other public authority having the power to make determinations in respect of rights, obligations, or interests protected or recognised by law. The corollary is also affirmed, a right to apply in accordance with law for judicial review of the determination. Finally it may be noted that, with some exceptions, the Bill of Rights applies so far as is practicable for the benefit of all legal persons, as well as for the benefit of all natural persons.

Rights and paper aspirations

Through the rule of interpretation enshrined in s 6 quoted above, the Bill of Rights may be said to permeate statute law. Through its paramountcy over other law, as explained above, it may be said to permeate the common law. It cannot rightly be seen as some special and somewhat arcane or foreign phenomenon standing apart from the day-to-day practice and administration of the law. We are slowly but surely learning this approach in New Zealand. It should be, and no doubt is, taught at the most elementary levels in the law schools. In the language being adopted in the Bloemfontein Statement, "in democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law". And, in blending them into the corpus of the law, Judges have to learn to rise above any black-letter technique, avoiding what Lord Wilberforce has famously labelled "the austerity of tabulated legalism". In Privy Council judgments often cited, the great British Judges Wilberforce and Diplock have recommended a generous approach to the interpretation or application of broad-textured human rights declarations. It is the generality and character of the declarations that make this approach apt. Whether or not a given declaration is also entrenched in supreme law is beside the point.

Most of the Bill of Rights cases that have come before the New Zealand Courts so far have arisen in criminal proceedings. Hence the unpopularity of the Bill of Rights with some to whom "law and order" policies have a ready appeal. Indeed, after an initial period when many people, including many lawyers, tended to think of the Act as a token and toothless thing, there ensued something of a flood of Bill of Rights points, as criminal advocates came to realise that the Courts were not merely paying lip service to this historic development. It has become necessary to quell this tendency by emphasising that points must be clearly taken at the trial and based on a sufficient evidential foundation, although if such a foundation is established (at a voir dire or deposition hearing, for instance) the onus has been held to fall on the prosecution to negative a material breach on the balance of probabilities. A highly desirable factor now beginning to reduce the incidence of criminal Bill of Rights cases is a better appreciation by the police and other public authorities of the need for compliance.

Civil law

But the potential of the Bill is by no means confined to the criminal law, as may be illustrated by two 1993 cases[2] encouraging freedom of expression. Both show how the Bill may be used in situations where the law is not clear. In speaking of them it is necessary to be careful, as both came to the Court of Appeal at the interlocutory stage and further proceedings are pending.

In one, an "investigative" television documentary is complained of by manufacturers and distributors of a certain brand of ionisation smoke detectors. They claim, as plaintiffs, that the programme meant that the products contained radioactive material rendering them a major health hazard. The programme included contributions by scientists supporting a conservation cause who appeared to lend some support to the suggestion. It also featured the reactions of members of the public whose concern had been aroused – such as a housewife and mother who said that she had consigned the device to an outside garage or shed: "I would not let my kids near it". The plaintiffs plead two causes of action, malicious falsehood and defamation. In addition to damages for injury to their business and reputation, they seek an order directing the television company to publish a corrective statement.

The defendants moved to strike out the latter prayer on the ground that it is a form of relief not available in the Courts. Certainly it is not alluded to in such standard works as *Gatley on Libel and Slander* and *Salmond on Torts.*

But there is strangely little direct judicial authority on the question in the Commonwealth, and apparently no case containing an examination of it in depth. Various scholars, such as Professor Fleming, favour the introduction of such a remedy. That there seems to be no compelling reason of public policy against it is suggested by the enactment in New Zealand of jurisdiction to order the publishing of corrections in the specific fields of broadcasting (but the complaint of the plaintiffs to the Broadcasting Standards Authority has been stymied by the retort of the defendants that the matter is sub judice and that a possible jury trial should not be prejudiced) and misleading trade descriptions (the Commerce Commission may apply to the High Court for an order). On the other hand the press is of course insistent that editorial freedom is sacred. Media attitudes have not changed since in Anthony Trollope's Phineas Finn and Palliser novels, Mr Quintus Slide edited *The People's Banner.*[3]

The Court of Appeal

unanimously took the view that in principle the jurisdiction to grant mandatory injunctions should not be fettered and is wide enough to cover this type of case. One member of the Court of three, however, considered that in this particular case the likelihood of any order being obtained is so slight that the prayer should be struck out. The decision of principle remains; and, while it can be reached without the aid of the Bill of Rights, s 14 has been invoked in support. As has been seen, the section extends to the right to impart information. Especially if, for example, a programme is shown to be seriously damaging, false and malicious, the section is capable of providing the victim with effective redress in kind. Let it be added that the defences pleaded include the claim that the programme was true, so I am expressing no view about the final outcome.

Parliamentary privilege

The other case, *Prebble v Television New Zealand Limited*, goes the other way, showing how the section can be used in aid of the defence. The plaintiff, a former Cabinet Minister, is suing on another "investigative" television programme. Its theme is alleged to have been that the former Labour Government, moving from its traditional position to a sudden conversion to the prevailing market philosophy, had decided to sell off public assets without a mandate from the electorate; and that the plaintiff in particular had come to support this policy, contrary to his true convictions, in return for donations from business leaders to his party's funds. The defendant is pleading justification, qualified privilege and fair comment. Some one hundred pages of particulars include a number of references to speeches made by the plaintiff in the House of Representatives and other statements which may come under the heading of proceedings in Parliament. On an application to strike out particulars of his claim, the Attorney-General, with the authority of the Privileges Committee of the House, has maintained that to allow them to be investigated in Court would be to transgress parliamentary privilege.

As we have been reminded by *Pepper v Hart* in the House of Lords, s 9 of the Bill of Rights 1689 provides

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

For some time the New Zealand Courts have acted on the view now endorsed by the House of Lords that this ancient provision does not prevent a Court from obtaining aid from *Hansard* in appropriate cases in interpreting ambiguous legislation. In the *Prebble* case, however, the Court of Appeal has held that s 9 does in fact apply. The former Minister's motives for his speeches are being called in question by the defence. The Minister's right to the vital freedom of parliamentary expression is not to be permitted to be cut down by having his motives questioned by such means.

The more difficult point is the consequence for the future of the action. It cannot safely be assumed at this stage that the references to parliamentary debates are not of sufficient moment to the defendant's case to be dismissed as insubstantial or immaterial. Or at least such is the view of the majority of the Court. If a defendant is to have one hand tied behind his back in defending his or her comments on statements made within the shelter of parliamentary privilege, the result will be a gross restriction of freedom of speech in a democracy. A solution to the dilemma can be reached without resort to the Bill of Rights, but again s 14 seems of help. It can be seen as just as important as the long-standing s 9. The New Zealand Bill of Rights 1990 emphasises everyone's right to freedom of speech; the United Kingdom Bill of Rights 1689, also part of New Zealand law, emphasises the parliamentarian's right to freedom of speech in his own domain. Neither enactment need be seen as totally eclipsing the other.

The solution adopted by the Court of Appeal has been to order that the action be stayed unless and until parliamentary privilege is waived, both by the House as a whole and the plaintiff. This appears to be in accord with such comparatively few precedents as there are in Commonwealth jurisdictions, yet the Privileges Committee has now resolved that it has no power to waive privilege, even (it seems) on a petition for that purpose. Prominent among the reasons given is the need to protect witnesses before parliamentary committees, although it must be observed that neither in argument nor in judgment was there any suggestion in the case that the privilege of a witness could be waived without his or her joining in the waiver. Whether the Committee is right, and whether its view could bind subsequent Houses, does not matter for present purposes. The present point is simply that the 1990 Bill of Rights and its declarations of principle can be seen, in an area where the law has been uncertain, as of equal influence in working out a solution.

Another caveat remains to be added. Both the recent cases used here as illustrations of the permeating theme are, or may be, under appeal to the Privy Council. In evolving New Zealand law, the New Zealand Courts are still subject to the jurisdiction of their Lordships. The last word on evolution in these two instances could therefore rest with two other participants in the Colloquium.

The *Spycatcher* case

At any international gathering of lawyers having freedom of speech among the items on the agenda, the *Spycatcher* litigation with its territorial versions is a natural focus of attention. I must therefore not fail to lay claim to the status of a *Spycatcher* old boy, and even to ask whether any other Judge had to write as many as three judgments on the subject.[4] The stages of the New Zealand litigation, initiated by Her Majesty's Attorney-General, are reported consecutively in [1988] 1 NZLR from page 129 to page 183. At the last stage we declined discretionary leave to appeal to the Privy Council, partly on the ground that the case required the Court to balance the claimed interests of the British Government against the claimed interests of the New Zealand press and public. The approach of a New Zealand Court might be different from (not surely "to" as the headnote says) that of a British Court, and it would have

placed the Privy Council in an invidious position if required to determine for New Zealand a clash of interests of that kind.

What we did with the litigation in New Zealand was to recognise that Wright, and others in any national security service, must owe a lifelong duty of confidence to the government of their country. It did not seem to us to matter whether the duty stemmed from statute, equity, the royal prerogative or any other conceivable source. The duty may stem from more than one source, but surely it exists. Nor did it seem to the Court of Appeal, contrary to the opinion of the then Chief Justice at first instance, that in one aspect the case might be characterised as an attempt to enforce in the jurisdiction the penal law of another jurisdiction. The fact that the New Zealand Government had been persuaded to lend support to the action brought by the Government of a country in a sense our progenitor and now our ally was enough to overcome that obstacle; here we differed from the result reached later (not earlier, *pace* Lord Griffiths in [1988]3 All ER at 655) by the High Court of Australia, who disposed of the case by determining that it was non-justiciable in Australia.

We were not willing nevertheless to rubber-stamp the New Zealand Government's approbation of the British action. The late deeply-respected jurist Dr F A Mann subsequently told me that he thought we had not given enough weight to the wishes and assessments of the two Governments. He is as likely to be right as anyone. The factors turning the scales for us, in refusing first an interim injunction and secondly any permanent relief by way of injunction, account of profits, exemplary damages or otherwise, against the local newspaper which had reproduced extracts from the book published in the London *Sunday Times*, were twofold. It verged on the absurd to restrain a New Zealand newspaper from reproducing information or alleged information that was already in the international public domain. Moreover, for the purpose of the proceedings in New Zealand (and likewise those in Australia) the British Government formally accepted that the injurious stories in Wright's book were true. I remember the marked impact on our Court when it became clear that so much was conceded.

Breach of confidence by a public servant is a serious and commonly reprehensible step, as all human rights instruments recognise expressly or by implication. Occasionally though – and it may be only very occasionally – the time comes for what Lord Denning called "whistle blowing".

Concerned as we were with the New Zealand public interest, not automatically to be identified with the United Kingdom public interest, we had little doubt that the defence that publication was in the public interest had to prevail in the light of the factual concession. Sometimes it is called the iniquity defence, too narrow a description. The circumstances in which the judiciary can properly hold that a Bill of Rights freedom of expression prevails over a Bill of Rights or international instrument recognition of confidentiality as a protected value cannot be encapsulated in a phrase. Like so much else in the law, everything depends on facts and circumstances. The true motives of the media in an expose or an ostensible one may have to be weighed in deciding the question.

Lord Lester of Herne Hill, and this is the first and possibly a technically proleptic opportunity of having the pleasure of writing that designation, has pointed out that in the *Spycatcher* litigation the New Zealand Court of Appeal did not cite international instruments. That is true. In mitigation one can only say that neither side asked us to, and it was before the era of the New Zealand Bill of Rights. If our judgments needed further support, as Francis Mann thought, we could have found it in that quarter. The point to stress is the one so well made by numbers at the Colloquium. Any restriction of freedom of speech is to be regarded in a democracy with deep suspicion, to be subjected to the closest scrutiny. It is a freedom always entitled to the benefit of the doubt.

Appeals to Privy Council

All democratic nations contribute to the universal law, slowly but inevitably evolving, as to freedom of speech and other basic human rights. Partly it is that consideration which leads to the doubts already hinted at regarding the retention of a New Zealand appeal to the Privy Council in England, composed essentially as it is of English and Scottish Judges. How can they honestly speak for New Zealand in contributing to an international process? It is asking too much of them, schooled as they are in the belief instinctively that English or Scottish law knows no fellow, to see issues from a South Pacific perspective.[5] It is asking too much of New Zealand Judges to expect them to fill a role different from that of their British, Canadian and Australian counterparts and contemporaries, to accept a British legal intellectual yoke – much though the leaders of British human rights thought are admired. Legislators and the general public do not understand these truths and are seldom encouraged to understand them by the media. That is but one respect in which faith in the freedom of speech enjoyed and at times exploited by the media is the ultimate fallback position.

Anti-discrimination legislation

Long before the 1990 Bill of Rights with its generally-expressed right to freedom from discrimination, New Zealand had specific legislation against discrimination. In recent weeks there has been enacted the Human Rights Act 1993.

> An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection for human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights.

An elaborate piece of legislation of 153 sections plus schedules, the Act enlarges upon the preceding statute law, an account of which and the leading cases thereunder will be found in *Constitutional and Administrative Law in New Zealand* by Philip Joseph (Law Book Company, Sydney, 1993) 130 et seq. The Act constitutes a Human Rights Commission chaired by a Chief Commissioner (currently an academic lawyer, Margaret Mulgan). Its members include the

Race Relations Conciliator and the Privacy Commissioner: the office of the latter, created by the Privacy Act 1993, adds another player to the rather crowded human rights stage in New Zealand. It is largely a response to the power of the computer; the first holder of the office is Bruce Slane, a former President of the New Zealand Law Society and well-known internationally.

The role of the Human Rights Commission is educational in the formation of public and political understanding of human rights issues. There are wide powers of investigation and report. The Act lists prohibited grounds of discrimination and, with sundry exceptions and qualifications, outlaws action based on such grounds in various fields of activity – employment, vocational control, partnership, education, disposal of land and accommodation, access to public facilities, and so forth. Complaints of breaches may be made to the Commission, and those found to have substance are usually settled by the Commission's mediation. Failing settlement, the Commission may bring proceedings before a body of a judicial character, the Complaints Review Tribunal. The Tribunal has extensive powers to grant relief by way of mandatory remedial orders, monetary compensation for loss or humiliation and distress, etc. From its decisions there are full rights of appeal on both fact and law to the High Court, where the proceedings are to be reheard before a Judge sitting with additional members. Finally there is a right of appeal by leave to the Court of Appeal on questions of law. Thus the human rights administrative and adjudicatory machinery is linked to, and in the judicial aspect integrated with, the basic Court structure of the state, a pattern to be found also in other fields in New Zealand.

No doubt the categories of discrimination are never closed, but the draftsman of the 1993 Act (I decline to say "draftsperson") appears to have made something not far from a bid in that direction. Anyone in search of a catalogue might care to consult s 21. Taking into account the numerous specific sub-classifications in a section notable for dotting i's and crossing t's, there seem to be more than fifty prohibited grounds of discrimination. Some of the phraseology is unexpected, and some of the substance striking:

> Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions
>
> Political opinion, which includes the lack of a particular political opinion or any political opinion
>
> The presence in the body of organisms capable of causing illness.

Thus s 21 might be called in some respects, and without depreciating its laudable and necessary purpose, discrimination for the connoisseur. But so far the bulk of complaints apparently relate to more familiar discriminatory practices, such as sexual harassment in the workplace or racial intolerance. For the most part the Tribunal has been able to keep its feet on the ground. For instance "robust banter" was found to be not truly insulting to Australians. Perhaps on the other side of the line was the Tribunal's finding of breaches of the Act by newspapers carrying an advertisement offering a position as a service station attendant, required to pour petrol, to a "keen Christian person". Although the Prime Minister of the day did not fail to take the opportunity of pronouncing the law to be an ass, he did so without expressly drawing to the attention of the people that in this instance what was involved was law enacted by Parliament.

The Waitangi cases

The present visit to South Africa has underlined that the New Zealand experience in recent years in dealing with the justiciable claims of an indigenous people may not be without some relevance to the problems awaiting a reconstructed Republic. In the newspaper *Business Day*, September 7, 1993, an article from Simon Barber in Washington conveys the views of consultants and officers of the World Bank there; while markets and property rights should be fortified, the status quo is economically irrational. Instead of wide-scale, capital-intensive white commercial farms, there should be, according to the argument, a shift towards small-scale farming with black smallholders: farm sizes not exceeding "what one family with a tractor would comfortably manage". It is said that no one aside from the PAC is suggesting expropriation but that, once the ANC is in power, the urban trade unions and the needs of unemployed urban youth should not be allowed to monopolise attention. A rural restructuring will be required. Claims to land both general and specific will have to be adjusted. All this for economically rational rather than racially-based reasons. In any event, Mr Nelson Mandela is reported as having promised that privately-owned land and property would not be seized by an ANC government.[6]

The New Zealand analogy cannot be pressed too closely. The overwhelming predominance of black numbers in South Africa contrasts with a New Zealand situation in which less than 15 per cent of the population are Maori, although their growth rate is faster. It is in ideas capable of modification or development, rather than imitation, that the New Zealand developments may possibly be helpful.

The judiciary has a part to play in the just evolution of a diverse yet integrated and functional society. The following account reflects largely the lessons of sitting in a series of cases in the New Zealand Court of Appeal in which the Court was faced, probably as never before, with the need to adjudicate for a society now multicultural – there are many from other South Pacific Islands or of Indian or Chinese extraction – and formed fundamentally by the union of two races, the predominantly British European and the Polynesian Maori. When we had to confront this task virtually afresh and realistically, it was a far cry from the nineteenth century colonial days when Judges could speak of the founding Treaty of Waitangi 1840 as "a praiseworthy device to pacify savages" or "a simple nullity".

As any adjudication in the sphere of race relations is almost sure to be, the answers rendered by the Court of Appeal have been followed by controversy and misrepresentation. The misrepresentation has not been confined to the uninformed; some who have aspired to, and probably

deserve, the accolade of statesmanship have been driven to descend. In writing a judgment in this field one is acutely conscious of the risk of misconstruction. One's words have to be chosen carefully. Still, it is hard for anyone writing about a race relations case to be completely objective. With academic lawyers, for instance, ingrained approaches or pet theories tend to creep in. So it is that, while recognising that there has been much admirable academic and even scholarly writing on the subject, I should prefer those seriously interested in it to read the Court of Appeal judgments themselves before commentaries thereon. To date the main reported judgments are *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the lands case); *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (the forests case); *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (the coal case); *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (the fisheries case); and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (the Sealord case).

The Treaty of Waitangi 1840 was made between Queen Victoria (by her representative, Captain William Hobson) and numerous Maori chiefs (there were more than 500 signatories eventually). It is a deceptively simple document of only three articles, with introductory recitals and a conclusion. There are English and Maori versions, which do not completely tally. The key features are that the Queen acquires governance or sovereignty and the Maoris become British subjects, but they are guaranteed the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties so long as it is their wish and desire to retain the same in their possession. If they are disposed to alienate, the Crown has an exclusive right of pre-emption. The Maori text uses "taonga" (treasures) for the other properties, a term which has been held to embrace the Maori language, now under threat of extinction: see the Broadcasting case.

Regrettably, over the years the pressures of colonial expansion brought with them many breaches of the Treaty, such as acquisition of lands at undervalue or from Maori having no authority from the tribe to sell, the compulsory taking of land or its seizure for alleged rebellion, failure to set aside promised reserves, use of trust land for other purposes, and so forth.

The Treaty was always appealed to by Maori complainants as their intended safeguard. At times a more cynical attitude to it prevailed on the European side. For long the ascendant public policy was integration: through intermarriage and assimilation Maori distinctiveness was seen as ultimately disappearing. But in much more recent times the emphasis has shifted to the importance of preserving a flourishing Maori identity and culture, and to raising their socio economic status.

For long, too, the orthodox view was ascendant that the Treaty was of no legal force or value, unenforceable in the Courts except in so far as it might be incorporated in the law by statute. A Privy Council decision in 1941 was the highwater mark of that approach: *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. But that was half a century ago. The years since the second world war have seen a vast general change in international attitudes to the rights of colonised indigenous peoples. New Zealand law, like Canadian and Australian law, has naturally begun to be evolved against a changed background of values and circumstances, and with a changed spirit. There are those who contend that the Treaty must be seen as the foundation document of New Zealand, not only in fact as it undoubtedly was, but in law also; a kind of grundnorm, a political compact as fundamental for our South Pacific country as was Magna Carta for England. The Courts have not yet had to face squarely the profound jurisprudential questions raised by such contentions; and long may that remain the position.

The Treaty in statute law

In any event there have now been some very significant recognitions of the Treaty by statute. Especially notable is the Treaty of Waitangi Act 1975 and the amending legislation extending its scope. The Act establishes the Waitangi Tribunal, with a majority of Maori members, whose function is to inquire into and make recommendation to the Crown upon claims submitted by Maori. Policies, acts or omissions of the Crown, and even parliamentary legislation, as far back as 1840 may be the subject of claims that Maoris have been prejudicially affected inconsistently with the principles of the Treaty of Waitangi. For the most part the Tribunal's conclusions are recommendatory only, although in strictly limited spheres it may make binding orders. In practice, however, its recommendations have a moral force which cannot be and is not ignored by the Government of the day. The recommendations are not necessarily implemented *in toto* or in the precise manner contemplated by the Tribunal, but they lead to negotiations and sometimes settlements on a major scale. The present Government has embarked on a policy of endeavouring to settle all outstanding claims by the end of the century. Possibly this is optimistic, but real progress is being made, real goodwill displayed to practical effect.

In the changes the Courts have had a formative role stemming in part from other legislation recognising the Treaty. The prime example is the State-Owned Enterprises Act 1986, a measure prompted by the prevailing market philosophy and having the immediate object of ensuring the conduct of certain state activities on a commercial basis, with the prospect of ultimate privatisation. The risk that land and other assets held by the Government might pass out of public hands and so become unavailable for satisfying Maori claims led to the insertion of a provision which was to prove of profound effect. It is section 9:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

What the legislators meant by the "principles of the Treaty" was not defined; it is doubtful whether there was any clear concept in their minds. Necessarily it fell to the Courts to interpret the phrase. The line of cases already cited have turned chiefly on its interpretation and application. In the leading case, the lands case, the

analogy of partnership was selected by the Court of Appeal as a sort of shorthand. The Crown and the Maori are seen as partners owing mutual duties of good faith and reasonableness in their dealings. The duties of the Crown extend to providing proper safeguards for Maori claims and remedies for part breaches of the Treaty. The duties of the Maori include reasonable cooperation and loyalty to the Queen and the state.

These may seem generalities, and so they are, but they have had solid and demonstrable practical effect. Perhaps the best illustration concerns sea fisheries. The overfishing by non-Maori interests of traditional Maori fishing grounds, on which they had depended for subsistence, created a situation unforeseen at the time of the Treaty. Accepted as a living instrument, the Treaty had to be applied in a way taking into account the realities of life in present-day New Zealand. In effect the Waitangi Tribunal (which is not strictly a Court) and the Courts produced by their decisions a situation in which it became obligatory on the Government to provide for Maori some reasonable share of national fishing resources. In effect, in the Sealord case, the Court of Appeal approved a pact or deed of settlement between the Government and leading Maori negotiators whereby, by purchase of shares in the leading fishing company and otherwise, the Government provided more than 23% of the fishing quotas for Maori, with a 20% share of any new quota issued in future. This is quite a spectacular, yet a just, result; for, although they had legitimate grievances as to past virtual appropriation of their fisheries, the Maori people compose less than 15% of the total population.

Let it be repeated that the foregoing pages about the Treaty of Waitangi, like the rest of this paper, are no more than a sketch. The next steps for those wishing to explore the subject further would be to read the decisions to which references have been given and the reports issued by the Waitangi Tribunal recording the results of its extensive and continuing investigations. The whole subject may be in a sense linked with the New Zealand Bill of Rights Act 1990. In providing redress for past injustices the Waitangi decisions may be classified as a form of positive discrimination within the concept of s 19(2) of that Act.

My colleagues and I have spent much time on Bill of Rights and Treaty of Waitangi cases. It is stretching and anxious work, calling I think for efforts to follow an approach different from that required in, or sufficient for, cases in traditional fields of private law. The reward to be found in these labours is a sense of the worthwhile and probably indispensable contribution that the judiciary and the legal profession can make towards the evolution of more just national and international societies. □

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1 In November 1993 the referendum resulted in a clear majority for proportional representation, a form of which ("MMP") will now be introduced.

2 *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 and *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513.

3 Trollope drew a rather odious character, quite without the charm of some editors of the present day, who was nonetheless sincere in his belief that his scandalous "revelations" were in the public interest. One difficulty was that he had ceased to be able to distinguish truth from falsehood.

4 Other old boys at the Colloquium are Lord Browne-Wilkinson, who when Vice-Chancellor delivered an early *Spycatcher* judgment in England; President Michael Kirby, who wrote the first majority judgment in the New South Wales Court of Appeal; and Anthony Lester, beside whose record of arguing the case sixteen times my own judicial figure pales into insignificance.

5 The recent judgment of their Lordships in *Attorney-General for Hong Kong v Reid* contains some significant concessions on this point. These are valuable, but they cannot remove the basic problem.

6 Mr Mandela said that the SADF controlled about 40% of the country's land which the ANC would "certainly" use to compensate those who had lost land under apartheid. The prevalence of initials in South African political discourse – other examples are NP, CP, IFP, DP, AZAPO, SACP, TVBC, COSATU, CODESA, TEC is supposed to have led an irreverent commentator to suggest that the Republic be renamed South Acronym.

Recent Admissions

Barristers and Solicitors

Adno CD	Auckland	5 November 1993
Gallate LN	Napier	5 November 1993
Lim S	Auckland	7 December 1993
Plowman CL	Napier	5 November 1993
Ryan DM	Christchurch	17 September 1993
Sang ML	Auckland	24 September 1993
Saul SF	Auckland	24 September 1993
Shea SN	Auckland	24 September 1993
Smith CG	Christchurch	17 September 1993
Smith CH	Auckland	24 September 1993
Steel AK	Christchurch	17 September 1993
Strang CJ	Auckland	24 September 1993
Strathdee TS	Auckland	24 September 1993
Sullivan AJM	Christchurch	17 September 1993
Sullivan KP	Christchurch	17 September 1993
Sullivan PM	Auckland	24 September 1993
Tapper ARP	Auckland	24 September 1993
Taylor IR	Christchurch	17 September 1993
Thai SJAM	Auckland	24 September 1993
Thomson DJD	Christchurch	17 September 1993
Tulloch SM	Auckland	24 September 1993
Van Noort JF	Auckland	25 November 1993
Vickers JK	Auckland	24 September 1993
Vukotic HE	Auckland	24 September 1993
Wallis RF	Wanganui	27 August 1993
Weil SCD	Auckland	24 September 1993
Wilding AJ	Christchurch	17 September 1993
Williams JE	Auckland	24 September 1993
Williams KM	Auckland	24 September 1993
Wilson DM	Auckland	24 September 1993
Wilson SN	Auckland	24 September 1993
Wilton MV	Auckland	24 September 1993
Wise NM	Auckland	24 September 1993
Wright JV	Auckland	24 September 1993
Wright M	Auckland	24 September 1993

Sino-British discord over Hong Kong

By Maurice Kelly, Barrister and Solicitor of the High Courts of Australia and New Zealand

This article considers some of the issues and problems inherent in the change of status for Hong Kong in 1997 as reflected in the agreements between the great powers involved, and the new proposals of Governor Patten. The author, Maurice Kelly, is a New Zealander who began his career in the British Foreign Service, in which capacity he was seconded to a course in Mandarin Chinese and lived for a time in Hong Kong. He worked in recent years as a law officer with the Attorney-General's Department of the Commonwealth of Australia, retiring in 1990.

As the Thatcher memoirs make clear,[1] the British had no real alternative to giving up Hong Kong. As early as 1982, negotiation with the Chinese became imperative because of business uncertainties relating to the expiry of the New Territories lease in 1997. London's opening strategy was to maintain British administration for the foreseeable future in return for a formal cession of sovereignty in respect of Hong Kong Island.

That soon foundered upon Chinese determination to undo the legacy of the "unequal treaties". Effective sovereignty was not negotiable. If necessary, the Chinese would put recovery of sovereignty ahead of the stability of the colony. Casually but firmly, Deng Xiaoping reminded Mrs Thatcher that they could walk in and take Hong Kong in an afternoon.

The lesser aim was to secure as much autonomy as possible and guarantees as to the continuance of the local way of life. Chinese models foreshadowed agreement on that basis. First, the concept of "one country, two systems" envisaged the possibility of a capitalist enclave within the socialist state of the Chinese People's Republic. Secondly, Article 31 of the Chinese People's Republic Constitution made provision for special administrative zones.

Pragmatism strengthened the case for controlling Hong Kong as a substantially autonomous region. It was the key facilitator in Chinese national development, the largest source of foreign earnings and an important window on the outside world. The interest in maintaining those advantages was compelling and suggested taking over with minimum disturbance to the status quo.

Convergent Sino-British aims were embodied in the Joint Declaration of December 1984 and related documents.[2] This arrangement, which constitutes a treaty, provided for the return of Hong Kong to the Chinese People's Republic on 1 July 1997 and its transformation into a Special Administrative Region. Guarantees were included in respect of local autonomy and the current social and economic systems. The Chinese elaborated, as an annex, their basic policies for governing Hong Kong. In the Hong Kong Act 1985 (UK) the British expressly abandoned "sovereignty or jurisdiction" as from 1997.

As required by the Joint Declaration, the Basic Law of the Special Administrative Region was formulated incorporating the agreed principles. It was adopted by the National People's Congress of the Chinese People's Republic in April 1990. The Basic Law was not a unilateral production. The drafting committee consisted of 35 members of the Chinese People's Republic and 23 from Hong Kong assisted by a consultative group of 200 Hong Kong citizens. Drafts were exposed to public scrutiny. British involvement has been acknowledged and the British Government would appear to have been satisfied with the outcome. Foreign Secretary Douglas Hurd felt able to recommend the Basic Law to the United Kingdom Parliament.[3]

In the context of a Communist state still acutely resentful of 150 years of Western capitalist penetration and still largely closed off to normal international relationships, the Joint Declaration and the Basic Law involved expedient concessions to the practicalities but amounted also to quite a generous act of faith by the leadership.

To reach that outcome, negotiators such as Sir Percy Cradock and the late Sir Edward Youde called in the substantial credit established by a distinguished line of British sinologist-officials and had undoubted catalytic influence. They would be strangely vilified as "pusillanimous" for their trouble.[4] In fact, as Baroness Thatcher also makes clear, the policy was decided at Westminster rather than in Whitehall. She and Foreign Secretary Sir Geoffrey Howe both played a key role personally and her Cabinet fully endorsed the agreements.

In one aspect, the Basic Law establishes something like a federal structure, but with an unusually restricted application of central government laws (Annex III). The matters covered relate to national symbols, regulations concerning diplomatic privileges and immunities, nationality law and decrees in respect of the territorial sea. Further, a limited range of powers is conferred exclusively on Beijing, the relevant

subjects being:
- Foreign affairs and defence;
- Declaration of war and action in any emergency beyond local control;
- Access of foreign warships and foreign state aircraft;
- Interpretation of the Basic Law (by the Standing Committee of the National People's Congress).

Some other matters for determination by Beijing really involve concomitant powers. The following are examples:

- Appointment of Chief Executive of Hong Kong and principal officials (subject to local consultation);
- Assistance of Chinese People's Republic garrison in maintaining public order or for disaster relief (on request by Hong Kong Government);
- Invalidation of Hong Kong laws for repugnancy to Basic Law (subject to procedures of consultation);
- Air service agreements (consultation);
- Participation of Hong Kong in international organisations.

Plenty of room is left for the "high degree of autonomy" promised by Article 12 of the Basic Law. Hong Kong is given a kind of Dominion status within the relatively monolithic structure of the Chinese People's Republic. The following provisions are noteworthy:

- The Special Administrative Region is vested (subject to the limitations mentioned) with plenary legislative power and with executive power;
- Laws previously in force (including English common law and local Ordinances) continue;
- The Special Administrative Region is vested with independent judicial power, including that of final adjudication;
- Specified individual and civic freedoms are guaranteed; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights will remain in force and be implemented by Special Administrative Region laws;
- The Chinese People's Republic is not to levy taxes or to have recourse to Special Administrative Region taxes or other revenues;
- The Special Administrative Region is to continue as a free port with a convertible currency and to pursue policies of free trade;
- Policies for health, education, social welfare, culture and so on are matters for the Special Administrative Region "on its own";
- Arrangements are specified to guarantee land (leasehold) titles.

On the face of it, the yoke of Beijing is light, and Hong Kong will be entitled to send elected representatives to the National People's Congress. But much will depend on the spirit in which the Basic Law is implemented and on that score, since 1989, some commentators have serious misgivings.

At least there would appear to be no prospect of the Chinese People's Republic packing the local administration with carpetbaggers from the national capital. The position of chief executive is potentially a very powerful one – whether modelled on the British Governorship or, as some say, on the Presidency of the United States. Under the Basic Law, the chief executive is to be chosen by involved procedures in which the Hong Kong voice is dominant. And the position is available only to a person "ordinarily resident in Hong Kong for a period of not less than 20 years". For other principal officials, the period of residence is 15 years.

Localisation, notwithstanding, is not pursued beyond the commanding heights of government. Provision is made for the recruitment of foreign nationals and new residents in most other ranks of the administration and the judiciary. Rights of residence and employment for foreign businessmen, the professions and like occupations are protected. These measures defer to the distinctive international character of Hong Kong and its historical dependence on expatriate abilities.

Hong Kong acquired its first political Governor after the British general election of 1992. Early in October, Mr Chris Patten announced a programme of constitutional change for the colony.[5] The Chinese Government reacted sharply. Sino-British relations soured overnight and have not recovered. In worldwide commentary and within the British establishment, there has been vigorous and acrimonious debate as to the wisdom, propriety and legality of the Patten initiatives. Chinese polemic recaptured the vituperative flair last observed in the frenetic days of the cultural revolution.

Why did Patten deviate from the placid progression to 1997? Was the programme simply a personal commitment to enlarge democracy for the people of Hong Kong? Or was this calculated grandstanding, with an eye to accolades of fresh recognition – and the main chance – among conservative power brokers in Britain? Or were the measures essentially institutional, preparing yet another territory for self-government in the familiar paradigm of British colonial development? If so, it was a common perception that it came about a couple of generations late. Or was an Imperialist conspiracy afoot, projecting a contrived Hong Kong model to destabilise the modernising regions of China and ultimately exerting pressures to break up the post-liberation regime? The Soviet collapse gave some credibility to Chinese apprehensions of that kind.

At the threshold, there are significant issues to cover. From the time of World War II, the British position in Hong Kong was equivocal. In the American administration, then strongly anti-colonial, there was much support for returning the colony to China in 1945. Had Roosevelt lived, it is unlikely that France would have returned to Indochina or Great Britain to Hong Kong. Even during the Messianic phase of the Communist regime, however, there was no strident clamour for the return of the territory. All in good time.

For the British, the encouraging status quo did not mask recognition of the inevitable, and that attitude had a very practical foundation. Once the mainland lease expired in 1997, Hong Kong Island would scarcely be a viable unit. In 1967, when cultural revolution disturbances seriously dislocated Hong Kong, there is some evidence that the British offered up the colony there and then. The timing was no longer in their hands.

For the Chinese, the British were really just squatters, indulged and

useful for the time being. The assumption was they would quit on notice and it would not be necessary to evict. Ideological imperatives could be held in abeyance. Would any other occupiers demonstrate such remarkable assiduity in improving the property?

Accordingly, the 1984 agreement was not a response to Chinese agitation. For business reasons, the British had to have a climate of certainty and it fell to them to make the fateful approach. Since Chinese circumstances had changed, they now wished to resolve the issue. That meant cession. Once that was conceded in a long time frame, a formal understanding as to the parameters of Chinese control also became imperative. Without guarantees as to the conditions of Hong Kong life after 1997, the vitality of the colony would at once begin to wither away.

The "one country, two systems" approach met fairly satisfactorily the insistent apprehensions of the population which fuelled the dynamism of Hong Kong – and which had already been told by the British that, except for a fortunate 50,000, they had no other refuge.[6] It was a mutual and fundamental purpose of the Sino-British arrangements to maintain confidence in the present by establishing safeguards for the future. The Basic Law was a post-dated cheque – drawn to be cashed in the new environment of the Special Administrative Region. The logic and expectation of its origins was that implementation of the Basic Law was substantially a matter for the Chinese.

The Patten initiative stood all this on its head. From being a design for the future, the Basic Law was seized on as a manifesto for the present. The assumption as to Chinese implementation was submerged by the pro-active aspiration to perfect its promise before the handover in 1997. It was an act strangely consistent with the traditions of Chinese theatre to present to the audience a shield which suddenly manifested itself as a sword.

The basic difficulty was that a gap had been left in the package of treaty arrangements. We must turn again to Baroness Thatcher:

> It was clear to me that the Chinese were as concerned (in 1984) about the transitional period as I was . . . I said that the Chinese would be aware of our proposals for the constitutional development of Hong Kong – essentially strengthening in a modest way democracy and autonomy, though I was careful not to use those words. Mr Zhao (Ziyang) answered that the Chinese Government was not prepared to make any comment on constitutional development in the transitional period. In principle, the Chinese too wanted more Hong Kong people involved in the administration. But that process must not adversely affect stability and prosperity or the smooth transfer of government in 1997. I left it at that; it was as far as I felt it was prudent to go at this meeting.[7]

In the event, the British abandoned the constitutional proposals set out in the White Paper of 1984, presumably because they would have been unacceptable to the Chinese. In the yawning years between 1984 and 1997, however, some movement in the structure of governance of Hong Kong was inescapable. What was legitimately, fairly and practically open to the British in the way of constitutional progress? The matter does not seem to have been seriously discussed, let alone reduced to agreement. A potentially dangerous uncertainty resulted.

The Basic Law constituted new clothes for Hong Kong, tailored by the Chinese Government for the time after 1997. In the nature of things, the clothes were exhibited to, and even commended by, the British. Governor Patten stole the clothes and announced them as the current model for Hong Kong. By the dialectic of "convergence" (with the Basic Law) and the "through train" (of transitional institutions), conformity with the obligations under the Sino-British agreements was said to be maintained. But extreme irritation on the side of the Chinese should not have come as a surprise.

One consequence of the reversal of initiative was especially unwelcome to them. Discussions in relation to the settlement were conducted exclusively between Chinese representatives and those of the British Government. Hong Kong citizens were consulted on some questions, some would say marginally, but Hong Kong was never admitted as a participant. Until a very late stage, the Chinese refused even to countenance the presence of Hong Kong officials in the British negotiating team.

This attitude now rebounded because the Governor lacked the power to give effect to his proposals personally. Ordinances would have to be enacted by the Legislative Council of Hong Kong. That thrust the local legislators into the spotlight and gave them an essential and unexpected role. The Chinese authorities, by contrast, found themselves relegated to the sidelines in the legislative elaboration of their very own creature and concession, the Basic Law, which they had undertaken a mandate to give effect to.

Vigorous lobbying for the proposals by the Governor and administration could not be ignored by the Chinese and had further unpleasant implications. If any separate perceptions of their objectives were to be salvaged, they would need to court influence on turf not of their choosing with a body they had studiously ignored. That they had done so on grounds that did not necessarily imply antagonism to democratic forms in Hong Kong scarcely reduced the disadvantages of their position. Chinese control over the processes of transition was mortally weakened as soon as those processes ceased to be the monopoly of the two sovereign powers.

In Chinese eyes, the source of these difficulties was apparent. The post-dated cheque was being presented in a context inconsistent with the expectations on which it was made out and five years before payment became due. In their view, that amounted to a betrayal of the understandings under the treaty.

The change of focus to the Legislative Council also highlighted the embarrassing fact that Hong Kong had been handed over rather in the fashion of a chattel, almost as eighteenth century monarchs surrendered, traded and exchanged the territories they plundered. Local endorsement had not been sought and was not fundamentally reflected in the agreement. That was natural enough from the point of view of the Chinese – Hong Kong was and always had been Chinese territory. They had so far inclined the world community toward that approach that Hong Kong was taken off the United Nations decolonisation list (with General Assembly approval)

in 1972.

The British position was much more vulnerable, since it was fundamentally alleged that Hong Kong Island had been permanently ceded. Apart from any moral qualms, the manner of surrender thus raised legal issues. Modern authority tends increasingly to the conclusion that any major change of status of a subordinate people requires a free choice and that consultation is an "inescapable imperative". When Samoa became independent without full democracy, endorsement of the constitution by a referendum was thought necessary. In the *Namibia*[8] and *Western Sahara*[9] cases before the International Court of Justice, there were strong judicial statements to the effect that the right of self-determination had crystallised into a norm of international law.[10] That looked ominous. Under Article 53 of the Vienna Convention on the Law of Treaties, a treaty may be considered void if, at the time of its conclusion, it is in conflict with a peremptory norm of international law.

To involve the Legislative Council decisively was not the central purpose of the Patten proposals. There is no evidence that considerations of international law influenced their formulation. Any legal shortcomings in the Sino-British agreement could not in any event be cured on an ex post facto basis and by unilateral action. The Patten proposals did however throw the spotlight on the people of Hong Kong as the forgotten factor in the disposition of the colony. That directed attention to serious questions as to the legality and propriety of British actions, stirred up political consciousness and created real difficulties for holding the line on a non-consensual transfer of sovereignty. These consequences were to be an inconvenience for the British; for the Chinese, they were infuriating.

A dispute not arising directly from the Patten proposals illustrates how the obtrusion of the Legislative Council could be awkward for both treaty partners. Section 4 of the Basic Law deals with the judiciary, providing (as relevant) for:

- A Court of Final Appeal (art 82);
- Appointment of judges on the recommendation of an independent commission (art 88);
- Recruitment of judges from other common law jurisdictions (art 89);
- Power of Court of Final Appeal to invite judges from other common law jurisdictions to sit on cases (art 82).

Some time ago, the Hong Kong Government announced the intention to abolish appeals to the Privy Council and to set up the Court of Final Appeal well before 1997. This had apparently been agreed on in the Joint Liaison Group, a consultative body created under the Joint Declaration to ensure its implementation and facilitate a smooth transfer of power in 1997. The initiative indicates that there *is* scope for "convergence" by consent with the regime envisaged under the Basic Law.

It was then further announced that the Court of Final Appeal would comprise the Chief Justice, three other "Hong Kong judges" and one Judge to be chosen either from a list of retired or serving local judges or from a list of judges from other common law jurisdictions. This agreement was severely criticised as in contravention of the Joint Declaration and the Basic Law and specifically as depriving the Final Court judges of a right expressly conferred on them.

The criticisms appear to be misconceived, since the Joint Liaison Group agreement relates only to the structure of the Court, a matter which, under Article 83, must be prescribed by law. It does not presume to intrude on the selection of judicial personnel under Article 88. Moreover, the power of invitation under Article 82 would appear to have an operation entirely separate from, and unaffected by, the Joint Liaison Group agreement.

Consistency between the agreement and the Basic Law thus seems entirely possible – but the contents of the Government Bill to be introduced in LegCo are not yet known.

The point for present purposes is, however, that the Legislative Council has passed a resolution to the effect that it will refuse to endorse as an Ordinance any scheme in the nature of the one described. The British and Chinese Governments insist it will not be varied. Without legislation, the scheme cannot operate. The prospects for a constitutional crisis are apparent.

The Patten programme as announced to the Legislative Council in October 1992[11] put commendable if predictable emphasis on economic growth and financial stability and on projected reforms in health, education and welfare and in relation to public order. These measures were well received in the colony and not notably controversial beyond it. But far-reaching proposals for constitutional reforms were also included in the package, with the pronounced goal of safeguarding Hong Kong's way of life for the post-1997 future. Those proposals had a very different reception.

Some media polemic has presented the ensuing dispute as a matter of democracy or no democracy for Hong Kong. That stark alternative is not in issue. It may well be true, as one authority suggests, that the Chinese were ideologically comfortable with the fairly authoritarian colonial structure of pre-1984 Hong Kong and would have preferred to freeze it. But that system already meant that appointed members of the Legislative Council were outnumbered by those elected (though not all directly elected).

There is no reason to believe, moreover, that the guarantees under the Basic Law are mere window-dressing. Annexes to it provide in great detail for the composition of the Legislative Council after the handover and stipulate for a clear and increasing majority of members returned by election. It is understood, finally, that the Chinese have no objection to constitutional changes during the transitional period which, in the opinion of both parties, are consistent with and result in convergence on the Basic Law model.

For the Legislative Council, dramatic change was planned in respect of the functional constituencies which provided 21 of the 60 members. First, entities would no longer choose their members on a corporate basis. Thus directors of companies within the Chamber of Commerce would vote personally instead of just the companies themselves. Secondly, the franchise would be broadened; in the educational constituency, for instance, ancillary as well as

professional workers would be included. Thirdly, nine new functional constituencies would be created, mainly by hiving off segments of the existing ones (eg hotels and catering, transport and communications). Voting in more than one constituency was ruled out. In reality, the democratic effect of these changes would be not much more than marginal. The functional constituencies, moreover, do not confer basic enfranchisement but are concerned only with a second vote.

Eighteen members of LegCo were already directly elected by universal franchise and that would rise by agreement to 20 in 1995. The first proposal was to lower the voting age from 21 to 18 (as in the United Kingdom and the Chinese People's Republic). The second was to do away with double member constituencies, which were alleged to have a "coat tails" effect. Thirdly, the number of directly elected members should be increased as fast as constraints allowed. The Basic Law provided for election of ten members by an election committee. That pattern would be followed reluctantly, but the committee's members would themselves be elected.

One other innovation was proposed in relation to LegCo arrangements. Rather on the House of Commons model, that body had included members of the Governor's Executive Council, functioning as a kind of Cabinet but without responsibility to its Chamber. Historically also, the Governor had presided over LegCo. The decision now was that ExCo and LegCo should not overlap. LegCo members would withdraw from ExCo, which would be constituted by officials and appointed citizens. The Governor would report periodically to LegCo but no longer preside. It would select its own President.

The last major proposal affecting representation related to the 19 district boards, a rather underexploited arm of local government. These bodies would have responsibility directly for some activities in their communities, including authority in respect of funds. On that basis, in the Governor's view, it would be hard to justify that any members should still be appointed. From 1994, all members of district boards would be directly elected.

All these changes are not so drastic as to make the heavens fall. They do not constitute a road to Damascus for democracy in Hong Kong. The purpose rather is to retune the system, but in such a way as to broaden its democratic base. Vigorous Chinese reaction is not to be explained simply by the substance of the programme, though they do insist that some of it is inconsistent with the Basic Law. To that question we shall return. As earlier comment has indicated, the deeper concern is for the implications. And some implications were created by method. In the presentation of his plans, the methods adopted by the new Governor revived dormant suspicions and animosities which a reserve of goodwill and conspicuous negotiating facility had earlier allayed.

The burning question was consultation. The Governor's style of announcing his programme broke with a convention of prior consultation on substantial initiatives. For that reason as well as others it was denounced by the Chinese as embodying "three betrayals" – of the Joint Declaration, of the Basic Law and of related understandings between the two governments. It is a complex question whether a binding obligation for such consultation had arisen. The Basic Law is not directly concerned with the matter and the Joint Declaration does not address it directly.

For the transitional period, the Joint Declaration stipulates only that the United Kingdom will be responsible for the administration "with the object of maintaining and preserving economic prosperity and stability". For the ensuing Special Administrative Region, the parties endorse the expectation that "the *current* social and economic systems in Hong Kong will remain unchanged". If "current" means 1984, British initiative thereafter would be inferentially foreclosed; if it could be read as referring to the time immediately before the handover, much more scope would be available. The setting up of the Joint Liaison Group under the Joint Declaration is another indicator. Its purpose is to ensure a consensual approach to the transfer of authority. The implication is that it could not function as intended if called on to grapple with unilateral initiatives only after they were in the public domain.

In such issues, conduct may also be significant. By virtue of the Joint Declaration, the British claimed a right of consultation in the drafting of the Basic Law. That was conceded before documentation was made public. In 1986, they accepted the concept of "convergence". That seemed to imply acceptance of prior consultation, since (as was already envisaged) the Basic Law would reserve questions of interpretation to the Chinese. Attention has also been drawn to the 1991 Memorandum of Understanding in relation to the construction of a new airport for Hong Kong.[12] It is an important precedent for prior consultation, and the language may be taken to imply that the rights specified are pursuant to a wider obligation. Finally, a record of secret negotiations and letters that was released in 1992 suggests that Foreign Secretary Douglas Hurd held out assurances of consultation in the course of discussion of electoral matters.

The margin for manoeuvre, therefore, would appear to have been much more restricted than the handling of constitutional reform implied. The Governor, it should be added, had not determined to abandon all consultation – "the proposals I am putting forward will require serious discussion in Peking". He has justified the course of action taken on the ground that prior discussion would simply have led to a veto. After 15 or so frustrating rounds of official talks to secure Chinese agreement, that reasoning is less attractive. The counter-argument is that the method served only to stiffen Chinese attitudes. Subsequent negotiations were embittered by their conviction that a fundamental rule of consensus had been flouted and that the Governor had played them a trick by a crude expedient to preempt Hong Kong support for his plan.

It is an open question how far the expedient succeeded. From his arrival, the style of the new Governor was something of a revolution – and revelation – in local life. Fei Peng, or Roly Poly, became a celebrity and only a little less "visible" across the frontier than

the Mayor of Shenzhen. The Governor capitalised on that image in launching proposals that appealed to those Hong Kong citizens who were aggrieved that they had been left out of the Sino-British talks and also left in the lurch by the British in terms of their future. Initially, opinion polls suggested fairly substantial support. But the popularity of the plan and the Governor appear to have faded as the implications of an impasse were recognised. At this stage, straws in the wind are not hopeful. On 27 October 1993, for example, an official meeting of 18 (of a total of 19) district board leaders decided unanimously that they did not want direct elections for all members and appealed to the Governor to withdraw his electoral proposals for them.

More sensitive still is the question whether the Patten plan is consistent with the Basic Law. The preliminary point is that all parties, including the Governor himself, acknowledge that it should be. Very detailed and quite technical examination would be necessary to reach settled conclusions in this matter. That is beyond present purposes and apparently beyond much western commentary, which simply takes the high road to a party line — gaps were left in the arrangements and Patten shrewdly found them; ergo, no breach of obligations occurred. In a certain sense, the present analysis concurs. Failure to conclude a formal agreement for the transitional period was a serious and culpable omission. But that does not discharge the burden of testing the Patten plan against the Basic Law.

Differences in cultural background or national psychology have created barriers to a meeting of minds and impose difficulties for fair appraisal of the Basic Law dispute. In particular, the adversarial obsessions of English law and British politics are not congenial to the Chinese. That may have practical implications. When a British Parliamentary delegation visited Beijing in October 1993, Chinese accusations were simply reiterated. Because the arguments were not put, the facile conclusion was drawn that they had no substance. The delegation duly reported its finding that no evidence had been produced that the Patten proposals were inconsistent with the Basic Law. Case dismissed. It would not have occurred to these "judges" that the Chinese might recoil from demeaning the occasion by a bout of detailed disputation. In the Chinese way of it, their position was abundantly apparent. That put the British on notice to do their homework for themselves.

The two sides thus have difficulty in closing with each other. The British incline not to listen and the Chinese are not inclined to talk. Complacent assumption confronts inflexible assertion. The one is not shaken, the other is not elaborated or explained. That relates to different self-perceptions as well as to differences in cultural style.

Style, notwithstanding, is important. Other incompatibilities stem from British adherence to the legal style. The common law background implies a certain reverence for legalism and deference to the letter of the law. Chinese habit, by contrast, is rooted in social and political considerations, with particular emphasis on accommodation. That means a focus that is much broader and by lawyerly standards unacceptably vague. Neither tradition is founded on criteria of equity, but both leave scope for partisan sensitivity in respect of what may be taken to be unfair.

All this has profound implications for attitudes toward the Basic Law dispute. The Patten proposals took refuge in statutory interpretation. From that narrow bridgehead, the argument was that no contravention of any particular provision had occurred and therefore there was no wrong. By Chinese standards, that was fundamentally irrelevant. The reproach was that mutual understandings had been turned inside out and that constituted dishonouring the agreement. The two sides approached the matter on different planes. It is worth noting again that the Basic Law confers the right of interpretation on the Chinese. It is unrealistic to suppose that common law canons of interpretation will be applied. It is not necessary to assume that that means entrenching methods that are deliberately discriminating or disreputable.

Although these factors are significant, they are not enough to non-suit the case against the Patten proposals. Even on common law criteria, a number are dubiously consistent with the Basic Law and some quite obvious contraventions have occurred. One instance must suffice. As described earlier, it is a cornerstone of the proposals that the Legislative and Executive Councils should be separate. LegCo members who were also on ExCo were called upon to resign from the latter.

One problem of the separation, as has been perceptively suggested, is that it does not mean more democracy at all:

> Policy making will become (or more accurately we should say, remain) a matter for bureaucrats and experts. It would appear that the Governor has opted for a vigorous administration in the transition period as against an opportunity for senior politicians . . . to gain experience in policy making.[13]

Insistent doubts are now raised, it should be added, as to the practical effects of the change. The *South China Morning Post,* (usually a Patten ally) should be permitted to speak:

> It was Mr Patten's decision to separate ExCo and LegCo entirely that ensured the legislature would become exclusively oppositional. No matter how strong the Governor or ambitious his plans, a legislature with no policy-making role and no contact with the secretive and private club which ExCo has become has no stake in his success.
>
> In the days when members of ExCo dominated LegCo's committees . . . the system was rightly criticised for giving the Government excessive power. Nevertheless, there was a lot to be said for giving the two councils regular, institutionalised contact![14]

Against this background, it is instructive to examine Article 55 (as relevant) of the Basic Law:

> Members of the Executive Council of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive from among the

principal officials of the executive authorities, members of the Legislative Council and public figures.

That clearly implies the inclusion of LegCo members who are not principal officials. In this important matter, accordingly, the two schemes are fundamentally inconsistent.

In the result, Mr Patten finds himself with the worst of all worlds. His ExCo scheme appears as a conspicuous curtailment of democracy, not an enhancement. It has alienated Hong Kong legislators and would seem to lack public support. Not least, a golden opportunity is presented to the Chinese to find common ground with the political leadership of Hong Kong and to make the point, if they deign to do so, that their proposal was the most suitable all the time. And only their proposal, of course, is legitimised by the Basic Law.

The constitutional reform proposals have preempted the agenda and envenomed the relations of the sovereign parties to the handover of Hong Kong. There are adverse consequences beyond that orbit, some of a very practical nature. The huge project for a new airport is delayed, partly also because the Chinese accuse British interests of milking the system and leaving them with the bills![15] The provision of a new container terminal has likewise been set back, though some other matters such as the disposition of military property and the land regime are said to be progressing smoothly.

Legal preparations, while closer to the constitutional dispute, are so far unevenly affected. An immense task is involved. One hundred and fifty or so Imperial Acts and local Ordinances and a similar number of subordinate instruments must be localised to harmonise with the regime of the Special Administrative Region. Even apparently simple changes may raise complex issues. What, for example, is to be substituted for the English law concept expressed as "the Crown"?

Other changes are transparently not simple. Thus Hong Kong merchant shipping law is a labyrinthine mesh of Imperial statutes, local legislation and common law operating against a background of international treaties and conventions. Within the prescription that Hong Kong law is to remain in force, adaptation is called for to give it all a coherent and comprehensible unity in a changed setting![16]

The international rights and obligations of Hong Kong as a dependent territory pose special problems because the Special Administrative Region will not necessarily succeed to them. Lawyers must identify which will have to be renegotiated. Further complication arises because Hong Kong law is affected by international institutions and agreements with which the prospective parent entity, the Chinese People's Republic, has no formal association. As in the case of domestic legislation, moreover, the application of international arrangements must take account, not only of the necessity of harmonisation for the circumstances of the Special Administrative Region, but also of the need for consistency with the Basic Law and compatibility with the constitution of the Chinese People's Republic.

Some of the work falls to the Joint Liaison Group, where legal experts of both treaty partners are active. Much is also being undertaken in the Attorney-General's Chambers. The local contribution necessarily includes translation of enactments, since English and Cantonese will be equally authentic for purposes of the legal system from 1997. Putonghua (Mandarin) is now sweeping so rapidly into the consciousness of the colony that that may not be the last word. Language issues, in any event, increase the inclination toward localisation. It is a fair objective now that legal personnel should be familiar with Hong Kong's special character and social texture and able to operate effectively in the two languages.

The through train to 1997 and beyond is derailed. Questions of practicality ensue. Can it be back on track to arrive in time at its several destinations? That is all the more in doubt now that unity is threatened as to what track is to be followed. In that respect, the Governor finds himself caught between two fires. For the Chinese, his proposals deviate too far from the route laid down in 1984. In the view of the largest faction in the Legislative Council, led by Martin Lee QC, a clawback from a British sellout is necessary and only something like full autonomy on a democratic basis is acceptable. The idea is to press forward to that objective in the expectation that the Chinese would leave arrangements in place rather than risk starting off the Special Administrative Region in a state of disruption. The assumption is probably foolhardy, and the British are constrained both by treaty obligations and by the imminent presence of the Chinese.

Economics and geography suggest a rather different direction. Hong Kong began as an entrepot port and then made itself an industrial city state. Now its primary role is as a financial centre, fuelling the startling metamorphosis of China. Two-thirds of external direct investment in the country comes from entrepreneurs in Hong Kong. Fifty thousand residents of the colony work across the frontier on a daily basis and a million mainland citizens are expected to visit Hong Kong this year. In that time, two and a half million passengers arriving at Kaitak airport (or one in seven) are bound for destinations in China![17]

As Guangdong province becomes the fastest growing area in the world, interdependence with Hong Kong becomes ineluctably closer. Straddling borders that are becoming transparently artificial, a dynamic and compatible community of 45-50 million people is being created. As capitalist organisation becomes the major engine of Guangdong development, a certain homogeneity is emerging. These facts may well speak louder than attachment to the historical character of Hong Kong. The case for administrative and legal harmonisation is likely to become compelling and the solution could scarcely be found in terms of a transplanted European system. The shield of the Basic Law, fashioned for protection, may then seem something of an irrelevance, or more likely an impediment to natural assimilation.

In the shorter term as in the long run, it is the Chinese who hold most of the cards. Between two systems that at this stage are still very different, the Basic Law does not meet the objectives of those who would seek to perfect democracy in

Hong Kong. It is, notwithstanding, an encouragingly fair compromise. As this analysis has indicated, it does promise substantial autonomy, steady progress toward full democracy and local administrative control. Would it be wiser now to be reconciled to the Basic Law regime on its terms rather than to provide grounds for one party to disavow the real gains it embodies? If that reasoning does not prevail with independence-minded local citizens, and that would be understandable, one possible avenue may be recourse to law. It is an open question whether the post-1997 legal order for Hong Kong is covered by the doctrine of Act of State or assailable in Courts of municipal or even of a broader jurisdiction![18] □

1 Margaret Thatcher, *The Downing Street Years* (London, Harper Collins, 1993). See esp. pp 259-262; 488-495.

2 The texts of the Joint Declaration and related documents are set out, with commentary, in Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong, China and Hong Kong Law Studies, 1987).

3 See Paul Fifoot, "China's Basic Law for Hong Kong" in [1991] *International Relations* 301. Also Yash Ghai in *Hong Kong In Transition: Problems and Prospects* (Faculty of Law, University of Hong Kong, 1993), p 47, n 54.

4 This epithet was levelled at "Whitehall sinologists" (and their Hong Kong allies) as the architects of British policy toward China in a savage editorial "Old China Hands" published in *The Times* (Nov 20, 1992). This leader appears to have created something like a Western conventional wisdom. See eg John Newhouse in *The New Yorker*, Mar 15, 1993, pp 89-101.

5 Chris Patten, *Our Next Five Years* (The Governor's Annual Address to the Legislative Council, 7 October 1992).

6 The Schedule to the Hong Kong Act 1985 (UK) provided for a new form of British nationality the holders of which would be known as British Nationals (Overseas). That status did not confer the right of permanent residence in the United Kingdom. British nationality legislation of 1990 provided for a selection process under which up to 50,000 Hong Kong citizens might be granted British nationality. The parameters of these arrangements are in part defined by an Exchange of Memoranda annexed to the Joint Declaration.

7 Thatcher, p 493.

8 ICJ Rep 1971 esp per Judge Ammoun at 74.

9 ICJ Rep 1975 esp per Judge Nagendra Singh at 81 and per Judge Dillard at 121.

10 On these matters see Nihal Jayawickrama, "The Right of Self-Determination" in *Hong Kong's Basic Law: Problems and Prospects* (Faculty of Law, University of Hong Kong, 1990).

11 Patten, *Our Next Five Years.*

12 *Sino-British Memorandum of Understanding concerning the Construction of the New Airport in Hong Kong and Related Questions,* 3 September 1991.

13 Yash Ghai, p 44.

14 28 October 1993, p 22.

15 Chinese attitudes to questions relating to the transition are outlined in an annual publication, *The Other Hong Kong Report* (Hong Kong, The Chinese University Press).

16 The constitutional status of Hong Kong is founded on (as amended) the Letters Patent of 1843 ("The Charter") and Royal Instructions. Also fundamental is the Application of English Laws Ordinance 1961 (UK). The Hong Kong (Legislative Powers) Order 1986 (1986 No 1298) of the United Kingdom had the effect of freeing the Hong Kong legislature from the constraints of the Colonial Laws Validity Act 1865 (Imp).

17 See Chris Patten, Hong Kong: *Today's Success, Tomorrow's Challenges* (The Governor's Annual Address to the Legislative Council on 6 October 1993).

18 See Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong,* and also in (1986) 6 *Legal Studies* 325, pp 327-328. Indicative cases include: *Secretary of State for India v Sahaba* (1859) 13 Moo PC 22; 15 ER 9; *Winfat Enterprise (HK) Co Ltd v Attorney-General* [1983] HKLR 211 (HCt).

New Zealand Universities Law Mooting Championships

For the second year in succession, the Otago University team has won the national law mooting championships. Andrew Horne and Mathew Downs won the competition over teams from the other four New Zealand law schools.

The competition is run as part of the New Zealand Law Students' Association annual conference. The topic for this year was a judicial review of a decision of the Minister for Education to increase fees at Universities without having regard to a United Nations convention on free education.

Otago defeated teams from Waikato and Canterbury in the initial rounds, held before five Judges. The final was held in the High Court in Christchurch, before Mr Justice Williamson, Professor Gerald Orchard (Dean of Law at Canterbury) and a representative from Buddle Findlay. Otago defeated the team from Victoria University to claim the title and retain the Cup.

The team, along with a third member, Tim Clarke, competed in the Australasian championships earlier this year. The team placed third overall from a field of 22 teams from all over Australia, Singapore, Malaysia and New Zealand, losing in the semi-finals to the eventual winners. Otago was the highest placed New Zealand team in the Australasian competition.

As national champions, Otago have won the right to represent New Zealand in the Jessup Cup competition. Teams from all over the world contest the Jessup Cup, which will be held in Washington DC during March, 1994.

Witness examination and family law mooting competitions were also held at the conference, which was sponsored by Buddle Findlay. The witness examination is sponsored by Rudd Watts & Stone, and Bell Gully Buddle Weir sponsors the mooting teams.

Tim Clarke, Matt Downs, Andrew Horne, Otago University law mooting team.

Canterbury District Law Society: 125 years anniversary

Speeches at Special Court Sitting 29 October 1993

Remarks by Acting Chief Justice

This special sitting of the High Court has been convened to mark the 125th anniversary of the founding of the Canterbury District Law Society in October 1868. A special sitting is one of the ways, hallowed by tradition, by which the Court and the legal profession acknowledge significant events in the life of the law. Today sees the first occasion in which a District Law Society has recorded 125 unbroken years.

As Acting Chief Justice, I am joined on the Bench by two Judges of the Court of Appeal, Justices Casey and Hardie Boys (both former Christchurch resident Judges). They have been participating in a special Christchurch sitting of the Court of Appeal. Also present are all the Christchurch Judges and the Master plus Justice Penlington, who needs no introduction to this assembly. I welcome too three retired Judges, Rt Hon Sir Edward Somers, Hon Sir Clinton Roper and the Hon J P Cook as well as representatives of the District Court Bench and many members of the profession.

On behalf of all the Judges of the Court of Appeal and the High Court, I congratulate the Canterbury Law Society on reaching this important milestone in its history. In our young country many important established institutions have yet to reach the century. The achievement of 125 years is surely a time for rejoicing, for looking back on the people and events of the past and for assessing the challenges of the future.

As Acting Chief Justice, I convey the special congratulations of the Chief Justice, the Rt Hon Sir Thomas Eichelbaum, who is unable to be present since he is currently sitting in the Judicial Committee of the Privy Council.

The format for today's sitting is that in a moment Justice Holland will speak as senior Judge in Christchurch on behalf of the judiciary. He will be followed by Miss Judith Potter, the President of the New Zealand Law Society and Mr Peter Phillips, President of the Canterbury Law Society. Justice Holland.

Justice Holland

Your Honours, Madam President of the New Zealand Law Society, Mr President of the Canterbury Law Society, Ladies and Gentlemen, I am grateful for the opportunity given to me by the Acting Chief Justice to address you on this anniversary occasion. I have not previously addressed the Bar or any member of it accompanied by such a large and distinguished Bench. May I say on behalf of the Christchurch Judges and Master how pleased we are that you, Acting Chief Justice, have honoured us with your presence, and that Justices Casey and Hardie Boys, who have been sitting this week in Christchurch in the Court of Appeal, have been able to join us on the Bench today. Both are well remembered, with affection and respect for the periods they sat on this Bench as Judges of this Court, Justice Casey from 1974 to 1982 and Justice Hardie Boys from 1981 to 1989. It all seems so long ago. We are also pleased to be joined by our old friends Sir Edward Somers, Sir Clinton Roper and Phillip Cook, former resident Judges of this Court in Christchurch.

A week or two ago I called on Sir Alec Haslam to invite him to join us on the Bench. He is approaching his 90th birthday. He is, I believe, your Society's oldest living past President. He is in fine mental shape and well aware of all that is currently going on in the world, including the legal world, but is somewhat restricted physically. He regretfully declined my invitation but sent his good wishes to the Society on its anniversary and all the functions associated with it.

A significant feature of this 125th anniversary is that the foundation of the Canterbury Society created the very first formal Law Society in New Zealand. Not only were we ahead of Auckland, which was not surprising in 1868, but we were also ahead of Otago and more significantly any form of New Zealand Society. I must in deference to my North Island colleagues acknowledge there is evidence of some informal Societies in Auckland as early as 1861 but the evidence is not clear and no records have been discovered.

In 1869 the New Zealand Parliament passed the New Zealand Law Society Act which contemplated a society for all barristers and solicitors practising in New Zealand, with a President and Vice-President to be appointed in the first instance by the Governor of the Colony. Although the statute incorporated the Society it does not appear to have functioned with any degree of effectiveness. Messrs

Duncan, Wynn Williams and Garrick of the Canterbury Society were appointed to its Council but the provisions of the Act made no reference to District Societies and the lack of communication and travel facilities apparently rendered it almost impossible to arrange meetings of the New Zealand Society.

The Canterbury Law Society, on the other hand, flourished. Some six months after its formation it adopted a conveyancing costs scale, commonly described as the life blood of the profession until its abolition approximately ten years ago, and as early as 1881 it pressed for the introduction of official law reporting throughout the colony. It played no small part in the foundation of the Council of Law Reporting and the commencement of the Official New Zealand Law Reports, Volume 1 of which came out in 1883.

In 1877 Canterbury was active in endeavours to regularise the position of District Societies vis-a-vis the New Zealand Law Society and may well have been the instigator of the 1878 Amendment Act formally creating District Societies, with Councils having the same powers as the Council of the New Zealand Law Society under the 1869 Act. The New Zealand Law Society Act had been materially amended in 1877 by amending the constitution of the New Zealand Law Society providing for District Law Societies to nominate members of the Council. This amendment only lasted one year until it was repealed by the District Law Societies Act 1878 setting out in much more detail the powers and duties of District Societies and Councils for each Judicial District with rights of appeal to the New Zealand Society, the basic structure of which continued until the formation of an Executive Committee in the mid 1970s.

Although there undoubtedly was a New Zealand Law Society from 1869 until the appointment of its president, Prendergast, as Chief Justice in 1875, there appears to have been no effective Society for the next 22 years. By 1886 eleven District Societies were formed following Canterbury. In accordance with the new 1878 legislation, five District Societies were formed in that year, the first being Westland followed by Taranaki, Auckland, Otago and Southland as one, and Wellington. The later three were Marlborough, Nelson and Hawkes Bay.

It was, however, the major defalcations of members of a Christchurch firm of impeccable lineage and reputation in the early 1890s that instigated the establishment of a more formal New Zealand Law Society, the introduction of compulsory trust accounts, audits and ultimately the Guarantee Fund which so sadly has been so much in the eye of the public and the eye and purse of the profession in the last four years. Those of you who are old enough to appreciate the devaluation of money in the last 100 years may be impressed or dismayed that when this Christchurch firm was declared bankrupt in or about 1892 its total debts were £205,000 with a deficiency of £182,830. It almost pales Renshaw Edwards into insignificance.

One of the many things of which the Canterbury Society may be proud is its early contributions to legal education in New Zealand. Although the responsibility for admission to the profession and the appointment of examiners rested with the Judges, as it continued to do until well into this century, the Canterbury Society was passing resolutions on the topic as early as 1870. In 1882 it instituted a scheme of prizes available throughout the colony and continued to this day in its award of the Gold Medal, although now restricted to those graduating from Canterbury. It provided and subsidised lecturers at the university as early as 1874 and continued to provide part time lecturers of some eminence until 1967. When I did my law degree in the late 1940s we were lectured by leaders of the profession in most subjects. I mention as a few, Sir Alec Haslam on Torts, Crime, and Evidence, E C Champion on Trusts, L J H Hensley, whose death sadly occurred last week, on Company Law, A C Brassington on Constitutional Law, Sir Ralph Thompson on procedure, and other lecturers who were leading practitioners in their subjects.

I should also like to record on behalf of all Judges who have sat on this Bench in Christchurch our appreciation of the never failing courtesy and cooperation which the Society and its members have at all times extended to the judiciary. We are all part of one profession albeit carrying out different roles. The loyalty of the members of the Society to the Court without in any way derogating from their duty to their clients has eased the responsibilities of the Judges.

The Canterbury Law Society has a great deal to be proud of in its 125 years. By 1868 Canterbury had already had a resident Supreme Court Judge for fourteen years. He was Henry Barnes Gresson who was the founder of quite a Canterbury legal dynasty producing two more Supreme Court Judges, one of whom became the foundation President of the permanent Court of Appeal and who also had held the part time office of Dean of the Faculty of Law at Canterbury University College. The family is presently represented by the holder of the office of Crown Solicitor in Timaru, a city euphemistically described as belonging to the South Canterbury Branch of the Canterbury District Law Society.

The Court of Appeal, which has this week sat in Christchurch for the second occasion since a permanent Court of Appeal was created in 1958, some 35 years ago, nevertheless sat in Christchurch for the first time in February 1863, five years before the Society was formed. For the purposes of completeness I record that the Criminal Appeal Division of the Court of Appeal in accordance with present plans sits in Christchurch for one or two weeks a year. According to my calculations there have been 76 permanent appointments to the Supreme Court or High Court including two direct appointments to the Court of Appeal in New Zealand's history. Of that 76 no less than 18 or 24% have been from practitioners practising at the time as members of your Society.

The function last night and the lead up to this week have so far centred upon history and rightly so. There are people better informed than I who are able to continue the historical narrative. I believe that anniversaries are occasions where it is appropriate to look forward as well as back.

So far I think I can say with confidence that I have spoken on behalf of the Bench but I must

make it clear that from now on I am on my own. Some, or even all of those sitting with me will no doubt not agree with all that I am about to say. Their presence must not be regarded as a sign of assent. They, like you are presently compulsory listeners, no more.

A Judge gets very few opportunities of public expression of opinion. He is almost always confined to the cases before him. That is probably right but I am often envious of the old days only just over 30 years ago when a Judge formally opened the sessions four times a year and addressed the Grand Jury. An occasion when by tradition he was able to express his views generally on matters related to the law and its general application. He had an opportunity to put right some of the public misconceptions about the Judge's role and the Judge's application of it.

One hundred and twenty-five years is a long while in the history of New Zealand. It is only just over 150 years since the formal settlement of British settlers in this land. The Maori people were, of course, settlers before the British, having been here for some seven or eight hundred years but we all regard ourselves as a young nation. It may be that we underplay our maturity in nationhood. When Felicity and I were travelling in Europe and particularly in Yugoslavia in 1974 it was pointed out to us what a young country it was and what risks there were of future turmoil which so sadly have turned out to be true. There are many countries in Europe and certainly many boundary areas which are much more recent and fragile than is the situation in New Zealand.

It is perhaps time that we as a country felt a greater confidence in our nationhood. For too long we have been dependent on Britain who has loyally supported us and provided us with services that we should be providing ourselves. I refer, in particular, to the structure of the Courts and appeals to the Privy Council. This topic has been debated for decades and strong feelings exist on the topic. Now is not the time or the occasion to raise the debate but in the light of recent remarks by the Prime Minister and Attorney-General I have been provoked into mentioning the topic today.

In a paper presented to the New Zealand Law Conference in 1975 I proposed the abolition of the right of appeal to the Privy Council. I am still of that view notwithstanding the splendid and very necessary decision in a local case announced earlier this month. But the abolition must not take place without the provision of an adequate alternative or a fully considered decision that no alternative is required. I venture to suggest that the main ground of opposition to abolition is not a desire to retain our ties with Britain but fear that no satisfactory alternative will be provided. Most lawyers would be unhappy unless a right of second appeal is retained. The primary reason for abolition of appeals to the Privy Council is that as a nation we should be capable of determining, interpreting and applying our own laws. We are. But to establish a final appellate Court that is not a New Zealand Court would please very few. If we are not to have our own final Court of Appeal let us keep the Privy Council.

The introduction of an intermediate Court of Appeal or a New Zealand Court to consider appeals from the Court of Appeal will require substantial money and resources. It is a decision for government but there is little point in politicians discussing proposals without realising that substantial financial resources are required.

An immediate and unlikely solution with little appeal to the Prime Minister would be for New Zealand to become a state of Australia which would automatically make the Australian High Court available. To this audience an even more attractive proposition would be for the South Island to be a separate state of Australia but that might be regarded as a little far fetched.

It is perhaps significant that in the year of foundation of the Society, 1868, the Provincial Council of Canterbury passed a resolution advocating a separate administration for the South Island saying "not only is this desirable because of the difficulties of communication but also because of the different considerations that prevail in the two countries separated by Cook Strait". That statement may still have some validity today but we got somehow left behind in the next reason advanced in 1868 that "the South Island is progressing much more rapidly than is possible in the North Island".

There are further significant changes likely to occur in the Courts within the next twenty-five years. Throughout the whole western world judicial systems are under threat from the sheer enormity in volume and length of criminal trials. In this respect New Zealand is in an infinitely better position than most other countries but there must be a risk that in any democracy the concern about the public cost of criminal trials will result in pressure for changes that may work to defeat what we have regarded as the cornerstone of British justice; that a person is presumed innocent of a crime until he is proved beyond reasonable doubt by a Court to be guilty.

I do not profess to know the answer to the problems, nor do I have sufficient statistical information to justify conclusions beyond my own observations. Undoubtedly part of the reason for the clogging of the Courts' calendar is the right of persons to defend criminal charges for free and regardless of merit. The vast majority of defended criminal cases result in conviction and the cost of establishing that conviction may be a great deal more than is required to ensure that an innocent person is not convicted.

I would not subscribe to some form of pre-trial investigation as to whether a defence has merit because I doubt if that can be satisfactorily carried out without going through the whole procedures of trial. The accused knows whether he is guilty or not. I believe that there must be some disincentive for him defending a charge without merit. Once a person is granted legal aid on a criminal matter it can fairly accurately be said that he has little to lose by proceeding with an unmeritorious defence. He will not get a discount in sentence that is available to those who plead guilty but that obviously is not sufficient disincentive when one considers the large number of defended trials without a vestige of merit.

I am quite amazed when on rare occasions detailed investigation is made as to criminals' assets. It is rare that they do not own some

means of transport, stereos, videos, and other items which some might regard as non-essential.

I do not wish it to be thought that I have investigated the matter in any depth but I make the suggestion that included in an application for legal aid there ought to be a written acknowledgment by the applicant that he will consent to judgment against him for the extent of the legal fees incurred in his defence if he is subsequently found guilty beyond the time involved for giving initial advice, investigation, and appearing for sentence on a plea of guilty.

Such a proposal may seem draconian. If proposals of that nature are not considered by your Society there must be a great risk that even more draconian principles will be introduced by Parliament which will take away the protection innocent persons presently have from being wrongly convicted.

In the field of civil litigation there must be also great cause for concern at the costs to parties. Notwithstanding the proliferation of interlocutory proceedings and pre-trial conferences, trials seem to take longer than they used to when interlocutory steps of any kind, other than discovery of documents, were the exception rather than the rule.

There can be no challenge to the statement that it is the duty of any democratic government to provide a means of enabling citizens to have their disputes resolved peacefully and according to law. That is the role of the Courts. There is concern now that the costs of litigation are beyond the means of those entitled to such a service. In that respect I am not referring to those persons able to receive legal aid but I am referring to the unfortunate ones who are not wealthy but have sufficient assets and income so as not to be eligible for legal aid.

It is not a new subject. I am indebted to the paper prepared by Justice Tipping published in the recent issue of the *Law Journal*. I quote the following passage from his paper:

> In April 1872 the Society was concerned at "the remarks of His Honour Mr Justice Gresson made on Friday, 12th inst in Chambers with regard to professional costs. It was moved by Dr Foster and seconded by Mr Fereday "that the president be requested to see His Honour privately with a view to calling His Honour's attention to the injurious misapprehensions likely to arise from the language attributed to His Honour in the *Lyttelton Times* on Saturday, the 13th and to request him to take an early opportunity of explaining in Court what he meant to say".

I am not in Chambers and your president is with us. I believe that the country cannot afford to have all civil disputes resolved in accordance with the expensive process that is required by the High Court Rules. That is recognised by the provision of Disputes Tribunals but I also believe that there is an intermediate stage between the Disputes Tribunal provisions and the High Court jurisdiction where simple forms and procedures for resolving disputes must be introduced.

I am aware that many Judges disagree with me but nevertheless I feel it was a retrograde step that with the increase in jurisdiction of the District Court it was decided appropriate for that Court to adopt almost in toto the High Court Rules without also providing different rules and procedures for what might be regarded as more routine and simpler issues requiring resolution by the Courts.

In so far as proceedings in the High Court are concerned, and it is probably only those of which I am now qualified to speak, I am concerned at the huge bills of costs that we see sometimes presented at the conclusion of litigation. I believe that within the next twenty-five years consideration will have to be given to the rules and practices of what is presently called the separate Bar. I am not criticising the hourly rates charged by barristers but the lack of support staff in barristers' chambers must in my view mean that a large proportion of work is being carried out by barristers which should be carried out by qualified or unqualified clerks and charged to the client at a much lower rate. The practice of the separate Bar in New Zealand usually is not the same as occurs in England and Wales. In most cases litigation tends to be totally handed over by the solicitor to the barrister.

I accept the need for specialisation and the right of a practitioner to say there are types of work which he or she will or will not do but I have grave doubts whether the justification of a separate Bar bound by its present rules can be economically justified. It appears to me that in New Zealand we are all lawyers and that there must be a good deal to be said for allowing people to practise as Court lawyers, accepting instructions direct from the public or from other firms but also having the responsibility for the total conduct of the litigation and employing staff both qualified and unqualified to assist them in this regard to provide a cheaper service and if such can be achieved to create economies by being in partnership.

I mention this topic not so much by way of criticism but as a warning that in these days of freedom of choice the monopoly rights of the Bar may well be challenged. The Judges would deplore the opening up of the Courts to unqualified advocates but nothing is secure in these days of change.

In so far as other branches of the profession are concerned I am even less qualified to speak but obviously the role of the conveyancing solicitor has changed substantially in the last 25 years and will do so in the next 25 years. Until some years ago solicitors performed a very necessary service to their clients and the public in relation to the investment of money. They provided a service not provided by banks and other lending and borrowing institutions but that is not the case today. There is probably little to be said in favour of solicitors presently undertaking the role of bankers or financial investors other than for the purpose of giving advice. One must wonder whether the huge overheads incurred by solicitors in maintaining accounting systems with audits in relation to clients' investments can be justified as an overhead charged to clients who do not want the service. There must be many who today would say what a tragedy the creation of the solicitors' nominee company was.

If there is still a need for solicitors to be in control of investing clients' funds as against advising them in respect of investment, there must be something to be said for groups of lawyers forming an independent

investment company which is in no way directly associated with the name of the practice and will obviously carry with it the clear indication that the investment company, like any other, is only as good as its assets.

Looking more positively the greater need for consultation and co-operation with accountants, and engineers must give one cause for wonder as to whether it is in the public interest to prevent solicitors being in partnership or in an incorporated company in association with their practice so that clients may within the one office have advice on legal, accounting and engineering matters.

I shall conclude on what I hope is a happier note. I suspect that what I have recently said today might have pleased some in some respects but will have pleased no-one in all respects. I have, as might have been expected when I was asked to speak, been quite deliberately provocative in raising matters which should be discussed in the future. None of my ideas are new and I do no more than raise them.

The Law Society can look back with pride on its past. We have in this country, where private ownership of land is the goal of all, a simple and effective means of conveyancing. We have, I believe, a Court system which will stand comparison with any other country in the world. We have a profession that notwithstanding its exceptional black sheep is highly regarded in the community and gives a service to the community at an hourly rate that is substantially less than is charged by lawyers in developed countries of the western world. Members of your profession have given service to the public in politics, charity, sports and sports administration far beyond the average. Your Society, without reward, for decades and maybe longer, has served governments by advising on amendments required to the law and perusing and advising Bills introduced into Parliament intended to revise the law without charge to the Government.

This has been expected and appreciated by governments but whereas the government obviously does not expect to pay a great deal for its advice on the law it appears willing to pay merchant bankers millions in respect of its proposed sale of assets and it is prepared to pay public relations and advertising firms millions when it is desirous of spreading propaganda.

The service of the Law Society to governments of this country is far greater than is commonly appreciated and is far greater than any other body of which I am aware.

I congratulate the Canterbury Society on its 125 years and wish it well in the future.

Judith Potter, President, New Zealand Law Society

Your Honours, Mr Phillips, colleagues, ladies and gentlemen.

His Honour has taken the opportunity to look back and to look forward. That is appropriate, as the very essence of a milestone, for today we celebrate a milestone.

Last week I became the owner of a new hall table. New, yet old – for the top of the table is from timber taken from the floor of the Supreme Court, Auckland, constructed in 1868. I ran my hand admiringly over the wood; smooth, mellow, ageless kauri – but with pits and scratches and all the insignia of having lived a long and useful life. I pondered that while the slab of kauri was being woven into the fabric of the Supreme Court at Auckland in all its freshly hewn and newly milled glory, so were a group of lawyers meeting here in October 1868 in Dr Foster's Chambers, to stitch into place in the newly emerging Canterbury Province and the infant legal profession of New Zealand, the Canterbury District Law Society. With the communications of 125 years ago, it is unlikely that those responsible for each of these historic events, knew much about the other.

It is exciting that there is a truly New Zealand history – a history that is becoming more meaningful, rich and real, as the research for the Treaty of Waitangi claims, and the decisions of the Waitangi Tribunal of the Courts fill up the warp and the weft of the fabric. History which takes us back far beyond 1868 and beyond the time when the kauri in my new hall table was a tiny seedling starting a new life, unaware that there would be white men who would bring to our country the British system of justice and who would take magnificent trees to build a Court worthy of the law they honoured. But in the context of New Zealand's legal history October 1868 in Christchurch was truly historic.

The first President of the Canterbury District Law Society, Thomas Smith Duncan, served as President for sixteen years until his death in 1884. In that he differed from his more recent successors, who take on a Presidential year of daunting responsibility and relentless demands. As your President of 1989 wrote:

> I actually feel quite honoured to have been President of this Society. I also feel quite tired.

Thomas Smith Duncan was described as "an example to the members of the profession of what a solicitor's conduct should be". In this respect he did *not* differ from his successors. The Canterbury District Law Society has been led by people of outstanding ability and integrity. Over the last twenty years I have come to know

most of them, and have worked with many of them. It has been an exceptional privilege. Perhaps it is because Canterbury was the first District Law Society, and perhaps because from the very beginning its Officers and Council saw the need for a New Zealand Law Society – and indeed agitated vigorously for a national body, which was not satisfactorily achieved until almost the turn of the century – perhaps for these reasons, this Society and its representatives have always been able to take a view of the profession, its concerns and its interests, which transcends parochial boundaries. In doing so they have led Canterbury with a wisdom and breadth of vision which has greatly benefited this district, and contributed immeasurably to the legal profession throughout New Zealand.

There is an aspect of history and evolution which never changes, and that is the involvement of human beings. We are inclined to think that 1992 and Renshaw Edwards was the worst experience the legal profession in New Zealand has ever had, or could ever have. It is educational, therefore, to contemplate that precisely 100 years before Renshaw Edwards, the trauma of Harper & Co was experienced here, which, as His Honour has commented, almost pales Renshaw Edwards into insignificance. I can't imagine that advance subscriptions and levies imposed on the Canterbury practitioners of 1892, were any more palatable than the 1992 levy imposed by the New Zealand Law Society.

I imagine our Canterbury predecessors would be horrified to know that the call in a report of 1894 for a national disciplinary system is echoed today by the efforts of the New Zealand Law Society to implement a national complaints and discipline system.

Their argument in the 1894 report that the continuation of the burden on districts would inevitably weaken disciplinary powers was, I believe, prophetic. Already in 1892 they had experienced the conflict inherent in the situation of a District Law Society expected to be both policeman and friend. Let us hope that this time the call for a national structure will be matched by action and implementation.

While the human component of history is ever present, the environment in which we operate is ever-changing, and today it is changing dramatically. I am sure the Canterbury District Law Society will celebrate its 250th anniversary 125 years from now, but it will be a Society that has embraced the change of today, and future change.

There are many Canterbury practitioners I would like to mention by name for the sheer quality of their contribution to the Law Society and to our profession. This is not the occasion to do so. I shall simply observe that as we today celebrate the outstanding contributions of outstanding lawyers over the past 125 years, so in years to come will others celebrate the contributions of many who are present in this Court today. I wish I could be there, but I will have to be content to say how privileged I am to be present here today, and to congratulate and thank the Canterbury District Law Society on behalf of the legal profession in New Zealand.

Mr Peter Phillips, President, Canterbury District Law Society

I am very grateful for the opportunity given to me by your Honour Justice Barker, Acting Chief Justice to address the Court. As the current President I feel privileged and proud to represent the Canterbury Profession today. I also feel somewhat less than adequate as a Conveyancer to address such a distinguished Bench and such a large gathering of the Profession. But I am proud to represent the Profession today in view of the generous remarks which have been made by you Sir, by Your Honour Justice Holland and by my learned friend Miss Potter.

This has been a splendid Ceremonial Sitting and on behalf of the Profession I do thank the Court for organising this sitting. In particular I would like to thank Justice Barker for presiding at this Special Sitting and for his congratulations on behalf of the Judiciary and the Chief Justice.

It has been a great honour to have had the Court of Appeal here this week and we are grateful for that. We know how much time and effort is required to move the Court of Appeal to Christchurch. As Justice Holland has pointed out this is only the second occasion since a permanent Court of Appeal was created in 1958 that the Court of Appeal has sat in Christchurch.

Justice Holland has commented on the courtesy and cooperation which has always been extended by the Society and its members to the Judiciary. The Society has enjoyed an enviable relationship with the Judiciary, I say enviable as I know that few other District Societies can claim such a working relationship. We do appreciate that relationship and hope that it will always continue. It is effectively demonstrated today by the large and distinguished Bench of Present Judges, both Court of Appeal and High Court and by former Resident Judges of this Court. We are privileged to have your presence and thank you for that.

It is no doubt partly because of the splendid cooperation which has existed between the Bench and the Bar that Canterbury has nurtured such a significant number of members of the Judiciary. The tradition of advocacy has always been high in Canterbury. Justice Holland has reminded us that of the 76 permanent appointments to the Supreme Court or the High Court 18 or 24% of those have been from this District. That is something of which this District ought properly to be proud.

I am grateful to Miss Potter for the congratulations on behalf of the New Zealand Profession. Miss Potter has appropriately remarked on the excellent relationship this Society has enjoyed with the New Zealand Society. We were the first District Law Society, being founded in 1868, and it was the following year that the New Zealand Parliament passed the New Zealand Law Societies Act. But that Society did not really flourish until

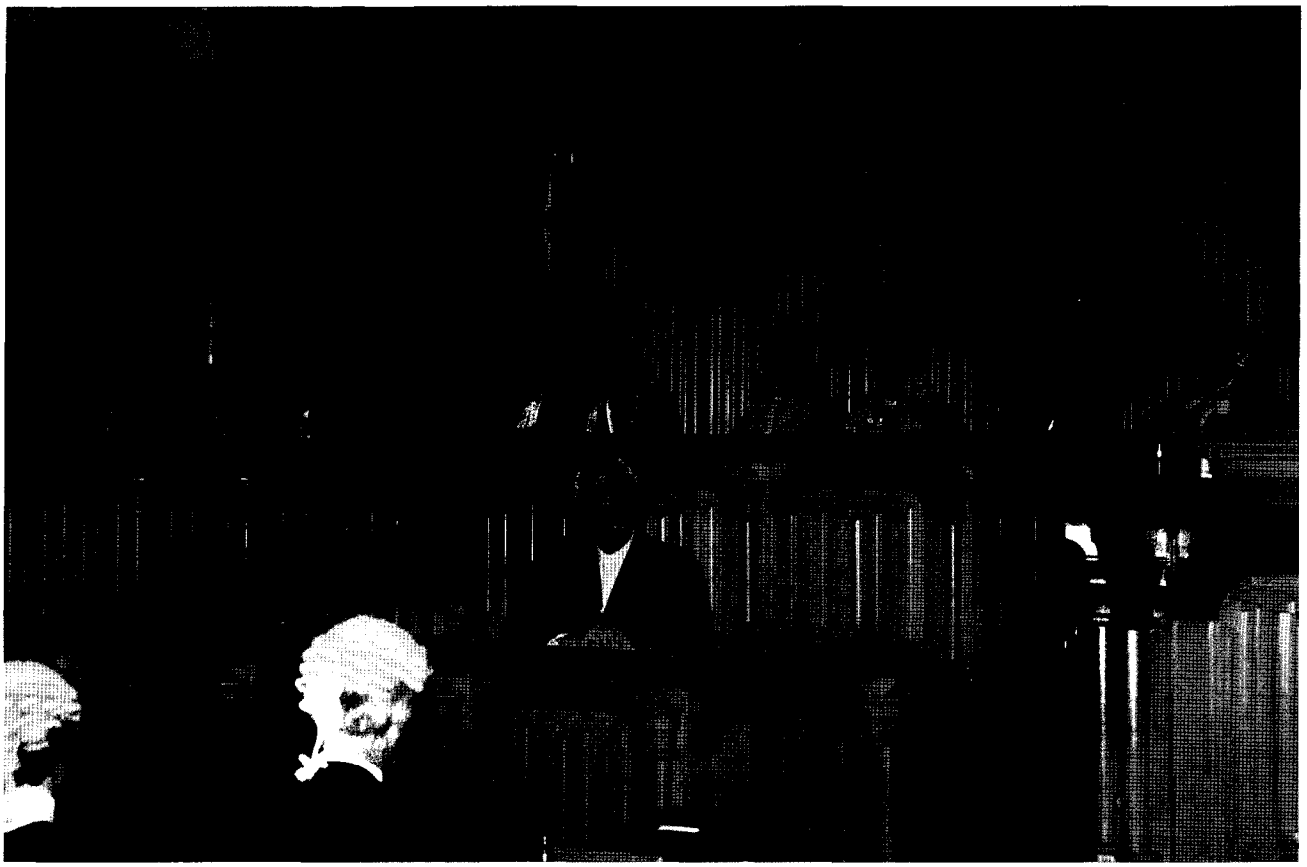
later in the Century. Miss Potter has rightly pointed out that the Canterbury District Law Society has always been a leader in New Zealand Law Society affairs. We were the first District Society, we were very active in promoting the Foundation of the New Zealand Law Society, as early as 1889 we were proposing a yearly conference of the members of various Law Societies in New Zealand. We have always promoted legal education. As Justice Holland has reminded us the Canterbury Society instituted in 1882 a system of prizes available throughout New Zealand for academic excellence, this was the forerunner of the gold medal now awarded by this Society.

Your Honour Justice Holland we are very appreciative of your comments and your ready support. You are no doubt correct in stating that some of those sitting with you today will not agree with everything you have said but I am certain that such issues will be debated both today, this evening and in the months and years to come. I can assure you that this Society will consider your proposals, I personally hope you will continue to be, in your words "*provocative*" for many years.

A lot has been said of the history of this Society over the past week or so and I do not wish to cover that ground today, except to say that the history makes fascinating reading and I do encourage you all to read the splendid paper prepared by Your Honour Justice Tipping in the *New Zealand Law Journal* for October 1993 and to re-read the fascinating chapters on the Canterbury District Law Society by Edgar Bowie in *Portrait of a Profession* which is the Centennial Book of the New Zealand Law Society. What emerges from this history, from the Minutes of this Society over the past 125 years, from the Minutes of the New Zealand Law Society, and from those articles, is that this Society is comprised of men and women who have served and do serve their profession and the public very well. It is a profession comprised of many and varied practitioners, of diverse backgrounds, of diverse views; many of these men and women have achieved recognition as High Court Judges, District Court Judges, Queen's Counsel, Coroners and the list goes on. I have deliberately not singled out specific names as to do so could be to omit some member of our profession who is very deserving of special mention.

Despite consumer criticism, despite the misdeeds of a few, I suggest that our profession has served the public of Canterbury well. Last year this Society held the Canterbury Community Lawyer of the Year award, which was initiated and organised by the public relations committee. There were 71 nominees for that award, these lawyers were nominated by a wide range of organisations to which the lawyers nominated had made a significant contribution. These are the men and women who are the profession in Canterbury, these are practitioners who serve their profession, who serve the public and who serve Canterbury. These practitioners uphold the values of service and integrity which have been the distinguishing marks of our profession over the past 125 years and which I sincerely hope will continue to be its hallmarks over the next 125 years.

We have celebrated that today. It is something to celebrate and on behalf of the profession I do sincerely thank your Honours, Acting Chief Justice and Justice Holland and Miss Potter for your congratulations. □



Special High Court sitting to mark 125 years anniversary of Canterbury District Law Society

Canterbury District Law Society: 125 years anniversary

Speech by Justice Penlington at Butterworths Bar Dinner, 28 October 1993

Mr Chairman, Your Honours and old friends of the Canterbury District Law Society.

Appreciation

First of all, Mr Chairman, I would like to thank you for your very kind and gracious words. It is great being back here in Christchurch amongst my many old friends in the law.

I see that you have noted that I am no longer a Mister.

I can tell you the change in the form of address has prompted Debretts Peerage to coin a new description derived from the Old French as before and from modern hairdressing salons. The editors are now calling us Puisne-sex Judges.

Introduction

In April your ever efficient Cushla wrote to me and extended an invitation to speak tonight.

Conscious that she now has the exulted title of Executive Director and that according to page 27 of the 1988 Annual Report she has taken over Hilda Rumpole's mantle of "she who must be obeyed" I, like Horace, meekly complied.

I had the same fear as that son of a trapeze artist John Major. I wondered what the Right Honourable lady was concealing in her handbag.

I realised that I was to follow a President and an Ex-Chancellor. As the result I have been afflicted with much mental and physical anguish.

In these days when you can get a Mareva or Madonna for a song I hoped that there would be fish on the menu tonight and that Chris McVeigh would ask Sir Robin to injunct me by granting him a Tipene Special.

Waikato

You folk may come from "the Mainland". I now come from the Waikato. That is a synonym for "the heartland". For the geographically ignorant the Waikato adjoins the King Country which is known in incipient Republican circles as Bolgeria.

In the Waikato they speak a different language. A cowpat is a friendly greeting.

Their psyche is dominated by Rugby football.

Since mid September the Log of Wood has been renamed the Pinus Rugbiata.

During a game they do a stomp called the Honky Tonks.

And regrettably some suffer from a malady called Mooloo Myopia. It afflicts high and Loe alike. It results in the other side not being able to see where they are going; and six months' suspension at the hands of Tim Gresson.

My brief

My brief tonight is reminiscence. I too pondered why a 60-year-old should be asked to carry out this task. Then, like Henry Higgins I had a sudden realisation. "By George, I've got it!". I am a sexagenarian and at that age, due to the ravages of time, certain functions are "just a memory".

Law student days

My first nostalgic recollection of the law is of course those halcyon university days when the first term was too early, the second term was too cold and the third term was too late.

My abiding memory of university is our Dean Eric Wills giving us a guarded account of the goings on in the brougham in *Pearce v Brooks*; or taking nine-tenths of the academic year to instruct the property class on the finer points of indefeasibility of title with copious citations from *Assets Company v Mere Rohi* and I add of course at this time *Frazer v Walker* was just a twinkle in the eye of the Acting Chief Justice.

By day of course one was a Law Clerk.

Life as a Law Clerk was tolerably pleasant. You could do some shopping *or* get a haircut in the boss's time *or* even go to the office toilet without having to agonise over how you were going to account for the non-costable time.

I received the princely wage of 2 pounds 10 shillings and 10 pence per week. That sum, with an advance from petty cash, was enough to take your girlfriend to the Law Ball complete with the compulsory corsage and fortified by a half pint of cheap brandy.

Law offices

The law offices where one toiled were quaintly drab and Dickensian. This was the pre Hearn era.

The clients arrived to a cacophony of old Olivettis being thrashed unmercifully in the typing pool.

The normal objet d'art in the reception area was a well thumbed and out of date copy of that upmarket and swinging publication *The Journal of Agriculture*.

All this was in striking contrast to the art galleries which are today's offices.

And while on that subject, and by way of complete digression, I recently read in that well respected journal *The Pahiatua Advertiser* following the explosions and disasters in that cradle of renaissance art, the city of Florence, that David Stock had recently

effected a series of mergers and takeovers which will result in Buddle Findlay being henceforth known as Buddle Fiat and Uffizi.

Dress

Life had a crispness in those far off days.

We were sartorially perfect especially when Sir Alec was in town. You would then grab a suit of a darker hue and see that your bands and wing collars were stiff as boards and as white as the driven snow.

Of course that was easy in those days. They were laundered by an army of Chinamen who in broken Cantonese enjoined you to "Come Fliday" or for the forgetful "No ticky, no collar".

The Law Society

The Law Society was then an outpost of empire; rather than an empire. The secretary was dear old Ivan Wood. He was known to his hard case racing companions as Dosey. Ivan kept the Society's petty cash in the Raymond Ferner bowls trophy and the complaints in a shoe box.

Ivan got through the work comfortably by lunch time. He would then retire to the Canterbury Club for lunch with a libation or two and a complete break in the billiard room.

Council meetings were brief and to the point. They considered such teasing and momentous problems as whether the winner of the Hunter Cup was really a burglar and whether law offices should open at all on Cup Day.

Crime

Unlike the glittering career of Sir Robin who thrived on a daily diet of Certiorari and Prohibition, I cut my teeth on crime and divorce.

I soon learnt the importance of fixing the fee. One time I was acting for a rather gnarled and decayed strumpet who knew every nook and cranny of Kings Cross and who had a list as long as your arm.

This brothel keeper faced a formidable Crown case. Prudence dictated that suitable financial arrangements should be made *before* the trial. I raised the subject. My client replied with an inviting smile:

> Never you mind, Mr Pendleton. When I get out, you will be first off the rank.

Undefended divorces

Those were the days of the undefended divorce. A petitioner would tell the presiding Judge that he loved his wife, that all he really wanted was a restoration of his conjugals and that he had recently expressed that love by way of a registered letter.

And outside the old Supreme Court, on undefended divorce day, the Avon river bank often looked like the Royal Enclosure at Ascot. Which prompted Roper J to say the only thing missing was the band of the Canterbury Regiment playing "Happy Days are Here Again" or the "Last Post".

Defended divorces

And then there were the defended divorces.

I once acted for a jockey called Meikle. He was known at the stables as Treacle. He was cited as a co-respondent in an adultery suit. This case gave me instantaneous national prominence. John Norton's *Truth* newspaper ran on its billboard that week:

> "Treacle Meikle's sticky spot".

During the trial I was given a lesson in judicial intervention.

The presiding Judge was FB Adams. He was a teetotaller. Alcohol strangely played a major part in the events of the night in question. I asked one witness, "Were there a lot of jars and cartons?".

The Judge intervened in his measured way, "What is a carton?".

I could not believe the judicial ignorance. And so I said to the witness:

> Is a carton a cardboard box subdivided into 12 compartments each containing a quart bottle of beer?

Before the witness could reply FB wryly observed:

> Thank you Mr Penlington, for giving evidence as an expert.

Personal injury litigation

No reminiscence would be complete without reference to the good old days of blood and bone litigation. Juries were then persuaded to believe the unbelievable.

Charlie Thomas would produce the phantom car.

Austen Young would convince a jury that a fire engine with its siren going answering a fire call produced a cone of silence.

And then there was that consummate actor from the Repertory Society Roy Twyneham who made it a rule to postpone reading his brief until the last possible moment so that it was fresh in his mind when he went into Court.

Roy acted for a well known local insurance outfit which was decidedly stingy. Its chief executive had the nickname of "Tiger". The latter mistakenly thought that an act of settlement had something to do with the Hanoverian succession.

The special conveyance

Inspired by the *Forensic Fables of O*, now let me take you to the other side of the profession. Let me tell you about "the special conveyance".

This was not, as you might expect, some arcane precedent from the 7th Edition of *Key and Elphinstone Precedents*. The special conveyance was the pride of General Motors in 1938. It was a blue Chevrolet sedan proudly owned by Annesley Harman. By the time Annesley had been joined by his three sons, Brian, Colin and Peter, the car had a very venerable look.

It was customary for the Harmans to go home for lunch. Of frugal disposition they said "Why use the big reds when the big blue is available for a fraction of the cost?"

And so the four Harmans, Annesley and the three boys all in their look-alike grey suits and grey felt hats would perform this daily ritual.

And it so happened that as the Big Blue started to make its funereal way along Hereford Street at 1.57 pm one day, Peter Mahon and Cliff Perry were standing on the corner of Hereford Street and Oxford Terrace. They were then fashioning the last arrow to shoot at their Lordships to restore the primacy of *Salomon v Salomon* in *Lee v Lees Air Farming*.

Mahon spotted the big blue. He turned to Perry in tones reminiscent of God's Vice-Regent and said:

> Look Cliff, there they go, the untouchables.

And it so happened that Brian McClelland was a little further down the street. He was with Ralph Thompson. To the annoyance of Macarthur J and Jack Gerken his faithful registrar, they had conveniently settled a personal injuries "list stopper" at lunchtime on the second day and had then had a good lunch, washed down with a little Chateau Neuf du Pape.

At this point McClelland's eagle eye spotted the Big Blue and he then said:

> For God's sake Ralph, go to ground. It's Al Capone.

Window watchers:

In my early years in the law, window watching was a popular sport. The practitioners of this habit were inspired by EM Forster's *A Room With A View.*

One was George Weston, the second of four generations of that name to proudly practise in this city. He had been a friend and confidant of OTJ Alpers And with George's death the bowler-hatted practitioner disappeared from our city.

George was also famed for his signature. It had the appearance of Mao Tse Tung's execution of a State document. It made Nigel Hampton's signature look like copperplate.

George Weston's office was directly across the road from Les Dougall's office.

And not to put too fine a point on it, each of them could be distinctly crusty.

One day Weston phoned Dougall. A girl politely answered. Weston asked to be put through to Dougall. Dougall responded – not with that fancy stuff "I am in conference", but simply "Tell him I'm out". The receptionist dutifully obeyed. Weston snapped back "Nonsense girl, nonsense. I can see him through the window".

"God is watching"

And this leads me to tell you about two other practitioners. They practised in adjoining buildings in Hereford Street. For reasons of delicacy both will remain unnamed. One whose office was at a slightly lower level had distinctly amorous habits. One day the practitioner in the other building, while watching through his window, saw the amorous one in a situation of compromise which was giving true meaning to the concept of Accord and Satisfaction.

The watcher immediately picked up his telephone and said to his colleague the amorous one "God is watching".

Brassington

The mention of George Weston's bowler leads me to recall with great affection the last wearer of the Homburg, Alan Claudius Brassington, otherwise known affectionately to many generations as "Brasso".

Invigorated by a second marriage he made the customary pilgrimage to England. He patronised the tailors of Savile Row. He returned to Christchurch as the epitome of sartorial elegance, the polka-dotted tie, the tuft of silver hair emerging from the Homburg, spats, a furled umbrella. He looked like a law lord. It was as if the flesh had dwelt amongst us. This was the new Brasso. Gone forever were the days of a suit from Hallensteins and seconds from Hannahs.

One lunchtime as Brasso returned to his office he was espied by Bert Ludecke, a humble honest-to-goodness practitioner who was dressed in a rather crumpled suit and who was clutching his Speedo swimming togs after doing his customary ten lengths of the Centennial Pool.

Ludecke, taking his roll-me-own out of his mouth, looked at Brassington and said "Gee, Brasso, you are a bit of a toff aren't you?" to which Brassington replied with a one-line judgment "Ludecke, buzz off."

Coffee club

No reminiscence of yester-year would be complete without the mention of the morning Coffee Club. I understand that it is currently presided over by Tony Hughes Johnson. It was there that the bar assembled, as it still does today.

Gordon Leggat would be there notwithstanding his frenetic life. He might relay to the coffee-drinkers the inside buzz on the Australian team as picked up from Sir Donald Bradman or the nocturnal habits of the handsome Nawab of Pataudi during the Indian tour. And he would always regale those present with the latest Wellington gossip, for example information on a new appointment which had the impeccable accuracy of having been picked up in the latrine of the Wellington Club.

Brian McClelland would then offer his view on the intellectual qualities of the new appointment. His gracious tribute would be economically expressed: "He has not got a brain above the navel".

And if a new appointment was not in the offing Brian might then give his view on the reputation for honesty of some philanthropist who had just picked up a gong in the Honours List, "He couldn't lie straight in bed."

A D Holland surprisingly would fulminate on the inadequacies of a local stipendiary magistrate who had the nerve to sprint to the far side of his Chambers to hide behind a big sofa when Alan was about to serve him with a writ of mandamus.

John Burn might offer some bon mot; or perhaps a snippet of Bernard Levin from the airmail edition of *The Times.*

There were portents of great things to come. E J Somers would indulge the table with a masterly demolition of Lord Justice Buckley's most recent judgment in the Chancery Division.

There was the up and coming Austin Forbes then of cherubic countenance. He was already honing his appellate skills. He once told the table that he had read that appeals from that Edwardian Chancery Judge, Kekewich J would be customarily opened with the words "This is an appeal from a judgment of Mr Justice Kekewich. The second ground of the appeal is so-and-so."

Austin questioned whether he should adapt these lines for an appeal from Wilson J.

The unanimous view was expressed in words now immortalised by the TAB: "Have a Go!"

And then there was the laconic wit of Peter Mahon, whether he was describing with meticulous detail his

birdie on the Pagoda at Shirley or forecasting with a warranty of complete certainty the winner of the sixth at Addington or opining that The Court of Appeal had failed miserably to understand his argument on the application of the rule in *Andrews v Partington*, a recent case decided in 1791.

Another visitor sometimes was Peter Alpers OTJ's son. Alpers was an athletic fellow. One morning Mahon noticed that Alpers had his trouser leg well up and was showing a lot of hairy leg. Mahon turned the docket over and wrote on it "pull your pants down". Alpers duly obeyed Mahon's command. Alpers then went to the nice little lass at the counter to pay his bill. He tendered the document upside down.

The Dominion

A reference to popular watering spots would not be complete without a reference to the Dom. At that hostelry the Thespians of our profession congregated with the press and the Literati. And with Benj Drake quaffing an ale or two and benignly refereeing any artistic contretemps.

The principal performer who has already received an honourable mention tonight was of course Mervyn Glue. He had a marked similarity to that Tudor monarch Henry VIII. He was courtly, portly and had a passion for marriage.

Whether Mervyn was rehearsing his plea in mitigation for some hapless youth or polishing up his lines as a King Lear or Claudius or adjusting his toga to better show off the durable qualities of Parthenon tiles, Mervyn would always be giving a spectacular first night performance.

And then there might be a younger and less serious Erber or A K Grant crafting some lines for the Merely players or continuing his quest for a suitable nom de plume. And on that topic, Alan finally came up with the answer: Peregrine Ruapehu de Vere Stacpoole Whineray.

Appointments

Over the years Christchurch practitioners have been appointed to all sorts of things — Government quangos, an ambassador to the Chrysanthemum throne, a petrol licensing authority, Judges, Magistrates, and some have even been game enough to enter Parliament.

Sometimes however talent and ability has not received its proper and due recognition.

Terence Gresson was a practitioner who was the third generation to practise the law in New Zealand. He was a brilliant cross-examiner and raconteur. He had been an outstanding athlete and above all he was a gentleman and a dog lover. A pillar of the Kennel Club.

On People's Day 1956 at the A & P Show he ran into his cousin Garth Gould. Against a background of canine noises and with his customary urbanity he said "Oh, by the way Garth, they have made me a Judge", to which Garth responded "Congratulations Terence! Which breed?".

Conclusion

Ladies and gentlemen, may I thank you all sincerely for this opportunity to share with you some fragments of the past.

When OTJ Alpers was dying he was inspired by Wordsworth's *Excursion*. That great poet of the Lakes District had written:

> A man he seemed of cheerful yesterdays, and confident tomorrows.

Alpers called his book *Cheerful Yesterdays*. Recently his younger son honoured his father's memory with another book *Confident Tomorrows*.

Indeed for all of us this is a time when we can say with gratitude we have had our cheerful yesterdays and we now look forward to our confident tomorrows. □

Hong Kong — an Asian view

When Governor Chris Patten first put forth his package of modest reforms in October last year, he immediately changed the political equation in Hong Kong. Not by the proposals themselves, all of which are admittedly modest. What Mr Patten changed was the monopoly his predecessors had tacitly — some suspect explicitly — given Peking over how the 1984 Joint Declaration would be implemented. As he told us in a recent interview, the question is whether Britain has a bottom line. "If we don't," he says, the British might just as well give the Chinese side "a blank piece of paper and let them write on it what they want." Mr Patten's latest decision to introduce a portion of his package to Hong Kong's Legislative Council (Legco) suggests he is serious about this bottom line.

The governor's determination to break the debilitating pattern of the past has put him at odds with more than just China. It has also earned him the enmity of the British mandarins who have until now managed Hong Kong policy. Chief among these, of course, is Sir Percy Cradock. Britain's ambassador to China from 1978-83 and until recently a policy adviser to 10 Downing Street, Sir Percy took the opportunity of an appearance before the Commons Foreign Affairs Select Committee to blast the governor's approach. "My case against that policy in essence is that it is doing, and would do, much more harm to Hong Kong than the alternative policy of cooperation with China on the best terms we can get."

The operative phrase here is "the best terms we can get." For the whole reason Hong Kong finds itself in a pickle today is not because of Mr Patten, who does not regard it as any sort of achievement to secure China's agreement to another finely worded statement it will then redefine into nothingness.

Far Eastern Economic Review
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Keytitles Project I: A judicial perspective

By Justice Fisher, Courts Computer Committee (Judicial)

The law is defined by categories. Indexing is therefore an essential element of legal research. The growth in use of computers makes this element even more significant. A project has been undertaken to provide a new legal classification system for use of Judges, the Law Commission and others. In this article and the following one the project to date is described. Comment is requested from anyone with a view on what is being done.

The classification of legal concepts serves two functions. One is to provide a common language for indexers and researchers. Indexers need to put legal materials in places where researchers can later find them. Each source document is put into one or more labelled pigeon-holes. When researchers want something, they try to think of the labels which the indexers would have used. By this means they hope to go to the right pigeon-hole and to take from it whatever legal materials have been left there for them. The other function of classification is more dynamic. Classification moulds our conception of the law. It can therefore influence the way in which the law itself is made.

As to the first of those functions, the "indexer" is usually a law reporter, librarian, text-writer, publisher, Judge's clerk or Judge. The material indexed is usually a legal decision, legislative provision, article or text-book. The researcher is usually a legal practitioner, teacher, student, Judge's clerk or Judge. Suppose the decision in *Smith v Brown* deals with remoteness of damage following breach of contract. A law reporter in Auckland indexes the judgment under "Contract – damages for breaches – remoteness". Twenty years later, a client in Invercargill has a problem on that subject. So long as the lawyer categorises the problem in the same terms, then the lawyer can consult a computer database or digest under "Contract – damages for breach – remoteness". *Smith v Brown* will then spring into view. But *Smith v Brown* would be found only if the original law reporter and the subsequent lawyer shared, or had the means of sharing, the same concepts and language. If the case had been indexed under "private obligations – compensation for broken promises – proximity of loss" *Smith v Brown* would probably have been born to blush unseen and waste its sweetness on the desert air.

The sharing of common labels is not the only way in which indexers can communicate with researchers but it is certainly the most common one. A lawyer will expect to see a point relating to breach of contract under the keytitle "Contract", not "Summary judgments" (for some reason the latter is currently used by one indexer to embrace everything from "agency agreements" to "termination of contract" if the point happens to have arisen in the course of summary judgment proceedings). So it is preferable that indexers use labels that are widely understood by researchers. If that cannot be achieved, there must at least be a thesaurus which guides the researcher from terms with which he or she is personally familiar to the language used by the indexer.

The provision of a means by which indexers can talk to researchers is merely the passive role of classification. Its other function is more dynamic, and perhaps in the long run more important. Classification provides the windows through which we perceive, and therefore develop, the very content of the law itself.

Take the Bosnian territorial disputes between contract, tort, restitution, estoppel and constructive trusts. Outcomes can at times be influenced by the somewhat arbitrary choice of legal label which we choose to place upon the same set of facts. If the whole subject of private obligations were to be broken down and reclassified, its future development would probably differ substantively – not necessarily because of any conscious intention to change the law itself but simply because of the different perspective which a fresh set of sub-categories and labels would lend to the subject. Or to take a less abstract example, suppose a telecommunications question had arisen at a time when that subject was perceived to be a sub-category of "Government services". Principles and decisions concerning the relationship between the Crown and the individual might then have seemed relevant. Re-classify telecommunications as a sub-category of the proposed keytitle "Communications". The result is to juxtapose it with principles and decisions relating to freedom of communication, freedom of the press and piracy of information. The perspective, and potentially therefore the result, could be different. Or to take a third example, few would now want to preserve the old Halsbury heading "Bastardy", at least for the purpose originally intended by Lord Halsbury. But it would not be enough to show that the law on that subject had now changed. To the extent that it remained a subject at all, it would need to be seen in its proper contexts under the proposed keytitles "Family and domestic relationships" and "Property (General Rules)". As far as humanly possible, the classification of legal materials should reflect an enlightened analytical view of the law.

The way in which we classify our law is therefore important both for legal research and for legal reasoning. And just as the law evolves, so must its classifications.

The labels must be reviewed from time to time to ensure that they are still apposite.

These matters were brought home to the New Zealand judiciary in 1991 when they went to set up a computerised system for classifying their own judgments. None of the indexing systems then in use in New Zealand seemed entirely satisfactory for this purpose. To take random examples, one well-known system provided a separate heading for "Aquaculture" but made no provision for appeals, Courts or remedies. Another indexed much substantive law under the heading "Summary judgment". A third made no express provision for human rights. All contained anachronisms, gaps, overlaps and anomalies. A fresh approach was needed. The same conclusion had been reached by Australian Judges a year or two earlier. In both countries, the wheels were set in motion to produce revised classifications.

The New Zealand judiciary were fortunate in gaining the support of the Law Commission, the Council of Law Reporting, the New Zealand Law Society, and the general editors of the *New Zealand Law Reports* and *Laws of New Zealand*. They were equally fortunate in gaining the agreement of the Law Commission to undertake most of the work. The immediate purpose of the project was to provide a new classification system for internal use by Judges and other indexers in the Court of Appeal, High Court and District Court, use by the Law Commission in its own work, and use in the *New Zealand Law Reports* and the Linx database. But in addition it was hoped that the new system might be of some use to others who would be called upon from time to time to classify and index New Zealand legal materials.

Work on the project followed during 1992 and 1993. It was supervised by a Committee consisting of judicial representatives from the Court of Appeal, High Court and District Court, Sir Kenneth Keith and Mr Philip Shattky of the Law Commission, Mr Pat Downey, general editor of *Laws of New Zealand*, Mr Maurice O'Brien QC, editor of *NZLR*, and Mr Brendan Brown representing the Council of Law Reporting and the Law Society. The more important existing New Zealand indices were collected and analysed, as was the new index of the Australian Institute of Judicial Administration. New classifications were devised and refined. The burden of this work fell to Mr Shattky with valuable assistance from Mr Brown. The judiciary is grateful to them both.

The result is described in the accompanying article from the Law Commission. Comment to the Commission would be appreciated. The specific keytitles and subtitles proposed can undoubtedly be improved upon. And if the ideas of commentators cannot be directly incorporated in the basic classifications, they can at least be included in the thesaurus and thus provide another valuable means of accessing the basic indexing system. □

Keytitles Project II: Information and modern research

By Philip Shattky, Law Commission

This is the second of two articles in the project to provide a new legal classification system. Comments, criticisms and suggestions would be welcome and should be sent to the author at the Law Commission, PO Box 2590, Wellington by 21 February 1994.

Introduction

Good legal research is characterised by breadth, accuracy and completeness. This analysis is not novel but the information requirements of modern research do have new dimensions – in scope if not in kind. Modern computer technology also greatly enhances the range of information that can be collected and sought.

In addition to the ever growing collections of case and statute law, the researcher must often take account of international law, foreign law, and much extra-legal information. And always there is a need to recognise the movement away from legal compartmentalisation to more holistic views of the law, or at least to different compartments as the law and its subject matters evolve.

That is to say, there are several pressures for change in the way law is packaged and accessed. This article introduces one attempt to relieve that pressure through a new approach to the classification of law to facilitate access to collections using the system (the keytitle system). It is hoped that the keytitle system can be employed widely and in respect of many different types of legal collection.

While, as Justice Fisher indicates, the system began as an attempt to answer specific needs, its wider potential was always kept in view. It was evident very early that wider application of the system was primarily dependent on its treatment of two apparently inconsistent objectives:

- providing a sensible method of categorising legal material, and
- enhancing the ability to access the material from changing and more holistic viewpoints.

The system should also be as durable as possible.

The proposed keytitle system is designed with those objectives in mind. Comments on its adequacy are sought.

Categorisation

Categorisation of legal material has evolved into an art form with many classification systems as a result. Each tends to be longer and more detailed than its predecessor, and, in focusing on providing access to the law, each system continues to grow and evolve with the law itself.

While a need for classification will always remain, greater emphasis is needed on the dual role that it plays and the contradictions between them. Not only can classification be an aid to access but it is increasingly required as a means of managing the volume of material. The proposed system remains as a classification system but is radical in its omission of much of the detail of the traditional approach. It addresses the volume management role of classification but applies new techniques to better address the access issue.

If a categorisation system is used as the sole basis for locating material, its design will restrict the view of the material which a researcher can take. The more transparent the classification system, the easier the task of reconciling a researcher's concepts with those underlying the classification system – hence the concern to base the classification system on a more fundamental view of the world rather than on a particular legal philosophy.

Appreciation of the distinctions between the roles of the classifier and the researcher led to the design of a dual system and to the adoption of a "single-entry" approach for the classification system. As far as is possible, there is only one "box" available for each of the "world view" concepts – a major departure from traditional approaches which provide multiple cross-references for each legal concept.

Holism

Just as modern law increasingly crosses national boundaries, it also commonly crosses from one traditional compartment to another. For example, the explicit introduction of concepts of "fairness" into the law of contract provides a linkage between that law and administrative law. The legal researcher requires tools to help locate such linkages and the proposed system provides those tools.

In addressing the "sameness [which] afflicts many scholarly articles, books, and doctoral dissertations" R Delgado and J Stefancic say ("Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma" (1989) 42 *Stanford Law Review* 207):

> The very rules of structure that enable editors and indexers to place an article or case into particular categories are themselves matters of interpretation, custom, and ultimately politics, which in time have come to seem natural and inevitable . . . Relying on them exclusively, however, renders innovation more difficult; innovative jurisprudence may require entirely new tools, tools often left undeveloped or unnoticed because our attention is absorbed with manipulating old ones.

No system of classification can account for all possible or existing linkages but it can place material closer to that with which linkage is most likely and in a way which does not inhibit the use of new tools (such as computers) in the search for them.

Durability

Traditional systems tend to rely on the legal catch phrases of the day and become cluttered with redundant words and categories as that language evolves. If a system is to be durable it needs to address two central problems:

- evolution in legal language, concepts and categories
- changes in the areas in which the law is involved.

The draft system adopts keytitles (with subordinate classifications) in an endeavour to use concepts and terminology which are more descriptive of the tasks the law is serving (or may serve) than the language currently used. The basis for this approach was an initial categorisation of the areas in which the law (potentially or actually) has a role. The preliminary categories (which do not form part of the keytitle system itself) were chosen for minimal ambiguity and to avoid, as far as possible, biases arising from custom or politics. With that starting point it is hoped that the system provides coverage for new and unforeseen legal territory. The initial categorisation was:

- PEOPLE (legal persons and classes who can be concerned in, or the subject of, a legal issue)
- PROPERTY (the inanimate subject or object of a legal issue)
- PROCESS (the way in which legal issues are handled)
- CONTEXT (the external forces which affect legal development or the resolution of legal issues).

By departing, to some extent, from traditional legal terminology the keytitle system endeavours to focus on more permanent landmarks of the environment the law serves. However, it was recognised that complete abandonment of legal language and concepts would be too radical. A reasonable compromise has therefore been attempted; the standard tools of tables of cases, statutes, and words and phrases have been retained; and a thesaurus is being developed.

Structure of the proposed sytsem

The heart of the proposal is a list of keytitles. The list is short – only 58 terms are used. Each keytitle is itself subdivided, to a maximum of two subordinate levels. While there is greater use of familiar terminology in the subcategories, the conceptual approach remains predominant.

The extent to which the classification system can be used as a tool for location will depend on the researcher's understanding of the design of the system. The thesaurus providing the link between traditional legal terminology and that used in the keytitle system, and tables of cases, statutes, and words and phrases should reduce any sense that the system casts the user adrift from earlier practices.

While it is desirable to restrict the number of categories in the classification system and to minimise changes to it, the thesaurus is not subject to the same constraints. The thesaurus can be continuously expanded to cover changes in legal focus and terminology, and redundant terms can be retained in the thesaurus without creating classification problems.

KEYTITLES

The full list of draft keytitles follows this article. The lower level categories are not, for reasons of space, set out in full. The following demonstrates the way the proposal would work in practice.

The current indices to many legal collections in New Zealand contain primary references to *ACCIDENT COMPENSATION*. For example, the *New Zealand Law Reports* uses the term as a primary reference with the following secondary references:

- *assessment of permanent incapacity*
- *functions and powers of Corporation*
- *jurisdiction*
- *levies*

This categorisation partly reflects the scheme introduced in 1974. But recent changes to the legislation suggest that the categorisation itself may require change (even the phrase *accident compensation* is no longer used in the title to the amended Act).

In terms of the proposed classification, the relevant overall concept would be expressed as PERSONAL INJURY – a concept which is permanent and not directly tied to particular legal regimes. A more generic approach is also taken in the categories used to subdivide the primary keytitle as follows:

- *right to compensation*
- *administration of compensation schemes*
- *funding of compensation schemes*
- *administration of preventative schemes*
- *funding of preventative schemes*
- *rehabilitation benefits and services*

The thesaurus would list the NZLR primary and secondary references (and those of other current indices) and *personal injury* and link each of them to the relevant points of the proposed classification.

KEY TITLES

ADMINISTRATIVE ACTION

AGENCY

AGRICULTURE AND FISHERIES

ALTERNATIVE DISPUTE RESOLUTION

ANIMALS

APPEALS

CITIZENSHIP AND NATIONALITY

CIVIL PROCEDURE

COMMUNICATIONS

CONSTITUTION

CONSUMERS

CONTRACT

CORPORATE BODIES

COURTS AND TRIBUNALS

CRIMES AND OFFENCES

CRIMINAL PROCEDURE

CROWN, PARLIAMENT AND GOVERNMENT

DECEASED PERSONS

EDUCATION

EMPLOYMENT

ENVIRONMENT

EQUITY

EVIDENCE

FAMILY AND DOMESTIC RELATIONSHIPS

FIDUCIARY RELATIONSHIPS

FINANCE AND BANKING

HEALTH AND SAFETY

HUMAN RIGHTS

INDUSTRIES AND TRADES

INFORMATION

INSOLVENCY

INSURANCE

INTELLECTUAL PROPERTY

INTERNATIONAL LAW

INTERPRETATION

INVESTMENT

LAND

PENALTIES FOR CRIMES AND OFFENCES

PERSONAL INJURY

PERSONAL PROPERTY

POLICE

PROFESSIONAL ADVISERS

PROPERTY (GENERAL RULES)

PROPERTY INTEREST, SPECIAL TYPES

PUBLIC ORDER AND SAFETY

REMEDIES

RESOURCES AND ENERGY

RESTITUTION

REVENUE

SCIENCE AND TECHNOLOGY

SOURCES OF LAW

TORT

TRADE PRACTICES

TRANSPORT

TRUSTS

UNINCORPORATED ASSOCIATIONS

WELFARE ASSISTANCE

YOUNG PEOPLE

SUPPLEMENTARY TABLES

It is anticipated that tables which provide subject cross-references to things such as:

cases,
statutes,
treaties, and
words & phrases

would continue to be published.

Conclusion

As already indicated, the authors of the proposal seek comment which can be used to improve the keytitle system and facilitate its wider use. While the draft system is currently being installed on computers used by the Judiciary for the preparation of judgments it is not seen as final, and any improvements which arise out of comments received will be considered for incorporation either in the thesaurus or in the keytitle system itself. Because of the desire to see the system adopted as widely as possible, comments are specifically sought from the Judiciary, major legal publishers, and those within the academic and professional communities known to have an interest. But it is hoped that comments will be forthcoming from as wide an audience as is possible.

Those wishing to comment will need copies of the complete draft. These can be obtained by writing to, or telephoning the Law Commission, PO Box 2590, Wellington, (Philip Shattky, (04) 473-3453). □