THE NEW ZEALAND
LAW JOURNAL
21 FEBRUARY 1994

O T J Alpers — a Player of many parts

Confident Tomorrows, a Biographical Self-Portrait of O T J Alpers (Godwit Press, 1993 ISBN 0-908877-26-9), is a book that should be on the shelf of every New Zealand lawyer who thinks of himself or herself as literate, educated and cultured. The book is a delight to read, not only because of the fluency of its style, but because the warmth of personality of the author becomes so clear. O T J Alpers (1867-1927), one time Judge of the Supreme Court of New Zealand, was a man of letters, a man of action in the sense of taking an active interest in community affairs, a man of law, a man of culture and a man devoted to his adopted country.

Alpers arrived in New Zealand, at Napier, in 1875 with his parents. None of them could speak any English. He was eight years old. Fifty years later he sat in Napier as a Supreme Court Judge. It was appropriately his first sitting. It had been just a month earlier, on his fifty-eighth birthday, that he received a letter from Hoskin J asking if he would be prepared to accept a judgeship if it were offered to him. A week later he received the official letter from the Attorney-General, and on the same day he received a letter appointing him the Danish Consul for the South Island — a post he resigned that day. As he noted wryly he was able to report to Copenhagen that in the 14 hours he held the office he made no mistakes. It was indicative of his wide classical reading and retentive memory that he recalled a similar event noted by Cicero of a Consul in Republican Rome who held office for six hours — a reference he was to quote two years later in his last letter to Sir Francis Bell, the Attorney-General who had appointed him. The letters in the book are incidentally interesting for the many references and quotations from classical Roman authors — without the letter-writers translating these — although as a sign of the time they are kindly translated in footnotes.

His appointment in 1925 as a Judge caused Alpers to reflect on his career. He noted in his diary, after thinking of his lack of knowledge and experience in respect of the law:

> I remembered and tried to get comfort from early days in Napier: my incompetence to teach. I was nearly nine when I landed in New Zealand and had laboriously to acquire a new language of which till then I knew no word . . .
>
> "Dat Lamb haf verri fine vool" — my first sentence in English. And yet I was top in the exams at the end of my first, second and fourth years and second in Hawke's Bay District in my third — being beaten for top place by "Charlie" Laws, now principal of the Wesleyan Methodist College at Auckland, and an honorary D D of somewhere. Even then I was only beaten by eight marks, because I had fallen in love — at fifteen — with pretty Kate Andrews, and later in the year, when she jilted me for the said Charlie Laws, with Alice Garry. And erotic emotions interfered with study!
>
> Again I became top of Christchurch Normal School Training College in less than a month — was expelled for lampooning the drunken head-master (Malcolm) but restored on my apologising humbly in order to save £50 scholarship. Same year expelled from the Christchurch School of Art for "guying" the Head — a fool called Elliot . . .
>
> My first leading article in the Christchurch *Press* at twenty-one. My entry in the legal profession in Timaru in 1905 without one atom of previous experience — culminating after twenty years in my call to the Bench — why not as always "follow my star" and have courage? But pluck is just what I lack most, inwardly — call it self-confidence, or what not.
>
> On one point I had no diffidence — the moral as distinct from the intellectual aspect. I knew I would be a fair and just Judge — a humane Judge — balanced in his judgments according to my lights, forbearing the sins if not the stupidities of others, above all things else I knew I would be a kind Judge, and that was something.
>
> Financial considerations did not deter me for one moment. It meant a present sacrifice of income. The firm's business had expanded every year. I had ten years' lucrative practice before me, granting life and health. I had a right to bequeath my share in the firm some day to my son Peter if he chose the profession. All that would go, and if I accepted a judgeship I could not of course receive pay for my goodwill in the firm . . . Unfortunately a beggarly pension for me on retirement for ill-health, and not a penny of pension for my widow if I died.

The reference to his possible early death proved to be a presentiment for he was dead in less than three years,

dying in Wellington on 21 November 1927 at the age of 60.

It was because of his impending death that he wrote, during his terminal illness, his book of charming reminiscences *Cheerful Yesterdays*. He wrote it to provide a small income, from the royalties, for his wife who was soon to become his widow. Always a practical and realistic man he had told a friend, Charlie Thomas, that while he intended to be buried in Christchurch, the city where he had practised law, he had decided against going back to die in the city. His reason was that because of the state of his health he would have had to engage the bridal suite on the inter-island ferry *Maori*, and instead "I'm going down in the hold for half the price."

Cheerful Yesterdays was a successful book, in New Zealand terms, and has been read and enjoyed by generations of lawyers – and no doubt many others. What Alpers' youngest son Antony has now produced in *Confident Tomorrows* is what might be described, loosely, as a new, revised, and expanded edition – well, really a new version. As Antony Alpers was only eight years old when his father died this new book is at once the fulfilment of a filial duty and an acquaintance with a father he hardly knew.

Confident Tomorrows takes very substantial selections from the earlier book and interlards them, sometimes on a paragraph by paragraph basis with quotations from letters and a diary, and comments by Antony Alpers himself. It is a most successful method and all of those associated with the publication, particularly those described on the title page as having "compiled and edited" the work, Antony Alpers and Josephine Baker, are to be congratulated and thanked by those who fondly recall reading *Cheerful Yesterdays* and those who for the first time will have the pleasure of meeting OTJ in the pages of this new book.

Caricature of O T J Alpers by Kennaway Henderson

One of the most delightful things to do is to compare some parts of the original text with the slightly different versions of the same events as recorded in the diary notes and letters. There is an added immediacy. Two of the episodes I recalled particularly were the escapades as a student, referred to in the quotation above, and Alpers' delighted embarrassment when he and his wife went to the theatre just after the announcement of his appointment and the audience greeted their arrival with applause. Both read better in the diary notes.

It must not be thought that *Confident Tomorrows* replaces the earlier book. A large number of anecdotes have been dropped to allow for the new material, and many of these are ones that particularly amuse lawyers. I was disappointed for instance that the new work does not include the account of death by statute. This was about the farmer whose run needed to be divided up among his sons so that it could be properly farmed. Unfortunately the run holder was a committed patient in a mental asylum. The solution was a private Act which authorised probate of his will as if he were dead. The irony was that he subsequently recovered, after 20 years in hospital, and happily for all concerned was amused at his premature "death".

One odd discrepancy I noted from recollection was an account in the original book of a comment OTJ says he made to the manager of a client insurance company and the manager's reply (see *Cheerful Yesterdays* pp 211-212); and the same story and reply in a diary entry in *Confident Tomorrows* at page 149 as having been made by a medical witness. Memory plays tricks on us all.

In 1906 OTJ set and marked the University of New Zealand Matriculation Examination English paper. Antony Alpers adds a touching comment:

> One candidate in Dunedin (who kept her paper) was a girl who had been failed in 1905 for lack of one mark in arithmetic. When she passed in 1906 Mr Alpers, M.A. gave her only 61 percent for English, but in Christchurch five years later he made amends; he married her. The excerpted paper was thus preserved among his "treasures".

In his diary OTJ made comments about cases he heard, and particularly about Court of Appeal cases he was involved in. One of the great attributes of *Confident Tomorrows* is the Chapter by the President of the Court of Appeal, Sir Robin Cooke, on "Alpers as a Jurist". Sir Robin comments that a distinguishing feature of the judgments of Alpers J was their literacy and their wit. It needs to be remembered of course that OTJ had been a school-teacher, an amateur actor and a journalist before enrolling as a law student at age thirty six.

Sir Robin Cooke refers particularly to the New Zealand Court of Appeal decision in *The King v Carswell* [1926] NZLR 321. On that case OTJ had written in a letter to F H Bruges that he disagreed with a decision of the English Court of Appeal *The King v Wheat* [1921] 2 KB 119 which Counsel would obviously contend should be followed. Alpers wrote:

> I think the English decision is very illogical and that it shocks the conscience and (as at present advised) I am going to say so and also assert the independence of our Courts in a case where we think the English Court wrong. I am more and more disposed to say, "Judge – do not fear to legislate – it's part of your job."

In the English case, *The King v Wheat* the Court of Criminal Appeal held that it was no answer to a charge of bigamy that the accused reasonably believed that he was divorced. In *Carswell*, in answer to a specific question put to them, the jury found that Carswell believed in good faith and on reasonable grounds that he had been lawfully divorced and was thus entitled to marry again. Herdman J, as Judge at first instance, directed the jury to return a formal verdict of guilty, and stated a case for the Court of Appeal. The question was whether the finding of the jury constituted a good defence.

As it happened the New Zealand Court of Appeal divided five to four, with Alpers J being of the majority who decided not to follow *Wheat*, as did the English Court of Appeal 42 years later in *Regina v Gould* [1968] 2 QB 65 and the Australian High Court in *Thomas v The King* [1937] 50 CLR 279. Neither of these decisions cited *Carswell*, except for a passing reference in the Australian case.

Sir Robin Cooke concludes this chapter with two paragraphs that must stand as both a tribute to the memory of a great and warm-hearted man, and as a sad note of the loss to legal history because of Alpers J's untimely death.

> It would not do to wax indignant about the way *Carswell* has been treated in other jurisdictions. The more useful thought is that the majority New Zealand view, to which Alpers was the most firm of adherents, has prevailed internationally on its own merits. It is a lesson to his successors on the New Zealand bench to be discriminating in their approach to overseas precedents. As well I think it helps towards a tentative verdict on Alpers as a jurist. He may not have been especially learned or acute in the law: he found it hard to resist a temptation to panache: but his heart and his culture, together with his willingness to be independent, made him one who could have had a profound influence on the future of our law.
>
> How far he was receptive to new ideas one does not know, but there is much in this book to suggest that he would have responded to racial problems sensitively and would have been an asset in dealing with the cases in that field with which the Courts are now coping. On the other hand he had a more European and classical outlook than is now fashionable.
>
> He has been far from the only Judge in the history of New Zealand law to die prematurely, but he was such an unusual man and had such a strong personality that his must be one of the most significant of our losses. I salute him as a Judge who epitomised some of the best and most gracious characteristics of Western civilisation.

P J Downey

Recent Admissions

Barristers and Solicitors

Anicich C E	Dunedin	10 December 1993	Leong Y L	Christchurch	17 December 1993
Benjamin B E	Hamilton	16 December 1993	Lindroos J P	Christchurch	17 December 1993
Bodie M J	Dunedin	10 December 1993	Littlejohn K R M	Christchurch	17 December 1993
Brown M M	Christchurch	17 December 1993	McNeil S E	Auckland	15 December 1993
Buckley J M	Christchurch	17 December 1993	Mulholland C A	Christchurch	17 December 1993
Campbell S B	Dunedin	10 December 1993	Muller G P	Dunedin	10 December 1993
Chapman C J	Dunedin	10 December 1993	Parker M W	Dunedin	10 December 1993
Clarke C E	Christchurch	17 December 1993	Pili R F	Dunedin	10 December 1993
Clarke J R	Christchurch	17 December 1993	Ping-Fat S	Auckland	17 December 1993
Crehan M P	Christchurch	17 December 1993	Richards C A	Christchurch	17 December 1993
Corner N E	Christchurch	17 December 1993	Rogers J P	Christchurch	17 December 1993
Currie P B	Dunedin	10 December 1993	Ryde R D	Christchurch	17 December 1993
Darking B C	Dunedin	10 December 1993	Samways C A	Christchurch	17 December 1993
Dicey J	Dunedin	10 December 1993	Sharpe H A	Christchurch	17 December 1993
Eliott A E	Christchurch	17 December 1993	Simon S W	Dunedin	10 December 1993
Elley V A	Christchurch	17 December 1993	Simpson A F	Christchurch	17 December 1993
Ferguson J A	Dunedin	10 December 1993	Smellie R E	Dunedin	10 December 1993
Forster C M	Dunedin	10 December 1993	Stock S A	Christchurch	17 December 1993
Fright J E	Christchurch	17 December 1993	Stubbings A T	Christchurch	17 December 1993
Garland T J	Dunedin	10 December 1993	Taylor F M	Christchurch	17 December 1993
Gillespie C G	Christchurch	17 December 1993	Walker K-M	Christchurch	17 December 1993
Hann S K	Christchurch	17 December 1993	Wapperom A C K	Christchurch	17 December 1993
Hill T J	Christchurch	17 December 1993	Wee Yong Kuan R	Hamilton	16 December 1993
Inns J L	Christchurch	17 December 1993	Whiteley T J	Christchurch	17 December 1993
Jackson A P	Dunedin	10 December 1993	Winder K L	Christchurch	17 December 1993
Jacobs P A	Christchurch	17 December 1993	Wong G E P	Christchurch	17 December 1993
Johnson S P	Christchurch	17 December 1993	Yee R	Christchurch	17 December 1993
Leonard C M	Christchurch	17 December 1993			

Case and Comment

Offer to the public in New Zealand — The new "Old Friends" exception

The case of *The Society of Lloyd's v Hyslop* [1993] BCL 847, 29 April 1993, contains the latest pronouncements of the New Zealand Court of Appeal on the "offer to the public" provisions of the Securities Act 1978 ("the Act"). The Court found "friends of long standing" to be within the exceptions to the disclosure provisions of the Act relating to offers of securities to the public.

The respondent, Mrs Hyslop, sought to avoid liability for underwriting losses incurred by her as a Name at the Society of Lloyd's ("Lloyd's") and a member of a number of underwriting syndicates. It was contended for Mrs Hyslop that her investment in Lloyd's was an investment in a participatory security offered to the public by or on behalf of an issuer in the absence of a registered prospectus, authorised advertisement, deed of participation or a duly appointed statutory supervisor and that her liability for that investment was therefore avoided. It was further submitted for the respondent that this claim should be heard in New Zealand. The members of the Court of Appeal were unanimous in holding that these proceedings should be dismissed on the ground that it was not appropriate that the appellants be subject to New Zealand jurisdiction in this case.

Facts

Mrs Hyslop's contact with Lloyd's began when her husband was approached by a friend, Mr Phillip Langdale, who inquired whether Mr Hyslop was interested in becoming a member of Lloyd's. Phillip Langdale's brother Anthony Langdale was a partner in the firm Hall, Harford, Jeffreys, Langdale Ltd (henceforth "Hall Harford"), a firm which acted initially as Mrs Hyslop's members' agent in London. Mr and Mrs Hyslop met with Mr Harford of that firm in New Zealand in about November 1984 and in England in the following year. Mr Hyslop decided not to proceed further but Mrs Hyslop remained interested in Lloyd's membership. They maintained some social contact with Anthony Langdale and Mr Harford when either visited New Zealand, in 1985 and 1986.

In 1987 Mrs Hyslop inherited substantial assets and arranged to meet Mr Harford in New Zealand. Mrs Hyslop and Mr Harford exchanged information pertinent to membership of Lloyd's. She approached Barclays New Zealand Ltd for a guarantee as security for the required deposit and in June went to England to finalise the membership application process. Following her return to New Zealand, Mrs Hyslop learned that she had been accepted as a Name at Lloyd's. In November 1987, or soon after, Mrs Hyslop signed further documents. McKay J described them as follows:

> These included an agency agreement appointing Hall Harford as her agent, with the sole control and management of her underwriting business and with power to accept risks effecting insurance and to settle or compromise claims. Hall Harford were also given full powers to sign on her behalf any deeds, contracts or other documents relating to the underwriting business. She also signed a "general undertaking" with Lloyd's by which she undertook to comply with the Lloyd's Acts 1871-1982, and with any requirements made or imposed by the Council of Lloyd's pursuant to those Acts. She signed individual contracts with each of a number of syndicates. (*Transcript* p 8)

Mrs Hyslop paid her initial deposit, received confirmation that the bank guarantee had been provided and learned that her membership would be effective from 1 January 1988. Subsequently, record losses were reported by Lloyd's (£2.1 billion in 1989, reported 1992; £2.9 billion in 1990, reported in 1993: see, *National Business Review* 27 March, 25 September 1992; 7 May, 25 June, 23 July 1993).

Service out of New Zealand

It was argued for the respondent that action for breach of the Act fell within R 219 or, alternatively, R 220 of the High Court Rules (set out in the Second Schedule to the Judicature Act 1908). The respondent's costs of litigation would be markedly lower if she were held entitled to serve her Statement of Claim out of New Zealand, as the proceedings would then take place before New Zealand Courts. Rule 219 states the circumstances in which a Statement of Claim may be served out of New Zealand without leave. Rule 220 empowers the Court "[i]n any other proceeding which the Court has jurisdiction to hear and determine" to permit the service of "any document" out of New Zealand by leave of the Court. McKay J stressed that it was within the Court's discretion both to refuse leave under R 220 and to set aside service under R 219 (*Transcript* pp 4, 9, 12) and that whether or not the respondent's claim constituted a "good arguable case" was a consideration relevant to exercise of the discretion under either rule (*Transcript* pp 4, 10, 12). See, generally: CA McVeigh *A Dictionary of the High Court Rules* (Wellington, 1989); *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513.

The members of the Court of Appeal were unanimous in declining to accept jurisdiction in this case. McKay and Richardson JJ found that the respondent did not have a "good arguable case" for breach of the Act (per Richardson J, *Transcript* p 5; per McKay J, *Transcript* p 20) and Cooke P found nothing in the facts of the case to dissuade him from the view that "[p]rima facie a claim relating to liability as a Name is most appropriately tried in London" (per

Cooke P, *Transcript* p 2). However, the case merits attention in relation to dicta concerning alleged breaches of the Act.

Alleged breach of the Securities Act 1978

The relevant sections of the Act provide as follows:

> s 3(1) Any reference in this Act to an offer of securities to the public shall be construed as including—
>
> (a) A reference to offering the securities to any section of the public, however selected; and
>
> (b) A reference to offering the securities to individual members of the public selected at random; and
>
> (c) . . .
>
> whether or not any such offer is calculated to result in the securities becoming available for subscription by persons other than those receiving the offer.
>
> 3(2) None of the following offers shall constitute an offer of securities to the public:
>
> (a) An offer of securities made to any or all of the following persons only:
>
> (i) Relatives or close business associates of the issuer:
>
> (ii) . . .
>
> (iii) Any other person who in all the circumstances can properly be regarded as having been selected otherwise than as a member of the public:
>
> . . .
>
> 33(1) No security shall be offered to the public for subscription by or on behalf of an issuer, unless —
>
> (a) The offer is made in, or accompanied by, a registered prospectus that complies with this Act and all regulations made under this Act; or
>
> (b) The offer is made in an authorised advertisement.
>
> . . .
>
> 33(3) No participatory security shall be offered to the public for subscription, by or on behalf of an issuer unless —
>
> (a) The issuer of the security has appointed a person as a statutory supervisor in respect of the security and both the issuer and that person have signed a deed of participation relating to the security; and
>
> (b) A copy of the deed of participation has been registered by the Registrar pursuant to section 46 of this Act; and
>
> (c) . . .
>
> . . .
>
> s 37(1) No allotment of a security offered to the public for subscription shall be made unless at the time of the subscription for the security there was a registered prospectus relating to the security.
>
> . . .
>
> 37(4) Any allotment made in contravention of the provisions of this section shall be invalid and of no effect.
>
> . . .

It was common ground that there existed no registered prospectus or authorised advertisement (s 33(1)), statutory supervisor (s 33(3)(a)) or registered deed of participation (s 33(3)(b)) in respect of any "security" which Lloyd's or syndicates of its members may have offered. The respondent's case was that Lloyd's or Mrs Hyslop's members' agent, or both, were obliged to furnish these pursuant to the Act's requirements relating to offers of securities to the public. Richardson J identified five issues in the respondent's case each of which required close consideration.

First, was the respondent's investment in or through Lloyd's or Oxford Members' Agency Ltd, (the second appellant, henceforth "Oxford", a firm which replaced Hall Harford as Mrs Hyslop's members' agent) a "security" or "participatory security"? The respondent contended that she had been offered securities in the form of membership of Lloyd's as a Name and, or alternatively, membership of syndicates of Lloyd's Names. Richardson J considered that membership of Lloyd's ". . . did not confer any interest or right to participate in any capital, assets, earnings, royalties or other property of any other person" and that a right to share in any surplus on the winding up of Lloyd's ". . . cannot fairly be characterised as part of the offer of membership" (*Transcript*, p 6). It was not determined whether membership of syndicates was or was not a security as Richardson J held that neither Lloyd's nor Oxford was the "issuer" in any event (*Transcript*, p 7) and McKay J put the latter question to one side (*Transcript*, p 18).

Secondly, was the investment "offered to the public for subscription"? Richardson and McKay JJ both considered that no "offer of securities to the public" was established. Mr Phillip Langdale's evidence was that usually he merely received approaches from persons interested in becoming a Name but he had himself made the first approach in about six cases (including Mr and Mrs Hyslop), each of which involved friends of long standing. Section 3(1)(c) could not apply in the absence of an advertisement. Nor had Mrs Hyslop been "selected at random" in terms of s 3(1)(b) (per Richardson J, *Transcript*, p 8; per McKay J, *Transcript*, p 18). Richardson J concluded that:

> Reading s 3(1)(a) and s 3(2)(a)(iii) together I consider the proper inference is that those solicited were not selected as a section of the public. Rather they were approached as private individuals because they were old friends. Approaches to relatives and close business associates are excluded under s 3(2)(a)(i). (*Transcript* p 8)

His Honour's reference to s 3(2)(a)(i) appears to suggest that offers to "friends of long standing" ought to be excluded on the same basis as offers to "relatives or close business associates" but "friends of long standing" do not necessarily come within either category. Richardson J does not explain how s 3(1)(a) and s 3(2)(a)(iii) may be read together. The apparent conflict between these provisions, whereby the manner of selection is relevant in the first provision but immaterial in the second, has been noted: Farrar and Russell *Company Law and Securities Regulation in New Zealand* (Wellington, 1985) p 354;

Robert Jones Investments Ltd v Gardner [1988] 4 NZCLC 64,412 (Tipping J); High Court, Christchurch, CP 30/88, 11 May 1993 (Hansen J). Richardson J's preference for seeing the persons solicited in this case as falling within s 3(2) rather than s 3(1) is consistent with the view of Tipping J in *Gardner* that s 3(1) applies to offers made to sections of the public and s 3(2) to offers made to individuals. Richardson J also concluded that:

> Even if, contrary to my assessment, the six old friends of Mr Langdale could be regarded as a section of the public, I would hold that they were selected otherwise than as members of the public. (*Transcript* p 8)

This conclusion may be seen as accepting the predominance of s 3(2)(a)(iii) over s 3(1)(a), in so far as it holds the manner of selection to be material, if the offerees are "a section of the public". McKay J concluded that:

> Even if an offer had been made to [Mrs Hyslop] in New Zealand, it was not an offer made to a section of the public, but an offer made to her as an individual, and she had not been selected at random. (*Transcript* p 18)
>
> [Hall Harford] did not make offers to the public. In Mrs Hyslop's case, she was approached as being a long standing friend of Mr Phillip Langdale. (*Transcript* p 19)

Clearly both Richardson and McKay JJ regarded the friendship between Mrs Hyslop and Mr Phillip Langdale as separating her case from those of random selection or selection of a section of the public.

Thirdly, was the investment offered "by or on behalf of an issuer"? Richardson J indicated that "[a] syndicate such as the Lloyd's syndicates would seem to answer the wide description 'an unincorporated body of persons'. . ." (*Transcript* p 3) and was thus able to come within the s 2 definition of a "person" who may, by acting in the promotion or management of the arrangement or the scheme to which the security relates, be a "manager" and thus the "issuer" of a participatory security (s 2). However, His Honour concluded that even if membership of a syndicate were "security", neither Lloyd's nor Oxford (as members' agent) was the "issuer" as it is the managing agent of each syndicate who alone may offer membership of a syndicate (*Transcript* p 7). McKay J put to one side the question whether Oxford might be held an "issuer" in the context of these proceedings (*Transcript* p 18).

Fourthly, was there an "allotment"? Under s 2 "allot" includes ". . . sell, issue, assign, and convey. . .". Whether there was an allotment was not answered conclusively. If in other respects membership of a syndicate were a security, the assignment of Names to syndicates might constitute the offer of a security but ". . . it would still be necessary to consider whether Lloyd's or Oxford could be said to have made that offer and whether it constituted an 'allotment' of a security" (per Richardson J, *Transcript* p 4).

Finally, does the Act apply to an investment outside New Zealand? Richardson J observed that s 7 of the Act provides for the Act's extraterritorial application and could see ". . . nothing in the statute to suggest a narrower approach in the present case" (*Transcript* p 4); cf *Barclays New Zealand Ltd v Gillies* (1990) 5 NZCLC 66,659.

Observations

The decision that any offer of securities in this case was not an "offer of securities to the public" is of particular interest. The reasoning may be compared with that in *Gardner*, in which Hansen J held that the exemption provisions of s 3(2)(a) applied to all those allotted shares in the share issue in question, so that the share issue was not "offered to the public". In that case the issuer had scrutinised unsolicited approaches from potential subscribers on an individual basis and in relation to a number of criteria which bore on the financial standing and sophistication of applicants for shares. Hansen J's decision in *Gardner* is consistent with the view that the investor protection objectives of the Act (*Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385 per Richardson J p 391; *Gardner* per Hansen J, *Transcript* p 31) do not require that full disclosure be made to "sophisticated" or "high net worth" investors: see, Dodd T "Offer to the Public in New Zealand – The Return of Gardner", (1993) 11 *C&SLJ* (forthcoming). This is a policy which may facilitate capital raisings in this country: see, Walker, GR "The New Zealand National Interest in Securities Regulation", (1992) 7 *JIBL* 452, 460.

The exclusion in *Hyslop* of "friends of long standing" goes further than *Gardner* and seems an undesirable development. The Act expressly provides for the exclusion of ". . . Relatives or close business associates of the issuer:. . ." (s 3(2)(a)(i)) and ". . . Persons whose principal business is the investment of money or who, in the course of and for the purposes of their business, habitually invest money:. . ." (s 3(2)(a)(ii)). The rationale that disclosure is redundant in such cases does not support the *Hyslop* exemption for "friends of long standing". Also, this category of persons is not easily defined with precision. It may in practice be difficult to determine who is within the exception. This exemption might prove prone to abuse by issuers eager to evade the disclosure requirements of the Act.

Andrew F Simpson
Canterbury University

Corrective advertising

TV 3 Network Limited (in Receivership) v Eveready New Zealand Limited [1993] 3 NZLR 435

The Defamation Act 1992 gives a Court the power to *recommend* that a defendant publish a correction of the matter which is the subject of a defamation action (s 26). It is of interest therefore that in *TV 3 Network v Eveready* all three members of the Court of Appeal upheld a decision of Robertson J and refused to strike out an application for a mandatory injunction that the defendant should broadcast corrective advertising. That is, it would seem that notwithstanding the 1992 Act, the Court always has had a power to *order* corrective

advertising even though this power had not been exercised before.

The action arose out of a 16-minute documentary about ionisation smoke detectors containing minute quantities of americium 241. This programme was broadcast by TV 3 as part of the current affairs "60 Minutes" programme. Eveready alleged that the programme contained false, malicious and defamatory statements about their product which damaged their reputation and their sales. Two causes of action were pleaded: malicious falsehood (alleging disparagement of goods, lost sales, damage to market reputation and lost sales of related products) and defamation (alleging disparagement of reputation, damage to market reputation, and lost sales together with wasted expenditure and advertising costs in mitigating the effects of what had been said). Part of the relief sought was a mandatory injunction, in the equitable jurisdiction of the Court, directing the television station to broadcast corrective advertising in a similar manner and form and with the same prominence as that in which the false statements and false visual effects were broadcast. This prayer for relief was incorporated in the Court proceedings only after McGechan J had ordered a stay of complaint proceedings before the Broadcasting Standards Authority. Eveready had hoped that the Authority would exercise its power under s 13(1)(a) of the Broadcasting Act 1989 and order TV 3 to publish an appropriate statement. It sought the order on the basis that it believed this was an appropriate form of relief to counter the effects of the alleged false statements and false visual effects published on the programme.

The primary argument made by counsel for the broadcasters was that in defamation proceedings the Courts had never claimed jurisdiction to order publication of corrective statements, and therefore it was too late to do so now. Counsel contended that the absence of such orders was consistent in principle with the right to freedom of speech; an order to publish was, counsel argued, as much a contravention of that right as an order not to publish.

All of the Judges agreed that the question of jurisdiction was without clear authority. However all also agreed that there was nothing in principle against the Court having jurisdiction to order corrective advertising. Their reasons for reaching this conclusion were similar. Both Gault and McKay JJ referred with approval to the passage from *Spry Equitable Remedies* (4th ed) 318, cited by Robertson J in the High Court. (Cooke P saw no need to repeat what had been said already by his brother Judges but made it clear that he agreed with them.) This passage adverted to the width of the equitable jurisdiction to grant injunctions and was itself supported by high authority.

In traversing those works, and the cases, which rejected the availability of a remedy such as retraction their Honours noted that it appeared none gave reasons why, in principle, the equitable remedy of a mandatory injunction should not be available in the appropriate case. The authority cited in leading texts for the inability of the Court to direct retraction was *Burnett v the Queen in Right of Canada* (1979) 94 DLR 3d 281 a decision from the Ontario High Court. There the prayer for the order had been struck out simply because such an order had not been made before. The issue of jurisdiction was not discussed.

Their Honours acknowledged that reports on the law of defamation gave no indication of a jurisdiction to order corrective advertising; in fact to the contrary; it was seen as a subject for possible reform. Gault J noted again however that in none of these reports was there any reasoned analysis as to why an injunction would not issue.

However both Cooke P and Gault J thought the issue of such an order was consistent with the process of fusion of law and equity. In this their Honours were echoing a current trend evident in recent Court of Appeal decisions; namely that in order best to serve the interests of justice the Courts should have available the full range of remedies for appropriate cases (see New Zealand Law Society Seminar series, Maxton, *Equity Update* (1993) 3-7). While defamation had developed in the common law as attracting a remedy only in damages this did not, now, prevent the use of injunctions to restrain threatened repeated publications of defamatory material. Interlocutory injunctions also issue to restrain publication, although only in exceptional circumstances (*Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406). Cooke P thought that to impose jurisdictional limits, as distinct from identifying factors which on practical grounds would tell against the discretionary grant of the remedy, would be a backward step. It would be to move against the weight of developments in the fusion of law and equity to hold that the jurisdiction was lacking.

That there was no public policy dictating non-intervention was indicated by the fact that the Broadcasting Standards Authority had the power to order a retraction, as did the Court under s 42 of the Fair Trading Act 1986.

TV 3 had also argued that s 14 of the Bill of Rights Act 1990 ("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") strengthened their case. Cooke P disagreed. He thought, on the contrary, that it had the opposite tendency. First the common law could effectively prescribe a limit to s 14 falling within s 5 of the Bill of Rights. Second the freedoms affirmed by s 14 were to be enjoyed by everyone and not just the media. Thus the freedom to impart information might well be supported by a jurisdiction to compel the publication of corrective statements when there has been established actionable defamation. Under s 4 of the Bill of Rights certain responsibilities fell on TV3, including some relating to balance in controversial issues of public importance. If malicious falsehood or unlawful defamation was established by Eveready then Cooke P thought it a tenable view that the Bill of Rights Act itself could provide the basis for an order that corrective information be broadcast.

This really left the matter of the 1992 Defamation Act, which did not receive as much attention as it perhaps merited. This was probably because the case itself fell to be decided under the earlier legislation. But the fact that later legislation, which in its original form intended to give a power to order correction, was enacted as giving a power to recommend correction only had to be given weight in determining jurisdiction. Cooke P referred to the reasons the Minister gave for the

change from the power to order correction to the power to recommend correction. This was that the order could not issue until final judgment had been given for a plaintiff which could be some two or three years later. The Minister of Justice thought this rendered such an order a waste of time (531 NZPD 12331, 17 Nov 1992). His Honour observed that the House had not approached the matter on the basis that the order was inherently objectionable. Moreover he did not know what view the House might have taken if it had known that the Court might already have a compulsory jurisdiction to award the order. He said that no opinion was now required on the effect of the new Act on defamation proceedings commenced after it came into effect.

The only point of difference between Their Honours lay in whether this was an appropriate case for such an order. McKay J thought not, but both Cooke P and Gault J considered it arguable that if Eveready proved its case it might be appropriate for such an order to issue.

Comment

The decision is not satisfactory. The arguments in favour of the equitable jurisdiction to grant a remedy such as a mandatory order to a plaintiff in a defamation action would perhaps be persuasive in the absence of the new legislation. However if as Cooke P suggested the matter might need further consideration when a case commenced under the new Act occurs what then? Is the legislation to be seen as taking precedence? The Act itself is not a code. There is, for example, no formal definition of "defamation" other than that it includes both libel and slander. Any definition is left to case law. And although absolutely privileged proceedings are to be found in ss 13 and 14 nothing there limits any other rule of law that relates to absolute privilege (s 15). A similar enactment so far as qualified privilege is concerned is to be found in s 16(3).

However could it perhaps be argued that Part III of the Act, which relates to remedies is a code in itself? This would seem to be unlikely. For example there is no mention of an interlocutory injunction in Part III, yet the McKay Report had recommended no change in this area (para 399). A brief look at the history of s 26 does not really assist. When the Defamation Bill was first introduced to Parliament it was thought that an order to correct would assist plaintiffs who were interested in setting the record straight (491 NZPD 6370 (25 August 1988)). The Justice and Law Reform Committee retained the provision after considering various petitions many from the news media (see 502 NZPD 1989 12895 (3 October 1989)). It was only later that the power to order became a power to recommend only, and even then it was primarily due to the delay before any order could be made, not because the order was inherently objectionable, and not because it would not assist plaintiffs. Nor is it easy to argue that the Act was intended to curtail a power no one knew the Court had. All of this seems to suggest that the remedies provided in the Act are in addition to any other appropriate remedies which are available to plaintiffs, such as the power to order correction; but there is no doubt that such a power sits uneasily beside s 26. The alternative is that s 26 takes precedence over the equitable remedy.

However if ss 26 (and 27) take precedence this means that in any action commenced after the Act came into force the most that a plaintiff who wants the matter corrected can do is ask a Court to recommend that correction. But s 26 applies only to a cause of action in defamation, it does not apply to malicious falsehood. That being so as Eveready's main cause of action was in malicious prosecution it would seem that Eveready might still achieve the order it sought. But why should it be better off than a plaintiff suing in defamation alone?

Rosemary Tobin
University of Auckland

Hearsay and hard cases

Reddy v Police [1993] BCL 1817

The hallmark of the Anglo-American system of criminal justice is that it is typically *process* rather than *result*-oriented. Fair process – goes the theory – actually creates good results. Under this model, the correctness of a particular decision follows from and depends on the correct application of adjudicative rules. In this way, the goals of the criminal justice system freeing the innocent and convicting the guilty become inseparable from the manner in which they are achieved.

Conflict may arise, however, when the facts of a case point to a conclusion which cannot be reached through the proper employment of procedural or evidential rules. Such situations test the commitment to those rules and, at the same time, suggest their re-evaluation.

In *Reddy v Police* – an appeal from a summary conviction in the Henderson District Court – Thomas J faced the difficult facts of a credible and serious assault case based according to the defence on inadmissible hearsay evidence from a police witness. Noting, perhaps injudiciously, his firm belief in the defendant's guilt, his Honour allowed the appeal and vacated Reddy's conviction.

The decision, correct on the law and unremarkable in its outcome, is nonetheless interesting for two reasons. First, for the open frustration it expresses at the manner in which a technical rule of evidence allowed an ostensibly guilty party to go free. Second, for the unwillingness of Thomas J despite that frustration to establish a judicially-created, reliability-based exception to the hearsay rule.

The facts of the case fit a familiar and ominous pattern for incidents of domestic violence. While drunk, Reddy allegedly pushed his wife to the floor and held a kitchen knife to her throat. The police were called and in the defendant's presence Mrs Reddy recounted the incident. When Constable Smith turned to the defendant for an explanation, Reddy replied: "I will see you in Hell. I did not hit her, she hit me and I did not cut her neck". Reddy was then arrested for assault with a weapon.

At trial, the victim refused to testify and recanted her previous version of events. However, the District Court Judge allowed Constable Smith to repeat Mrs Reddy's earlier account of the attack along with the defendant's statements in response. Accepting that account as true, the Judge convicted Reddy

and sentenced him to four months' periodic detention and six months' supervision.

On appeal, Reddy argued that his conviction was impermissibly based on Constable Smith's hearsay repetition of the victim's allegation of assault. In reply, Thomas J observed that Mrs Reddy's statement to the police was made in the presence of the accused. As a result, her words could have been treated as Reddy's *own* admission of guilt if Reddy had said or done something to acknowledge them as accurate. Following the House of Lord's decision in *R v Christie* [1914] AC 545, 554, his Honour accepted that Reddy may have even denied the accusing statement in such a tone or manner as to make that statement his own. Agreeing that any party admission is an exception to the hearsay rule, Thomas J found that Reddy's denial of the charge was, however, "too emphatic and complete" to suggest an acknowledgment of its truth. With no *admissible* evidence linking him to the crime, Reddy's conviction failed as a matter of law.

Ironically, the judgment suggests that, had Reddy remained silent in the face of his wife's accusation, an admission could properly have been inferred. Solicitous of a suspect's "right to silence", prior cases had allowed such conclusions when no police officer was present, a denial to the charge would have been expected, and the accusation was made between parties speaking on "even terms". (*R v Duffy* [1979] 2 NZLR 432, 438 (following *Parkes v The Queen* [1976] 3 All ER 380)). The instant case satisfying two of those three criteria, Thomas J thought that Constable Smith's mere *presence* at the scene without more would not have rendered Reddy's silence strictly inadmissible. Sceptical of a broad application of the right not to speak, his Honour would have excluded the accused's silence only if Reddy had been interrogated formally or if the police had been obligated to observe one or more of the requirements of the New Zealand Bill of Rights Act 1990.

The *Reddy* case leaves us with the disquieting feeling that justice has and has not been served. The judgment scrupulously upholds the due process model of adjudication by refusing to manipulate evidentiary rules merely to reach a certain result. Yet, in following those rules, the decision ignores the abiding conviction of *two* Judges that the defendant was, in fact, guilty of a serious crime. Indeed, neither factfinder was in any doubt that Mrs Reddy had accurately described the attack and that Constable Smith had accurately related her statement. Why, then, with the reliability of key hearsay testimony undoubted, was Reddy allowed to go free?

The answer to that question reflects neither an unthinking obedience to process nor an indifference to accurate results. What the *Reddy* case really demonstrates is the tendency of New Zealand criminal Courts to approach hearsay problems in an overly-technical and rule-based fashion. A poor argument for either a process *or* result-orientation in criminal cases, the *Reddy* decision suggests a less remarkable proposition: that issues of hearsay should be approached not as complex problems in the application of rules, but in light of the *purpose* of the hearsay rule itself. This means that the admission of hearsay statements should not depend on whether the evidence in question satisfies one of the many discrete exceptions to the hearsay rule. What is needed, as Thomas J recognised, is a "general principle" allowing the reception of hearsay evidence when circumstances surrounding the making of a statement provide a "reasonable assurance" of its reliability. Recommended by its simplicity, such a test would eliminate the arcane jurisprudence of hearsay and address, in a direct manner, the reason for the rule itself.

In looking towards a reliability-based approach, Thomas J echoed recent proposals of the New Zealand Law Commission and sentiments expressed by Cooke P. In criminal cases, the Commission favours the admission of hearsay evidence where its reliability can reasonably be demonstrated. See *Evidence Law: Hearsay* (NZLC PP 15, 1991) para 4 at p vii.) In the 1989 case of *R v Baker*, Cooke P proposed the receipt of hearsay evidence when it was "reasonably safe" to do so. ([1989] 1 NZLR 738, 741.) Similar tests are employed in Canada, where Courts focus on the need for the hearsay statement and circumstantial guarantees of its trustworthiness. (See *R v Smith* (1992) 94 DLR (4th) 590 (SCC); see also *R v Khan* (1990) 59 CCC (3d) 92 (SCC).)

Applied to the *Reddy* case, the principle of reliability would probably have allowed Constable Smith to testify to Mrs Reddy's account of the assault. The statement was made near the time of the incident, the victim had a visible cut on her neck, and the knife was recovered at the scene. There was, moreover, no evidence to suggest that Constable Smith had misunderstood the victim or repeated her story inaccurately. Accompanied by such indicia of trustworthiness, any lingering doubts about the statement's truth could have been relegated to an issue of weight.

Sympathetic to such an approach, Thomas J was, in the end, unwilling to follow it. In opting for a traditional analysis of the hearsay question, his Honour argued that reform of the rule should come legislatively and not from "piecemeal" decision-making by the Bench. Whatever merits that position may have, it seems fair to ask whether judicial restraint in the face of an outmoded jurisprudence serves either the interests of justice or the rule of law. Had Thomas J adopted his own suggestion, *Reddy* would have been a good test case for the Court of Appeal. And whether or not the Court approved a reliability standard, a definitive pronouncement on the issue would have signalled a direction for legislation and provided guidance to Judges below.

Finally, the *Reddy* decision reminds us that the rules of evidence like all legal rules do not operate in a social vacuum. Police and prosecutors are often frustrated in their ability to pursue serious domestic assault cases. One of the biggest problems they face is that like Mrs Reddy many victims ultimately refuse to give evidence against their partners. (See Victims Task Force (1992) *Protection from Family Violence: A Study of Protection Orders Under the Domestic Protection Act 1982* (abridged) (commissioned by the Victims Task Force and prepared for public release from an original report by Busch, Robertson & Lapsley) pp 163-64). Given this background, it seems particularly egregious to sacrifice domestic

violence prosecutions on the tarnished altar of the hearsay rule. Indeed, the social reality of such cases demands a reconsideration of the rules for their adjudication. The point is that intellectually honest Judges should not be put to a Hobson's choice of fair process or fair results. If the reliability of a victim's account can be demonstrated, there should be no prohibition on its hearsay repetition in Court. To approach hearsay in this way should create better results for the criminal justice system — *and better process as well.*

Scott Optican
University of Auckland

Author's Note: After this case note went to press, the author became aware of the Court of Appeal's decision in *R v L* (CA 421/93; 18 November 1993). L was convicted of raping his estranged wife. Shortly after the crime, she signed a sworn statement naming L as her attacker. Pursuant to s 185C(1) of the Summary Proceedings Act, the statement was admitted at the defendant's preliminary hearing and the complainant was neither examined nor cross-examined on her testimony. A month after the hearing, she committed suicide.

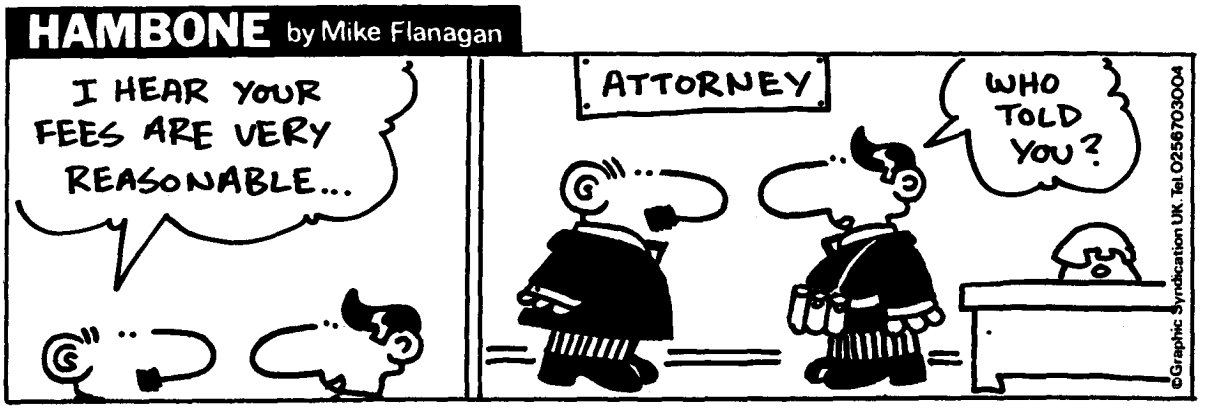
At trial in the High Court, the deceased's written testimony was received for its truth pursuant to s 184(1) of the Summary Proceedings Act and ss 3 and 18 of the Evidence Amendment Act (No 2) 1980. Allowing such documentary hearsay to be admitted, these statutes would likewise have permitted the *exclusion* of the statement at the discretion of the trial Judge. Alleging the victim's consent, L claimed that absent from any real opportunity for cross-examination at either the preliminary hearing or at trial — the statement should not have been received. Specifically, L argued that the admission of the statement in evidence denied him his common law right to a fair trial and his rights under s 25(a) and (f) of the Bill of Rights Act 1990 (guaranteeing, to persons charged with an offence, the right to a fair trial and the right to cross-examine witnesses for the prosecution.)

Rejecting the defendant's claim, the Court found that the admission of the victim's written testimony did not deny L a fair trial. Writing for a unamimous bench, Richardson J noted that the procedural guarantees of s 25 of the Bill of Rights Act operated against the "practical implications of the absence of an opportunity for cross-examination." (p 17). Having offered no credible evidence to support his defence of consent, the Court stated that the scope of L's right to confront his absent accuser could be circumscribed by the "likely veracity" of the complainant's account (ibid). Focusing directly on the rationale for the hearsay rule, the Court held that

> [i]f the testimony appears to be inherently reliable and there is nothing in any other evidence or in the surrounding circumstances casting any doubt on its trustworthiness the court may properly conclude on that material that cross-examination would not have made any relevant difference. (p 18).

The instant case satisfying those criteria, the Court found that the trial Judge had properly exercised his discretion not to exclude the victim's hearsay evidence.

R v L appears to be the first major Court of Appeal decision adopting an explicit, reliability-based test for the admission of hearsay evidence. The case is significant both for its use of the reliability rule and in its pragmatic approach to the fair trial guarantees of the New Zealand Bill of Rights. The judgment is, however, frustratingly silent on the intended scope of its application. Does the case signal a fundamentally new approach to the admission of *all* types of hearsay evidence? Or will cautious trial Judges read the decision more narrowly — adopting the reliability test only when faced with a discretion to *exclude* hearsay evidence otherwise admissible by statute? To avoid further uncertainty, a clear pronouncement from either Parliament or the Court of Appeal would now be desirable. If not, the lower Courts will determine the true impact of *R v L*, creating, with each piecemeal decision, either a new jurisprudence of hearsay or simply more new exceptions to the rule.



Conference on Courts and Policy

By Justice Michael Kirby, AC, CMG, President of the New South Wales Court of Appeal, and Fellow of the New Zealand Legal Research Foundation.

This article is a report on a Conference held in Auckland last year to consider the question of policy matters relating to the Courts. The New Zealand Legal Research Foundation was responsible for organising the Conference. As Justice Michael Kirby comments the Conference demonstrated that similar issues were coming before the judiciary in England, Australia and New Zealand. The conference was attended by Lord Woolf.

Between 5 and 6 August 1993 the New Zealand Legal Research Foundation conducted a Conference in Auckland on the subject of Courts and policy. The participants included some of New Zealand's leading lawyers. Overseas participants included Lord Woolf of Barnes (UK), and Professor G de Q Walker and the writer (Australia). At the close of the Conference the President of the Court of Appeal of New Zealand, Sir Robin Cooke, offered a summary of the principal themes. What follows is a precis of some of the main points raised during the conference.[1]

Appointment and removal of Judges

After an introduction by Justice Bruce Robertson, President of the foundation, the participants settled down to the energetic presentation of an eighty-page paper prepared by Sir Geoffrey Palmer, the former Prime Minister of New Zealand and now Professor of Law at the Victoria University of Wellington. The paper dealt with judicial selection and accountability. It described the features of judicial independence as practised in the United Kingdom, Australia and New Zealand. It then examined the practice of appointing Judges in New Zealand. Sir Geoffrey revealed, apparently for the first time, that changes in judicial superannuation in 1990, designed to close off the government's superannuation scheme, had elicited a suggestion that the Judges would sue if their entitlements were disturbed in breach of constitutional convention. This revelation, not subsequently carried into effect by the Judges, became front page news in the New Zealand newspapers.

Sir Geoffrey Palmer confronted the apparent paradox of how Judges could be independent and accountable at the same time. He listed ten qualities which, while in government, he had looked for when considering the suitability of a person for appointment to the judiciary.[2] He described his (unsuccessful) efforts to appoint a woman and a Maori to the New Zealand High Court Bench. It should be noted that the first woman has since been appointed to the High Court, following the elevation of Dame Silvia Cartwright, formerly Chief Judge of the District Court of New Zealand. As yet no person of Maori descent has served on the New Zealand High Court or the Court of Appeal.

Sir Geoffrey Palmer's paper examined the various schemes operating in the United States of America designed to ensure both the independence and accountability of the judiciary. In only eight States of that country does the Governor appoint Judges, and in most of these the appointment must be confirmed by the State Senate. In three States, the legislature elects the Judges. In thirteen States, party nominees are elected. In eighteen States, there are elections on a non-partisan basis. In nineteen States, the so-called "Missouri Plan" operates. Under that Plan a commission is established to nominate candidates for appointment as Judges. When a position falls vacant, the commission draws up a short list, usually consisting of three names. The Governor may then appoint a person from that list. Thereafter, voters may decide whether or not to retain the Judge.

A recent and well known example of the "recall" of a State Judge of the United States is that of Chief Justice Rose Bird of California who, with one of her colleagues, failed to secure re-election following a highly political campaign directed at the Judges' alleged refusal to uphold any sentence of capital punishment.[3]

Having reviewed the systems of judicial selection in the United States, including that followed in respect of Federal Judges (which requires the advice and consent of the Senate, following the President's nomination), Sir Geoffrey Palmer concluded that the present system in New Zealand served that country well, and should not be altered. Specifically, he rejected the suggestion that a judicial commission should be established to appoint Judges in New Zealand. He suggested that such a course of action might result in an unacceptable surrender of power by the judiciary and the legal profession. He acknowledged that, as judicial work increasingly involved important policy questions, not least under the New Zealand Bill of Rights, it might become necessary for Ministers to consult more widely about appointments than had occurred in the past. Specifically, he considered that it should be mandatory for the Attorney-General to consult with the Justice and Law Reform Select Committee of Parliament, the Deans of the New Zealand Law Schools, as well as the judiciary and other members of the legal profession. On the subject of the removal of Judges, Sir Geoffrey Palmer proposed that District Court Judges should be afforded the same level of protection from removal as that enjoyed by High Court Judges — something which has been achieved in some States of Australia. (See eg Constitution Act 1902 (NSW), s 53(2) read with s 52(1).)

Recent discussion papers and protocols for changes to the methods of appointing Judges in Australia and England make this session highly relevant beyond the New Zealand legal scene.

Democratic v elitist judicial solutions

Sir Geoffrey Palmer's address was followed by a paper by Professor William Hodge, of the Faculty of Law of the University of Auckland. Its title – "Lions under the Throne – the Least Dangerous Branch" – recalled the well known instances in English legal history where the subjection, even of the King, to the law, was asserted by the Judges. The hight point in the assertion of curial superintendence – reaching even to the enactments of Parliament – was reached in *Dr Bonham's* case. (1610) 8 *Co Rep* 113b; 77 ER 646 at 653. There, Sir Edward Coke asserted that:

> . . . [When an Act of Parliament is] . . . against common right and reason, the common law adjudges the said Act of Parliament as to that point void . . . .

The contrary assertion by Dicey, an apologist for Parliamentary sovereignty, presented the battle ground which was explored in a number of papers which followed, including that of Professor Hodge. Born and educated in the United States, Professor Hodge drew upon numerous examples from American jurisprudence where the power of the Courts over laws made in the other branches of government has been successfully asserted.

One of Professor Hodge's main points was his contention that this assertion of curial power often introduced a premature and elitist solution to a complex problem deserving of a more democratic resolution. He cited an article by Justice Ruth Bader Ginsburg, now confirmed as a Judge of the Supreme Court of the United States, suggesting that the abortion decision of that Court in *Roe v Wade*, whilst providing a solution of sorts to the public controversies about abortion in the United States, had interrupted an orderly process of legislative reforms then underway:

> *Roe v Wade* sparked public opposition and academic criticism . . . searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun, annual proposals for over-ruling *Roe* by constitutional amendment, and a variety of measures in Congress and State legislatures because the Court ventured too far in the change it ordered and presented an incomplete justification for its action . . . (R B Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v Wade*" 63 NCLR 375 (1985)).

Professor Hodge contrasted the way in which New Zealand, with its unicameral legislature, had quite quickly achieved important reforms of the law. It had done so by a more legitimate democratic process. Against this background he noted recent amendments to the Human Rights Bill, adopted by the New Zealand Parliament on 28 July 1993, which added to the list of proscribed grounds discrimination on the grounds of sexual orientation and (in effect) HIV status.

From the point of view of foreign participants, the most interesting part of Professor Hodge's paper was probably the section which described the line of authority in the New Zealand Court of Appeal which suggests that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them". *(Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) 121; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA), 390.) This idea has some supporters in other common law jurisdictions. To date this view has not attracted majority support in Courts in either Australia (*Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372 (CA) 397) or England (*Pickin v British Railways Board* [1974] AC 765 (HL), 782). However, the question has been reserved by the High Court of Australia[4]. Recent decisions of that Court concerning implied constitutional rights to free speech, although derived ultimately from the language, structure and purpose of the written Federal Constitution of Australia, suggest that the thinking in the High Court of Australia is progressing along lines similar to that found in the New Zealand decisions collated by Professor Hodge.

Growing impact of international law

The third paper was given by Professor Kenneth Keith, President of the New Zealand Law Commission. It addressed the topic of "Policy and Law: Politicians and Judges (and Poets)". The reference to poets picked up Shelley's famous line:

> Poets are the unacknowledged legislators of the world.

Professor Keith described the way in which domestic law, including that of New Zealand, had been affected by developments in international law. He mentioned a number of areas in which the New Zealand Bill of Rights Act had been applied to help Judges solve difficult questions which otherwise had no clear legal answers. Thus, he referred to the decision of Justice Thomas in a case concerning the lawfulness of the withdrawal of life-sustaining treatment and medical support procedures from a patient who was unable to consent to treatment, who had no hope of recovery, and who could gain no medical benefit from the treatment and support. (*Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC). Cf *Airedale NHS Trust v Bland* [1993] 1 All ER 821 (HL)). Professor Keith appealed for the use of a wider range of source materials in uncovering the principles which lie behind the common law. He suggested that, although common law judgments provide much assistance, there was a need for Judges today to explore a fuller range of sources to ensure that the appropriate principles are identified, tested against the facts, and against one another, and then, as necessary, abandoned or qualified.

Judicial review of Ministerial action

Lord Woolf's paper returned to the issue of the judicial role in identifying and applying policy in curial decisions. The paper, entitled

"Separation of Powers in the United Kingdom", examined the role played by the Courts in the United Kingdom in applying policy, and in scrutinising the appropriateness of executive and legislative action in particular cases where it was challenged.

Lord Woolf recounted the way in which leaders of the English judiciary, including members of the House of Lords – the Lord Chief Justice and the Master of the Rolls – had with increasing energy called for the enactment in United Kingdom domestic law of the European Convention on Human Rights. He pointed out that English legal decisions could now be taken to the European Court of Human Rights in Strasbourg. He suggested that it was more appropriate, at least in the first instance, that citizens should be entitled to have the opinion of the English Courts upon the application of the Convention to domestic law.

The peculiarities of the English constitutional arrangements tend to surprise New Zealanders, and shock Australians, Canadians and United States lawyers who are brought up on a stricter notion of the separation of the judicial branch of government from the others. The Lord Chancellor combines in his person all three branches. The Law Lords not infrequently take part in debates on policy questions in the chamber of the House of Lords, a course described by Lord Woolf.

Lord Woolf described the recent decision of the House of Lords in *In re M* (*In re M* [1993] 3 WLR 433 (HL) overruling *Factortame [No 1] (R v Secretary of State for Transport; ex parte Factortame Ltd* [1990] 2 AC 85 (HL)). That decision had been delivered shortly before the commencement of the Auckland conference. It provided a timely statement of the relationship of the Judges with the other branches of government in England. Lord Templeman, for example, said in his speech:

> Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against the institutions and against the executive. The Judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but Judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown . . . To enforce the law the Courts have power to grant remedies including injunctions against a minister in his official capacity. If the minister has personally broken the law, the litigant can sue the minister . . . in his personal capacity. For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity the Courts are armed with coercive powers exercisable in proceedings for contempt of Court. (*In re M*, at 437.)

Lord Woolf pointed out that the decision in *In re M* had vindicated criticism of earlier English authority voiced by the noted public law expert, Sir William Wade. The Crown's officers were shown not to be above the law. The Courts would enforce the law, if necessary, by orders directed to the Crown's officers to bring them into compliance with law.

Following the United Kingdom's announced intention to ratify the Maastricht Treaty on Europe, proceedings were brought in the High Court in London by Lord Rees-Mogg, challenging the proposed ratification on legal grounds. The Speaker of the House of Commons (Miss Betty Boothroyd) gave an unprecedented "warning" to the judiciary. She stated that the Bill of Rights of 1689 would be "required to be fully respected by all those appearing before the Court". The "warning" rather missed its target, given that Lord Rees-Mogg was not questioning the validity of the proposed statute but was arguing that it was not sufficient to permit the government to ratify the treaty. The High Court proceeded to hear and dismiss the challenge. At the time of the Auckland conference, an appeal was still pending.

Lord Woolf also mentioned important developments in Scottish law, consistent with the new authority of the House of Lords. His paper represented a clear exposition of the new assertiveness of the English judiciary in its use of judicial review to secure the triple objectives of lawfulness, fairness and reasonableness in administrative action.

Criticism of excessive judicial law making

By way of contrast, the succeeding paper was given by Professor Geoffrey Walker, Dean of the Faculty of Law at the University of Queensland. He described what he saw as a "polity drift" in the Australian judicial response to a number of issues considered by the Courts in the past decade. Singled out for particular criticism was the decision of the High Court of Australia in the *Tasmanian Dams* case (*The Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625 (HC)) and in *Mabo v Queensland [No 2]* (1992) 175 CLR 1. Of the latter, Professor Walker said:

> . . . [T]he Court . . . proceeded to overturn the long-established legal doctrines concerning the legal order of a territory occupied by way of settlement rather than conquest, and asserted an entirely new legal doctrine for the Australian mainland, retrospectively to 1788. In effect, the Court created a Treaty of Waitangi structure for land rights but dispensed with the need for a treaty. The economic consequence of that abuse of judicial power is already becoming apparent . . . .

Professor Walker called for a return to what he described as the rule of law and a respect by the judiciary for their proper role and limited province. As disclosed in earlier writings, Professor Walker is not a doctrinaire supporter of Dicey's theory of parliamentary omnipotence. He found attractive some of the theories expounded in the New Zealand Court of Appeal concerning common law rights which "lie so deep" that they cannot be overridden, even by Parliament. Whilst applauding the results of the High Court's decisions in the *Capital Television*[5] and *Nationwide News*[6] cases, Professor Walker's basic thesis was that the Courts should withdraw from inventing new law. Instead, the democratic forces in society should restore "the

rule of law, a democratic or republican agenda for constitutional change . . . [and] a restoration of the separation of powers and indeed perhaps its extension". by way of example, Professor Walker urged that introduction of citizen initiative referenda and citizen powers to recall Judges who exceeded their mandate. This was a provocative paper. Time does not allow a full discussion of some of Professor Walker's views. The tension in his comments between the criticism of judicial innovation and the praise of judicially discovered fundamental rights (such as the constitutional right to free speech) was never fully resolved in this writer's respectful view.

One of the participants in the audience at the seminar was Justice Robert French of the Federal Court of Australia. He described some of the reaction to the *Mabo* decision in Australia. He put the criticism in the context of heightened criticism of Judges generally, including on grounds of alleged gender bias. He expressed concern about community ignorance about the role of the judiciary and suggested that this ignorance was often shared, in full measure, by legislators.

Constitutional fundamentals: Waitangi Treaty

There was quite a contrast in the next presentation – that of Sian Elias QC – on "The Treaty of Waitangi and Separation of Powers in New Zealand". Ms Elias described the way in which the Treaty formed the foundation upon which the British assumption of sovereignty in New Zealand was based. To the Maori, it is a "sacred compact", with an entrenched status which the Courts of New Zealand should uphold as a fundamental principle of the (unwritten) New Zealand constitution. Ms Elias pointed out that the compact was seen (and explained at the time by the missionaries) as a personal one between the Queen [Victoria] and the Maori chiefs of New Zealand. Parliament did not feature in these discussions. Nor was there any suggestion that the Queen herself was constitutionally unable to exercise the powers which the Maori chiefs conferred upon her personally. This emphatic relationship between the Maori and the Sovereign presents a particular issue of interest to Australian lawyers, considering the legal implications of the suggestion that Australia should become a republic. In New Zealand, a particular difficulty which would be presented by a like proposal, would be the personal relationship between the Crown and the Maori people established by the Treaty.

Ms Elias criticised the way in which legislative and other "reforms", designed to achieve "corporatisation privatisation" in New Zealand, had reduced the Crown's capacity to perform its Treaty guarantees to the Maori. Of relevance to the theme of the conference, Ms Elias suggested that the doctrine of parliamentary sovereignty may not have any application to the "fundamentals of the New Zealand constitution", including the obligation of the Crown to respect the Treaty of Waitangi and of the Courts to uphold that obligation. She explained this notion upon the footing that the doctrine of parliamentary sovereignty is a feature of the possession of territorial sovereignty. As, in New Zealand, that territorial sovereignty was secured by the Crown in the terms of the Treaty, the conditions laid down by the Treaty attached to and controlled the grant of sovereignty and all the laws and rights which derived from it.

Ms Elias believed the early decisions of the New Zealand Court of Appeal on the Treaty of Waitangi had defused a potentially destabilising situation in New Zealand:

> By the Treaty an independent people lost their standing at international law. With the loss of sovereignty the Maori as a people have no effective forum in which to insist upon performance of the Treaty, except the forums afforded by domestic law. The protection of Maori culture and the authority and dignity as a people is fundamental to the legitimacy of our political and legal structures. If effective redress is denied, the result is unjust. The effect of injustice will be alienation and social disruption.

Judicial lawmaking and separation of powers

The succeeding paper was delivered by the writer on "Courts and Policy: the Exciting Australian Scene". It began with a description of the earlier Australian legal authority on the separation of powers. As the Executive must sit in Parliament under the Australian Constitution (s 64), the doctrine has been explored mainly, but not exclusively, in relation to the separation of the judicial branch. (See eg *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC); affirmed *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529 (PC).) Separation had, in turn, sustained the earlier approaches to judicial restraint on the part of Australian Courts, led by the High Court of Australia. Curial and extra-curial statements of Australian Judges describing that approach were listed. The latest in a long series of explanations of judicial restraint was that contained in *State Government Insurance Commission v Trigwell.* (1979) 142 CLR 617. There it was pointed out that why the High Court of Australia lacked the legitimacy and the methodology to replace the English law on liability for sheep, straying from adjoining land, by a legal principle more suitable to the Australian farming environment. Mention was made of the differing views concerning candour in the abolition of Judge-made rules of the common law, at least where these affect matters of procedural law where the Judges can be expected to take a more active and creative role. (*Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 (CA) 38, 45, 57.)

By way of contrast with these earlier cases a list of recent decisions of the High Court of Australia was presented illustrating the extent to which, in the past two years, that Court had entered with energy and creativeness into important issues of legal policy and principle. The list includes decisions altering the law on privity of contract (*Trident General Insurance Co Limited v McNiece Bros Pty Limited* (1988) 165 CLR 107); the law on verbal confessions to police (*McKinney v The Queen* (1991) 171 CLR 468); the approach to prospective over-ruling of earlier legal authority (discussed

in *R v Savvas* (1991) 55 A Crim R 241 (NSW CCA), 291); the law on rape within marriage (*The Queen v L* (1991) 66 ALJR 36 (HC)); the law on constitutional rights to free speech (*Australian Capital Television*, below, fn 5; *Nationwide News*, below, fn 6); the law on mistake on payments made under a mistake of law (*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768 (HC); the law on rights to legal representation in criminal trials (*Dietrich v The Queen* (1993) 67 ALJR 1 (HC)); and the law on native title to land (*Mabo v Queensland [No 2]* (*Mabo v Queensland [No 2]* (1992) 175 CLR 1).

Some of the criticism, unprecedented in its vigour, expression, variety and persistence, which has followed the foregoing decisions was recounted. The paper ended with an appeal for greater candour by the Judges in explaining to the community the legitimate role of the judiciary in a common law system in developing legal principle which reflect changing perceptions of legal policy.[7]

The last substantive paper of the conference was delivered by Professor Richard Mulgan, a New Zealander, now of the Australian National University in Canberra.

In the paper, entitled "The Westminster System and the Erosion of Democratic Legitimacy", Professor Mulgan took to task the democratic politicians in a number of countries (including Australia, New Zealand and the United Kingdom) who had lost the confidence of their communities by succumbing to the advice of "poll-driven media advisors" and repeatedly attempted to deceive the electorate. This, he claimed, had caused a crisis of legitimacy and a vacuum which the Courts, as a still relatively trusted branch of government had, naturally enough, begun to fill.

Professor Mulgan considered that the only remedy for this erosion of respect for elected government was substantial electoral reform. As it happened, coinciding with the conference in Auckland, a debate was occurring in the New Zealand Parliament concerning proposals for reform of the system by which that country's unicameral legislature is elected.

Responding to the words of praise concerning the New Zealand Parliament in matters of abortion, human rights and other reforms, Professor Mulgan pointed out that these were achieved generally upon free or "conscience" votes. Where, however, Parliament voted according to party whips, there was no such assurance that it would reach the right conclusion.

Summary of the Conference

The conference closed with a remarkable summary offered by Sir Robin Cooke. He was prompted, by one remark of Professor Walker, to express a personal view that, in Sir Anthony Mason, Australia had probably the best Chief Justice of the High Court of Australia it had ever had, "not excluding Sir Owen Dixon". He said that the cases coming before that Court today were much more difficult than those in earlier times. It was therefore fortunate that it had at the helm a Chief Justice with a "breadth of vision".

Nonetheless, Sir Robin agreed with Professor Walker's views about A V Dicey. He pointed out that, apart from Dicey's "dogma" about parliamentary sovereignty, he had also been wrong about Home Rule for Ireland and other topics.

In an interesting comment on Sian Elias's paper, and referring to the particular relationship between the Maori and the Sovereign, Sir Robin observed a possible application of his thesis that some laws were beyond parliamentary power. Specifically, he mentioned that if the New Zealand Parliament were purportedly to abolish the Monarchy in New Zealand, without, for example, consulting the people by referendum, the Courts would have to "think very seriously" whether the existence of the Monarchy, under the New Zealand constitution, was not a "fundamental postulate". He pointed out that Sir Owen Dixon had once suggested that the supremacy of the Crown, as the guardian of the law, was the fundamental rule of both Australian and English law.

Sir Robin Cooke pointed out that the decision of the High Court of Australia in *Mabo* was not revolutionary when seen from beyond Australia. It had the "soundest of legal antecedents". He said that it was "totally unfair" to venture the suggestion that it was not solidly based upon "a wide range of jurisprudence which exists outside Australia".

Sir Robin was less enthusiastic about the description of the New Zealand Court of Appeal as "activists". He preferred to adopt Lord Woolf's description of the present House of Lords, viz "virile". He supported the writer's appeal for "absolute honesty". For Judges this meant not only pecuniary honesty but also intellectual honesty, demonstrated by reasons which would be seen as both candid and compelling.

Sir Robin Cooke resisted one suggestion made by Sir Geoffrey Palmer, that Judges should refrain from public discussion of legal policy issues. He said that, increasingly, Judges in all of the countries represented at the conference were invited to take part in conferences and public activities. Such obligations had to be accepted. Nowadays they "go with the job". If this sometimes upsets politicians it may nonetheless contribute to better informed decisions within the community, especially upon matters of legal and judicial significance.

Sir Robin Cooke declared himself in favour of a judicial appointments commission, although not necessarily comprising a majority of Judges. In terms of accountability, he pointed to the fact that Judges must be accountable to a longer time frame than most politicians. A good Judge will be thinking ten, twenty and even fifty years ahead. That Judge's duty is to explore wider horizons and to look beyond his or her own jurisdiction to the "world as a whole". It is in that context that universal human rights, reflected in the New Zealand Bill of Rights and in the International Covenant on Civil and Political Rights had a part to play in influencing the development of domestic law.

Courts and policy: a concern for lawyers and citizens

The Auckland Conference concluded with a dinner at the

continued on p 56

Directions on a defendant's good character

By Gerald Orchard, Professor of Law, University of Canterbury

This article discusses the directions to the jury that may be required when there is evidence that a defendant in a criminal trial is of previous good character.

In England and other jurisdictions it is well established that when a defendant in a criminal case adduces evidence of his or her good character it may be relevant at trial in two distinct ways. It may be regarded as making it less likely that the defendant committed the offence charged, either because the apparently good reputation or disposition of the defendant might raise doubts about the credibility of prosecution witnesses, or because it creates doubt as to whether an inference of guilt should be drawn from circumstantial evidence. In addition, if the defendant has given evidence, or relies on exculpatory material in an out of Court statement, evidence of good character may be regarded as supporting his or her credibility. Although there is little New Zealand authority, these propositions were accepted in *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, 181-187, where many of the cases are collected, and relevance to the likelihood of guilt, independently of any question of credibility, was accepted by Quilliam J in *Te Tomo v Police* (1988) 4 CRNZ 442. The matter was also touched upon, but not discussed, in *R v Williams* (1990) 7 CRNZ 378, 384 (CA).

Three questions

Although the dual relevance of evidence of good character has not been in doubt, there has been uncertainty as to the rules governing the directions to be given to juries when there is such evidence.

Some matters have been clear. Thus, it has been held to be wrong to direct that evidence of good character can be used only to confirm a doubt the jury already has as to guilt (*R v Falconer-Atlee* (1973) 58 Cr App R 348), and positive rulings that such evidence can be relevant only to likelihood of guilt, or only to credibility, will also be wrong: eg *R v Murphy* (1985) 63 ALR 53 (NSW, CCA); *Te Tomo v Police* (1988) 4 CRNZ 442. On the other hand, directions explaining the relevance of good character may properly be qualified by observations that it is not itself a defence, that people do commit crimes for the first time, and that such evidence cannot prevail over evidence of guilt which the jury finds convincing notwithstanding the defendant's previous good character; and the Judge may properly suggest

continued from p 55

Northern Club in Auckland. Sir Robin Cooke was admitted as a Fellow of the New Zealand Legal Research Foundation, one of only six such Fellows admitted in the twenty year history of the Foundation. The dinner finished with civilised speeches extolling the links between lawyers, Judges and the legal systems of common law countries.

The Conference demonstrated the similarity of the issues coming, at the same time, before the judiciary of Australia, New Zealand and England. The high similarity of the judicial responses; the advancing notions of fundamental rights; and the increasing demand for judicial review to defend lawfulness, fairness, and reasonableness came out of all of the contributions. Whilst there was no unanimity about the success of the various responses to the common problems, the sharing of experience was valuable in itself.

In his closing comments, Lord Woolf pointed to the much greater use being made in England today of cases decided in Australian and New Zealand Courts. In the area of administrative law and judicial review, the antipodean decisions have sometimes led the way and provided a stimulus to the legal system from which they had originated.

It is to be hoped that the New Zealand Legal Research Foundation will publish the papers of the Conference. They concern issues of fundamental importance both to substantive public law and to the future role and methodology of the judiciary. Those issues deserve the most careful consideration by Judges and lawyers — and of all concerned citizens — in all common law countries at this time. □

1 The expected publication of the Conference papers will most likely reflect the format of an earlier Conference on the problems and prospects for judicial review in the 1980s. See M Taggart (ed) *Judicial Review of Administrative Action in the 1980s — Problems and Prospects*, OUP, Auckland, 1986. See also note M Bowman (1986) 5 *Auckland Uni L Rev* 360.

2 His list included: experience; knowledge of the law; integrity, honesty and uprightness; industry; impartiality; appropriate age; good health; community experience; skills in communication and collegiality.

3 See J R Grodin, "Developing a Consensus of Constraint" 61 *So Cal L Rev* 1969 (1988).

4 *Union Steamship Company of Australia Pty Limited v King* (1988) 166 CLR 1, 10. See also G Rumble, "The Role of the Courts in the Protection of Individual Rights through Constitutional Interpretation" in M McMillan (ed) *Administrative Law: Does the Public Benefit?*, AIAL, Canberra, 1992.

5 *Australian Capital Television Pty Limited & Ors v The Commonwealth* (1992) 66 ALJR 695 (HC). See N F Douglas, "Freedom of Expression under the Australian Constitution" (1993) 16 UNSWLJ 315.

6 *Nationwide News Pty Limited v Wills* (1992) 66 ALJR 658 (HC).

7 Referring to the criteria suggested by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 252; 62 ALJR 389 (HC), 413. See also D Solomon, *The Political Impact of the High Court*, Allen & Unwin, 1992, Sydney, 184 ff.

that such evidence may have more force in relation to some issues and offences than others: see, eg *R v Trimboli* (1979) 21 SASR 577, 577-8; *R v Vye* [1993] 3 All ER 241, 246-7. But there has been rather surprising uncertainty as to whether evidence of good character requires *any* directions as to its relevance.

At one time it was held that the trial Judge is never obliged to direct the jury as to the relevance of such evidence, and whether there should be such an explanation is always within the Judge's discretion: *R v Smith* [1971] Crim LR 531. More recent authorities, however, recognised that in some cases such directions are necessary, although some doubts remained as to when this is so. The English Court of Appeal has now sought to resolve this: see *R v Vye, R v Wise, R v Stephenson* [1993] 3 All ER 241. The Court considered and answered the following questions.

1 When a defendant has not given evidence but has relied on pre-trial statements to the police or others, is a direction explaining the relevance of the defendant's good character to credibility mandatory, or is it within the Judge's discretion?

Modern authority requires such a direction when the defendant has testified (eg *R Berrada* (1989) 91 Cr App R 131), and in *Vye* the Court concluded that such a direction must now also be given when the defendant does not give evidence but relies on out of Court statements which are in evidence.

In Australia it has been suggested that evidence of good character has much less force when the defendant is not exposed to cross-examination (*R v Zecevic* [1986] VR 797, 823), but there is no echo of this in *Vye*, although the Court does indicate that even when the credibility of a statement gains support from the maker's good character it may still be proper for the Judge to also suggest that the exculpatory parts do not have the same weight as incriminating parts: *R v Duncan* (1981) 73 Cr App R 359, 365; Note [1988] NZLJ 221, 223. It is no doubt also the case that good character will be of little help when inconsistent statements have been made (*Zecevic*, supra), but the need for a good character direction remains even if the defendant lied to the police in parts of the statements now relied upon: *R v Sharp* [1993] 3 All ER 225, 231-232, CA.

2 Is a direction as to the relevance of good character to the likelihood of the defendant's having committed the offence obligatory, or is it within the discretion of the trial Judge?

The Courts allowed evidence of good character to be received in order to enhance the probability of innocence before the defendant was a competent witness (eg *R v Stannard* (1837) 7 C & P 673, 173 ER 295), but in recent times there had been repeated suggestions in England that while the credibility direction (where applicable) had become obligatory, a direction about likelihood of guilt, or propensity, remained discretionary: eg *R v Berrada,* supra, 134; *R v Thanki* (1990) 93 Cr App R 12; *R v Bainbridge* (1991) 93 Cr App R 32; less than three weeks before the decision in *Vye* the Court was unable to discern any principle or consistent pattern in these cases. In order to overcome the resulting uncertainty it concluded that it should now be recognised as obligatory that there be a direction as to the relevance of a defendant's good character to the likelihood of guilt, whether or not the defendant testifies or has made pre-trial statements. It added, however, that the Judge retains a discretion to indicate whether much help was likely to be had from such evidence in the circumstances of the particular case.

3 What should the trial Judge do in a joint trial where one defendant is of good character but another is not?

In *R v Gibson* (1991) 93 Cr App R 9, 11-12 it was recognised that such cases present difficulty because, for example, stressing the good character of one defendant may highlight the apparent bad character of the other. It was suggested that in such a case the best course may be for the Judge to say nothing about the matter, leaving it to counsel's address, at least unless counsel insisted on directions from the Judge. In *Vye* the Court held that such a negotiated solution was unacceptable, and that in a joint trial a defendant with a good character remains entitled to the usual supportive directions. Depending on the circumstances of the case, it was said that the Judge might best deal with the co-defendant by telling the jury that they must not speculate as to character, or by saying nothing about the matter. Although the Court does not discuss it, if the bad character of a defendant has been revealed in evidence, and it is not evidence which is probative of guilt, no doubt it will always be vital that this be explained to the jury, and this seems especially important if a co-defendant receives the benefit of directions as to good character. Predictably, however, the Court did indicate that the mere fact that defendants have disparate characters will not generally justify separate trials.

Two doubts

In New Zealand, the Court of Appeal does not seem to have had to consider the issues raised in *Vye*, but the conclusions of the English Court of Appeal do no more than require that trial Judges explain the relevance of something which may not be obvious to the uninitiated, and presumably they will be followed here.

The position appears to be similar in Australia. Although the High Court of Australia has held that there is no rule that directions as to the manner in which good character evidence may be used are required in every case, it has also said that it is "wise" to give such instruction if it is requested: *Simic v R* (1980) 144 CLR 319, 333. Subsequently, some State appellate Courts have further held that such directions are "desirable" in all cases, or "generally speaking . . . should be given": eg *R v Trimboli* (1979) 21 SASR 577, 577-8, 586-7: *R v Warasta* (1991) 54 A Crim R 351, 356 (Vict CCA). These Courts also recognised the dual relevance of such evidence, although consistently with history (but in contrast with modern English authority) they have tended to regard relevance to propensity as of primary importance: eg *Attwood v R* (1960) 102 CLR 353, 359; *R v Trimboli*, supra; cp *R v Murphy* (1985) 63 ALR 53; *R v Bellis* [1966] 1 WLR 234, 236.

There are, however, two points

which might prompt doubts as to the wisdom of the rules crystallised in *Vye*.

First, while the directions required by *Vye* are obviously calculated to highlight and enhance the importance of evidence of good character, serious doubts have been raised as to the value of general evidence of this kind, whether in relation to credibility or propensity: see Australian Law Reform Commission, *Report on Evidence* (Report No 26, 1985), Vol I, Chapters 17 and 36. Moreover, the so-called evidence of good character which in *Vye* is held to require the dual directions is one of the least convincing forms of such evidence: the mere lack of previous convictions (or, in *Stephenson*, a clean record save for "one 'peccadillo' " as a youth). Even if it goes too far to suggest that such evidence does not even qualify as evidence of good character justifying directions on it (cp *R v Lopatta* (1983) 35 SASR 101, 114), there may be much to be said for the view that it is of less weight than "affirmative and credible evidence of good reputation and character": *R v Mandica* (1980) 24 SASR 394, 406. In *Vye*, however, the Court does not go further than acknowledging that the facts of a particular case may justify a Judge suggesting that the defendant's character may provide the jury with only limited help, and there is nothing to encourage any general devaluing of a clean record.

Second, some may wonder whether in some cases these rules do not allow an accused an unfair advantage over prosecution witnesses, who may have at least as good a character.

In *R v B (an accused)* [1987] 1 NZLR 362, 372 (CA) Casey J concurred in the decision that opinion evidence from a psychologist tendered to support the credibility of a complainant was not admissible, but added that "general evidence of good character may always be given". With respect, for witnesses other than a defendant this does not seem to be the law.

An accused has long been permitted to adduce such evidence, whether or not he or she is a witness in the case, but this is probably best seen as a humane concession which is one of the law's devices designed to minimise the risk of a wrongful conviction (Ligertwood, *Australian Evidence* (1988) 98-99). In the case of other witnesses (including complainants) the law has not allowed evidence to be adduced for the purpose of bolstering their credibility, at least unless their credibility has been impeached: *R v Turner* [1975] QB 834, 842; cp *R v Cargill* [1913] 2 KB 271. This exclusionary principle applies to evidence of general good character (*R v Johnson* [1923] NZLR 1315, 1316, per Chapman J), the theory being that such evidence is unnecessary because every witness is assumed to be of good character, and there being a concern that such evidence might artificially and wrongly enhance the probative strength of the evidence: *Wigmore on Evidence* (Chadbourn rev 1972) para 1104; Phipson, *Evidence* (14th ed), 465-6; Cross, *Evidence* (3rd Aust ed), para 10.2; Australian Law Reform Commission, *Report on Evidence* (Rep No 26 1985), Vol I, p 449; *Bishops of Durham v Beaumont* (1808) 1 Camp 207, 170 ER 931; *Bamfield v Massey* (1808) 1 Camp 460, 170 ER 1021; *Homan v US* 279 F 2d, 767, 772 (1960); compare *R v Georgeson* (1990) 6 CRNZ 68 (CA) where even an accused was denied the right to call evidence of the reputation of a place for the purpose of enhancing the credibility of his story.

Moreover, even when the credit or character of a witness has been attacked the extent to which it is permissible to rehabilitate the witness by evidence of general good character is not without doubt. This presumably would be allowed in order to rebut evidence of general bad character (cp *Bamfield v Massey* (1808) 1 Camp 460, 170 ER 1021), and it has been permitted for the purpose of negating the impact of evidence suggesting that the witness was responsible for the offence alleged against the defendant (*R v Murphy* (1753) 19 St Tr 693, 724; cp *R v Noel* (1834) 6 C & P 336, 172 ER 1266), or evidence of previous convictions elicited from the witness on cross-examination: (*R v Clarke* (1817) 2 Stark 241, 171 ER 633; but cp *Bamfield v Massey* (1808) 1 Camp 460, 170 ER 1021. The authorities, however, are in some disarray on the question whether this is permissible merely because a witness has been cross-examined in a way which challenges his or her character.

There seems to be no authority for allowing evidence of the good character of a witness merely because the truthfulness of his or her evidence has been challenged, and although there are cases where such evidence has been received after it has been suggested that the witness has been guilty of discreditable conduct, or is of bad character (*Bate v Hill* (1823) 1 C & P 100, 161 ER 1118; *AG v O'Sullivan* [1930] IR 552, 558; *R v Saleam* (1989) 41 A Crim R 108), there are other cases where this kind of evidence has been excluded notwithstanding such cross-examination: *Bamfield v Massey* (1808) 1 Camp 460, 170 ER 1021; *Doe d Reed v Harris* (1836) 7 C & P 330, 173 ER 147; *Dodd v Norris* (1814) 3 Camp 519, 170 ER 1467; *R v Wood* (1951) 35 Cr App R 61. This issue was raised but left open in *R v Johnson* [1923] NZLR 1315 (CA).

Where a defendant prays in aid his or her good character it seems at least arguable that prosecution witnesses whose veracity is challenged should be entitled to support by like material, but it is very doubtful whether this is permissible, especially if the cross-examiner does not suggest misconduct on other occasions or general bad character. In *R v Vye* [1993] 3 All ER 241, 249 the 50-year-old defendant had been found guilty of rape after his evidence claiming consent had been rejected by the jury. The conviction was quashed because of the Trial Judge's failure to adequately direct the jury on the relevance of the defendant's previous good character to both credibility and likelihood of guilt. The case had turned on the contest between the credibility of the complainant and the defendant, and there is no doubt that many will think that if the defendant is to be entitled to claim support from a clean record the complainant should have a similar right.

Finally, mention should be made of *R v Johnson* [1923] NZLR 1315, 1321 (CA). Evidence had been received that two prosecution witnesses were of good character and Stout CJ thought that the trial Judge was not wrong in telling the jury that the witnesses were of good character. No doubt this is correct if the evidence establishes the fact, although it may be that, if it is material, the jury should also be told that it is relevant *only* to credibility and that,

continued on p 59

Motor vehicle securities:
Shifting dealer financing losses to the Fidelity Fund

By D W McLauchlan, Professor of Law, Victoria University of Wellington

In this article, Professor McLauchlan discusses recent developments concerning the right of secured parties to claim against the Motor Vehicle Dealers Fidelity Guarantee Fund upon the extinguishment of their security interests in motor vehicles. He is critical of the recent judgment of the Court of Appeal in Motor Vehicle Dealers' Institute v UDC Finance (1991) Ltd *which upheld the respondent's claim against the Fund in respect of losses incurred in a dealer financing arrangement.*

Introduction

One of the significant commercial law reforms contained in the Motor Vehicle Securities Act 1989 is that a consumer who buys a motor vehicle from a licensed motor vehicle dealer now takes free of security interests affecting the vehicle. This is provided for in s 24 which simply states:

> Where a consumer purchases a motor vehicle that is subject to a security interest from a dealer, –
>
> (a) The security interest in that motor vehicle shall be extinguished; and
> (b) The consumer shall acquire the vehicle free from the security interest; and
> (c) Where title to the vehicle was vested in the holder of that security interest, title shall pass to the consumer.

The consumer is protected, subject to minor qualifications, "whether or not the dealer or the consumer has notice of the security interest, and whether or not the dealer is the debtor" (s 26). A similar protection applies where the consumer takes a motor vehicle on hire purchase or lease (s 25). By contrast, where the consumer acquires the vehicle otherwise than from a licensed dealer the security interest will not be extinguished unless the consumer takes without notice (s 27). Registration under the Act constitutes notice for this purpose (s 29).

One important effect of s 24 was to extend the protection already available to retail purchasers under s 18A(2) of the Chattels Transfer Act 1924. Under that section the purchasers only took free of security interests granted or entered into by the dealer. Hence they were liable to have the chattels repossessed by the holders of valid security interests (commonly customary hire purchase agreements or registered chattel mortgages) entered into by purchasers earlier in the chain. Nowadays, in the case of motor vehicles, any such repossession would be wrongful.

In order to appease the inevitable concerns in the finance industry about the loss of previously valid securities, the Motor Vehicle Securities Act also provided secured parties with certain rights of recourse to the dealer and, in the event of default by the dealer, the Motor Vehicle Dealers Fidelity Guarantee Fund (hereafter "the Fund"). The key provision is s 34 (but see also s 38 dealing with reimbursement of the secured party where the dealer enters into hire purchase or lease agreements). Section 34 states:

> Where –
> (a) A motor vehicle is purchased from a dealer; and
> (b) The motor vehicle is subject to a security interest immediately before the time of purchase; and
> (c) The dealer has notice of that security interest at the time when the purchase price is paid or the exchange is made; and
> (d) The security interest in that motor vehicle is extinguished by virtue of section 24 or section 27 of this Act, –
>
> the dealer shall pay to the secured party, within 7 working days of the date on which the secured party serves a claim for payment on the dealer, the amount outstanding in respect of the debt or other

continued from p 58

notwithstanding the concession made for defendants, such evidence should not be used to support an inference of good behaviour by the witness: *R v Cheatley* (1981) 5 A Crim R 114 (Tas CA). In *Johnson*, however, Stout CJ also said that the jury could be told that they were entitled to assume that a witness was of good character until the contrary was proved. But if there is nothing in evidence to confirm the theory that a witness is assumed to be of good character it may be doubted whether it would be right for the jury to be invited to act on the theory as if it was a fact. In any particular case it may well be a quite false assumption, and if it were a proper approach with witnesses generally it should presumably be applied to a defendant who gives evidence, even if no evidence of good character is adduced. The real value of evidence of good character is very doubtful, and to invite weight to be given to a mere hypothesis about it seems to be a refinement which the law can do without. □

> obligation secured by the security interest.

If the dealer fails to comply with this section the secured party may claim the amount due against the Fund under s 35.

The basic thinking behind these recourse provisions seems to have been that, to justify the different treatment of dispositions by dealers, the onus should be placed on them to check the new register set up by the Act. Further, as a trade-off for the loss of their security, secured parties should have a right of recourse, supported by the backstop of the Fidelity Fund, against dealers who sell with notice (actual knowledge or constructive notice through registration of the security). The ramifications of allowing resort to the Fund were probably considered to be not all that serious. It was no doubt anticipated that there would be only occasional instances of dealers selling vehicles which were subject to registered security interests and hence rendering the Fund liable to reimburse the secured party in the event of the dealers' default. Such instances would be relatively rare because dealers would invariably take the precaution of searching the register before purchasing and then on-selling. However, little thought appears to have been given to the legal position where the security interests extinguished by the Act were entered into by the dealers themselves, not third parties. For example, would the Fund be liable in the event of dealers defaulting in their own financing arrangements with manufacturers, wholesalers or finance companies, perhaps by on-selling secured stock without accounting for the proceeds? Could these creditors whose security interests were extinguished upon retail sales by their client dealers recoup their losses from the Fund?

With the recent collapse of a number of motor vehicle dealerships, this issue has assumed considerable significance. Claims against the Fund of well in excess of $1 million have been made in respect of one failed dealer alone. The implications for the Fund, which currently contains only $500,000, are obvious.

The purpose of this article is to discuss two important developments which occurred during the latter part of 1993. The first is the Law Reform (Miscellaneous Provisions) Bill (No 2) 1993. This Bill contains provisions which, if enacted, will severely limit access to the Fund by manufacturers, wholesalers and finance companies who make claims after 21 September 1993, the date the Bill was introduced to Parliament. The second development is the decision of the Court of Appeal in *Motor Vehicle Dealers' Institute v UDC Finance (1991) Ltd* (CA 186/93, 8 December 1993) which upheld the respondent's claim against the Fund in respect of losses incurred in its dealer financing arrangements.

Law Reform (Miscellaneous Provisions) Bill (No 2) 1993

Clause 186 of this Bill amends s 35 of the Motor Vehicle Securities Act by inserting the following subsection:

> (1A) Notwithstanding subsection (1) of this section, no claim may be made against the Fund by or on behalf of a secured party other than a consumer unless the security interest was created by a consumer for the purpose of enabling that consumer to acquire a motor vehicle.

Clause 187, which amends s 38 of the Act, contains a similar limitation on claims against the Fund where the dealer disposes of vehicles under hire purchase or lease agreements.

Under these provisions a secured party will only be able to claim against the Fund where either (a) the secured party *is* a consumer (ie, any person other than a manufacturer, wholesaler, dealer or finance company within the definition of those terms in the Act), or (b) the security interest was created by a consumer for the purpose of enabling that consumer to acquire a motor vehicle.

These amendments, if enacted, will clearly achieve the desired effect of precluding financiers of dealers claiming against the Fund in respect of losses resulting from the extinguishment of their security interests under the Act. However, there are two difficulties with them, one technical and the other substantive. First, the reference to security interest "created by" a consumer should be altered to read security interest "entered into" by a consumer since, in the case of hire purchase and lease agreements, the *creditor* is the grantor. Secondly, and more importantly, there is one respect in which the amendments may go too far. There appears to be no sensible reason for distinguishing in this context between secured credit extended to enable the acquisition of a motor vehicle by a consumer (a purchase money security interest) and credit extended on the security of a vehicle already owned by a consumer (a non-purchase money security interest). Under the proposed amendments a finance company will have a claim against the Fund where it has a properly registered purchase money security interest which is later extinguished upon a sale by a dealer. But the finance company will not have a claim where there is a non-purchase money security interest (for example, credit extended on the security of the debtor's existing vehicle to enable home renovations). It is suggested that *if* a claim is to be allowed in the former situation – there may be something to be said for barring *all* claims by finance companies against the Fund under the Motor Vehicle Securities Act – it also ought to be allowed in the latter. For this reason, the amendments should perhaps be altered to read something like "no claim may be made against the Fund by or on behalf of a secured party unless that secured party *or the debtor* is a consumer".

MVDI v UDC Finance (1991) Ltd

Counsel for the appellant Institute in this case argued that if finance companies were entitled to claim against the Fund in respect of dealer financing losses the Fund could not survive in its present form. In the course of its brief six-page judgment delivered by Gallen J the Court of Appeal accepted that this was "a valid consideration which would have substantial weight if other things were equal and there was a serious ambiguity". However, the Court concluded that "[u]n-fortunately we do not read the other considerations as being equal or any real ambiguity in the statutory provisions". Accordingly, the respondent finance company was

entitled to succeed in its claim against the Fund.

It will be contended below that the reasoning on which this conclusion is based is unconvincing. Some powerful arguments put forward by counsel for the Institute were summarily dismissed, misunderstood, or ignored.

Factual background

The case arose out of the fraudulent financing activities of City Motors, a Dunedin motor vehicle dealer. City Motors had entered into a bailment display plan agreement with UDC. Under this agreement City Motors could request UDC to purchase vehicles in respect of which finance was required. If UDC agreed and a purchase was completed, City Motors were allowed to continue in possession pursuant to the terms of the bailment agreement. They signed a form acknowledging that the vehicles were held as bailee only for UDC and that title remained in the latter until the completion of any sale between the parties. City Motors were required to obtain UDC's written consent before on-selling, although it seems that this was not observed in practice. When City Motors were placed in receivership in February 1992 it was discovered that they had entered into several cash sales of bailed vehicles to retail customers without accounting to UDC for the proceeds. UDC eventually lodged claims against the Fund under the Act. When the Institute rejected the claims UDC sought and obtained summary judgment from Master Thomson; see (1993) NZBLC 103,245. This judgment was upheld by the Court of Appeal.

There was no doubt that the retail purchasers had obtained clear title and that, even if UDC's security interests were otherwise valid, they were extinguished under s 24 of the Motor Vehicle Securities Act. Indeed, the purchasers were protected in this situation even prior to the Act. They could invoke s 18A(2) of the Chattels Transfer Act 1924 and probably, as will be explained later, other exceptions to the nemo dat rule.

UDC's claims against the Fund were, of course based on ss 34 and 35 of the Motor Vehicle Securities Act and, on the face of these provisions, they had a straightforward case against the Institute. In particular, the requirements of s 34 were apparently satisfied because (a) motor vehicles had been purchased from a dealer (City Motors), (b) those vehicles were subject to security interests before the time of purchase, (c) City Motors had notice of the security interests (indeed, they were parties to them), and (d) the interests were extinguished under s 24. Further, since City Motors had failed to pay the amount of the debts secured, the Fund was liable under s 35. How then could the Institute possibly deny liability?

The first argument

There was one complicating feature of the facts which formed the basis of the Institute's first argument that UDC's claim ought not to be upheld or that, at least, the case was not an appropriate one for summary judgment. Some of the vehicles in question had initially been acquired by City Motors from a wholesaler, Daihatsu (NZ) Ltd, pursuant to the terms of a dealership agreement between the two companies which provided that property did not pass until payment of the price. Although City Motors had not paid for the vehicles this did not in itself prevent UDC obtaining title (and hence valid security interests) provided that they did not have actual notice of Daihatsu's security interests. Since the latter were not registered UDC could claim that they were extinguished under s 27 of the Motor Vehicle Securities Act. (Section 27(2) of the Sale of Goods Act 1908 — sales by buyers in possession — could also be invoked, but it was unnecessary to do so.) The real difficulty confronting UDC was that there was evidence that two of the vehicles had not been invoiced to City Motors until the day after the purported sales to UDC. If this were true, and City Motors had neither agreed to buy nor obtained possession of the vehicles at the time of the sales to UDC, it would appear that these sales must have been devoid of legal effect. This is because City Motors simply had no interest to transfer to UDC. Daihatsu's proprietary rights could not possibly be defeated under s 27 of the Act since at the relevant time it had both ownership and possession and there were no transactions in existence which constituted security interests. Accordingly, the Institute had a strong argument that (a) title never passed to UDC, (b) hence UDC never acquired security interests, (c) hence they had no claim against the Fund under s 35.

The Court of Appeal's response to this argument was as follows:

> Although Mr Reed argued that the question of when title passed from Daihatsu to City Motors was important, there is no dispute in this case that the persons who ultimately purchased the vehicles from City Motors acquired a clear title as against UDC, which has no claim against such persons. UDC is unable to recover the loss which it has sustained from City Motors (the dealer) and the real question is whether or not UDC is entitled under the provisions of ss 34 and 35 of the Motor Vehicle Securities Act 1989, to reimbursement of its loss from the Motor Vehicle Dealers Fidelity Guarantee Fund which is administered by the appellant.

It is submitted, with respect, that this reasoning missed the point of counsel's argument. It was no answer to that argument simply to say that the retail purchasers obtained a clear title as against UDC. That was indeed common ground in the case. As noted above, the Institute's argument was that, in respect of two of the vehicles, there was no question of the retail purchasers defeating UDC under s 24 because no security interests in favour of UDC were in existence at the relevant time. The transactions purporting to vest title and create security interests in UDC were nullities. On this basis the only party whose security interests were defeated under s 24 was Daihatsu.

It is, of course, possible that, despite the dates of the invoices, City Motors had in fact agreed to buy or obtain possession of the two disputed vehicles prior to the sales to UDC. But this was surely a factual issue requiring investigation at trial and, in light of the Institute's first argument, it is difficult to see how the case was an appropriate one for summary judgment.

The second argument

The Institute's second argument was that, even leaving aside the involvement of Daihatsu and assuming that UDC did have valid security interests in all the vehicles prior to their sale to the retail purchasers, the requirement of s 34(d) that the security interests be extinguished "by virtue of" s 24 was not satisfied because, regardless of that section, the security interests were clearly defeated by other exceptions to the nemo dat rule. In other words, the application of s 24 was not causative of UDC's loss because, quite independently of that section, the purchasers obtained clear title.

It is important to note that this argument did not deny that s 24 applied in the circumstances that arose. Clearly, that section could be invoked by the purchasers to defeat UDC's security interests. The argument was that the security interests could not be said to be lost *by virtue of* s 24 in view of the application to the facts of other nemo dat exceptions. These included s 3 of the Mercantile Law Act 1908 (disposition by mercantile agent), s 27(1) of the Sale of Goods Act 1908 (disposition by seller in possession) and s 23 of the Sale of Goods Act (estoppel and ostensible ownership — UDC knew that City Motors would sell as owner and allowed them to do so).

It appears that counsel for the respondent conceded the application of at least some of these exceptions' but contended that this was irrelevant provided that the situation fell within s 24 of the Motor Vehicle Securities Act. The application of that section was "sufficient to trigger the reimbursement contemplated by ss 34 and 35, regardless of the fact that the interest might have been subject to extinction under some other provision as well".

The Court of Appeal held that this was "the correct answer". It concluded that "if the transaction can be brought within the provisions of ss 24 or 27, then it may properly be said that the result occurs by virtue of those sections, even although a similar result is achieved by the other statutory provisions to which reference has been made". The argument of the Institute involved reading s 34(d) as though it said by virtue *only* of ss 24 or 27. There was no need to read in this additional word. The statute was clear.

It is suggested that this reasoning is unconvincing. The Institute's argument did not necessarily involve reading an additional word into the statute. The phrase "by virtue of" is inherently ambiguous. It is defined in *The Oxford English Dictionary* (2nd ed 1989), vol XIX, p 676, as meaning ". . . by the authority of, in reliance upon, in consequence of, because of". Similarly, according to *The New Shorter Oxford English Dictionary* (4th ed 1993) at p 3586 the phrase means "by the power or efficacy of; now, on the strength of, in consequence of, because of". It might be said that UDC's security interests were lost "by the authority of", "in reliance upon" or "on the strength of" s 24, but can it be said that they were lost "in consequence of" or "because of" s 24, when, regardless of the application of that section, UDC would have had no proprietary rights to the vehicles once purchased by City Motors' customers?

One can readily understand the Court of Appeal's reluctance to accept the strict or narrow interpretation of the phrase but the problem with the wider interpretation favoured by the Court is that it gives rise to consequences which surely cannot have been intended. For example, a secured party could claim against the Fund when it expressly authorised dispositions to retail customers or was otherwise estopped from denying the dealer's authority to sell. Take the following simple example, which may not be too far removed from the actual facts of the *UDC* case given the way the bailment agreement operated in practice:

> Dealer (D) holds its stock of cars under a bailment agreement with Finance Company (FC). FC retains title to the cars. D is allowed to sell the cars, either for cash or on hire purchase terms, in the ordinary course of business without first obtaining FC's consent. However, D is obliged to account immediately to FC for the proceeds of sale. D sells several cars for cash. The proceeds cannot be traced.

It is clear that FC has no claim to the cars. Its security interests are extinguished. This is confirmed by s 24 of the Motor Vehicle Securities Act. The security interests are also extinguished under common law principles now codified in the Sale of Goods Act. FC cannot rely on its title because it allowed D to represent itself as owner and sell as such. It seems extraordinary that FC should be able to protect itself from the consequences of D's insolvency by obtaining reimbursement from the Fund, but that is the effect of the Court of Appeal's reasoning. The requirements of s 34 are satisfied because D sells vehicles subject to security interests of which D has notice and these security interests are extinguished by virtue of s 24.

The case for resolving the ambiguity in favour of the Institute is further strengthened by a consideration of the likely thinking behind the decision to extend the range of claims available against the Fund. It seems that ss 34 and 35 were primarily designed as a quid pro quo for secured parties being deprived of previously enforceable security interests in motor vehicles in the event of dispositions by licensed dealers. More specifically, the scheme of the Act is to allow secured parties, who hitherto had rights to follow their property into the hands of innocent third parties, to have the consolation of being able to claim against the Fund when those rights are lost in the event of dispositions by dealers in the circumstances specified in ss 34 and 38. It can be argued that the only situation where the Act confers a more extensive right to resort to the Fund (that is, gives a claim on the Fund where the security interest was endangered under previous law) is the relatively rare one where an unregistered security interest is extinguished under s 27 or s 28 upon a disposition by a dealer who has actual knowledge of that security interest.

If this assessment is correct then it seems hardly likely that Parliament would have intended to confer on institutions financing dealers rights to claim against the Fund in situations where there was nothing in the Motor Vehicle Securities Act adversely affecting their existing legal rights. It was probably for this reason that counsel for the Institute placed

some reliance on s 18A(2) of the Chattels Transfer Act. As noted earlier, under this section retail purchasers of chattels take free of security interests entered into by the dealer, even if duly registered. This provision no longer applies to dispositions of motor vehicles (which are now excluded from the definition of chattels) but it was highly relevant to the Institute's argument in that it confirmed that, prior to the Motor Vehicle Securities Act, UDC's security would have been defeated by the retail customers and the company would have had no claim against the Fund in the event of the dealer's default. In other words, the enactment of the Motor Vehicle Securities Act had no adverse impact on the rights of UDC in the situation before the Court and to allow their claim against the Fund would result in an unwarranted windfall.

It seems that the Court of Appeal failed to grasp the point of counsel's reliance on s 18A(2) for, like Master Thomson in the High Court, it was content to observe that the Chattels Transfer Act "no longer applies because motor vehicles do not constitute chattels for the purposes of that Act".

The third argument

A further independent ground for suggesting that s 34 (and hence s 35) did not apply was put forward by counsel. Surprisingly, this argument is not even mentioned in the Court of Appeal's judgment. The argument stemmed from the requirement of s 34(c) that the dealer have notice of the security interest at the time the purchase price is paid. In general terms, it was suggested that in light of this requirement the provisions for reimbursement of a secured party whose security interest is extinguished in the event of a disposition by a dealer are not addressed to situations where the dealer itself has created or was otherwise party to the security interest. More specifically, the argument was that, read as a whole, the provisions contemplate reimbursement from the dealer and (in the event of the dealer's default) from the Fund only where (a) the motor vehicle is subject to a valid security interest, (b) it then comes into the hands of a dealer, and (c) the dealer, with notice of the security interest, disposes of the vehicle in circumstances which result in the extinguishment of the security interest by virtue of ss 24-28.

There are a number of specific points which make this argument much more plausible than it might appear to be at first sight. First, it is not usual in the law relating to chattel securities to refer to the debtor as a person having notice of the security interest. In the typical priority contest there are three combatants – the secured party, the debtor and the third party purchaser – and the issue arises, can the *debtor*, despite the proprietary interest of the *secured party*, give good title to a *purchaser* for value and without notice. So, when s 34(c) refers to a dealer who has notice of the security interest it is not contemplating a situation where the dealer is the debtor and thus (a) is primarily responsible for the priority dispute arising in the first place and (b) cannot possibly be without notice of the security interest.

Secondly, the purpose of s 34 is to impose on the dealer a new legal obligation to pay someone else's debt. If paras (a)-(d) are satisfied the dealer must, upon receiving a claim from the secured party, pay the amount outstanding within seven days. The section does not contemplate situations where the dealer is the debtor and thus already contractually obliged by the security agreement to pay the debt in the event of default, probably immediately and without any notice requirement.

Thirdly, s 26 provides a useful contextual argument. As noted at the beginning of this article, it states that the consumer is protected under ss 24 and 25 "whether or not the dealer . . . has notice of the security interest, *and whether or not the dealer is the debtor*". If Parliament contemplated that the reference in s 34 to the dealer having notice of the security interest would include situations where the dealer is the debtor, why would the words "whether or not the dealer is the debtor" be included in s 26? Acceptance of the respondent's argument in the present case has the effect that those words are mere surplusage.

Fourthly, the provisions of s 37 provide another useful contextual argument. They strongly suggest that s 34 is not addressed to situations where the dealer is the principal debtor. Section 37 says that where payment is made to the secured party under s 34 the dealer (that is, the dealer having notice of the security interest) shall be subrogated "to all rights and remedies that, but for the subrogation, the secured party would have had against the debtor . . .". Would not one expect suitable words of qualification to appear in the section if it were contemplated that the dealer might actually *be* the debtor?

Conclusion

The concerns about the survival of the Fund which prompted the proposed amendments to the Motor Vehicle Securities Act discussed earlier in this paper were proved correct when the Court of Appeal delivered its judgment in the *UDC* case. However, for the reasons discussed above, it is suggested that there was ample basis for justifying a conclusion that the Fund was not liable, thus rendering any amendments to the Act unnecessary. In the writer's view, the current provisions are not as clear as the Court suggests. Moreover, even if it be conceded that the technically correct conclusion was reached, the arguments presented on behalf of the Institute were surely deserving, particularly given the commercial importance of the case, of more than the rather cursory treatment that they received from the Court. □

---

1 There could be no doubt that s 27(1) of the Sale of Goods Act applied in the circumstances. The dealer was a person who, having sold to UDC, continued in unbroken physical possession, so that the deliveries under the sales to the consumers had the same effect as if expressly authorised by the owner (UDC); see *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 687. It is interesting to note that s 27(1) would also apply even if UDC's security interests were registered. Although the section requires the third party to take in good faith and without notice of the previous sale, registration under the Motor Vehicle Securities Act is only notice for the purposes of that Act. Further, even if there were constructive notice, that would not necessarily import notice of *the previous sale* nor negate the existence of good faith.

Conflict of interest

By Wayne Thompson, Barrister and Solicitor of Auckland

Legal practice has many pitfalls. One of these is possibly conflict of interest situations. This article looks at the principles that are applicable. In this respect the author examines critically the New Zealand position as set out in the New Zealand Law Society Rules of Professional Conduct. He suggests that New Zealand could benefit from following American examples in this area.

The prohibition against legal practitioners acting when there is a conflict of interest is explained and justified by the nature of the relationship that exists between the lawyer and the client. The integrity of the lawyer/client relationship is essential to the functioning of the adversary system. Conflict of interest rules are intended to ensure that the lawyer is dedicated and loyal to the client and the client's ends. The conflict of interest rule can be said to be "instrumentally" justified in ensuring that the lawyer pursues his principal duty to the client of exercising "professional judgment"[1] solely for the benefit of this client. The rule against conflict of interest is intended to assist the lawyer's pursuit of the client's ends. Such rules are "instrumental" and are distinguished from the lawyer's principal duty which is to exercise professional judgment or independent judgment in pursuing the client's goals through the legal system. The client relies on the lawyer's judgment when dealing with the client's legal problems and the client trusts the lawyer to be loyal to the client's goals.

In analysing the issue of conflict of interest, it is important to identify which clients are likely to be harmed by such conflicts. The rules of professional conduct for barristers and solicitors issued by the New Zealand Law Society has stated that there are three types of situations where clients can be harmed.[2] The first is where a lawyer's personal interests conflict with those of a client. Secondly, where a lawyer acts contrary to the interests of a former client and thirdly, where there is simultaneous representation of two clients by the one lawyer. Aspects of these conflict of interest situations will be canvassed and stated in more detail further into this discussion.

An accepted and important characteristic of the adversary system is that the lawyer be a zealous advocate for his client, that is, exhibit total partisanship to the client's cause. This idea is proffered by the famous answer given by Lord Henry Brougham in the Queen Caroline case where he said "An advocate in the discharge of his duty knows but one person in all the world and that person is his client". This tells us something about how the lawyer sees his role and the relationship but what about the client's and society's views and expectations of the relationship. An understanding of the basis of the lawyer/client relationship will help in determining why a rule against conflict of interest is imperative to a proper functioning of the adversarial system.

Models for lawyer-client relationship

Three models are generally put forward to understand the lawyer/client relationship. These models are the libertarian (contract) model, the transformational model and the fiduciary model. The libertarian model states in short that the relationship between lawyer and client is one that arises from each bargaining with the other to protect their interests so as to specify the ends the lawyer will pursue for the client. At the other end of the spectrum, the transformational model is one whereby the lawyer/client relationship is used as a means to transform social institutions and the collective interests become paramount in determining the relationship between lawyer and client. Both the libertarian and transformational models have generally not been accepted as the appropriate basis for the lawyer/client relationship. Conversely the fiduciary model has gained wide acceptance in understanding the lawyer/client relationship and also in determining how the lawyer should behave in his professional role.[3] Furthermore the Courts have widely endorsed the fiduciary model in considering the lawyer's responsibilities to his clients. It should be noted that in New Zealand there have been to date no cases specifically on professional conflicts of interest and where the Courts have discussed this matter, it has been tangential to other legal issues, generally those of professional negligence.[4]

The fiduciary model is where the lawyer's behaviour in a professional relationship is governed by the principal notion of trust, whereby the lawyer acts for the benefit of the client to promote their interests and no other parties' interest. This imposes a moral obligation on the lawyer to be a zealous advocate for the client and if the lawyer strays from such an obligation the breach of trust is condemned.

Such a relational theory of legal ethics maintains that the lawyer/client relationship is important and the client has a special place in the moral universe of the lawyer. This is not to deny the premise that every human being is of equal moral dignity as used in the utilitarian calculus where relationships such as parent/child or lawyer/client, do not make a moral difference in maximising total human happiness. In the legal sense, the relational theory does acknowledge the equal moral dignity of every human being for the adversary system permits and encourages access to lawyers by anyone who requires one. The client has a right to have their point of view heard, regardless of its merits. The client is given moral dignity by their lawyer preferring the client's views and account of the situation over any other. It should be noted that although Wasserstrom in his article, (Wasserstrom R "Lawyers as

Professionals : Some Moral Issues "*Natural Law Forum* 5 (1975): 1-24) adopted a form of non-relational ethics as he considered the effect of role differentiation to be insidious in its effect upon the legal profession, pure non-relational ethics is probably never proposed as life tells us that certain relationships do matter and do have an effect.

The nature of the professional relationship is client-centred[5] and it is necessary to understand fully the nature of this relationship to justify the rule prohibiting conflicts of interest.

The lawyer/client relationship is based on a minimum of loyalty by the lawyer to the client in the adversary system within which our legal framework operates. The raison d'etre for the rule prohibiting conflicts of interest is that a conflict can influence the lawyer's loyalties to his client and so disturb the fiduciary basis of the relationship. In order for the adversary system to maintain a high level of integrity the lawyer must avoid any appearance of impropriety. If the adversary system is valid then the corollary is that the rule against conflicts of interest is also valid and justified by the nature of this institution. Without arguing the merits of the adversary system, writers and critics who have analysed it, such as David Luban, conclude that despite its shortcomings it is the best means we have of finding the truth and protecting legal rights.

A person sees a lawyer to assist in dealing with legal matters that are beyond their ability, experience or knowledge. Although, the client in theory retains ultimate power in decision making, the client is guided by the lawyer and the client has no way of objectively measuring the lawyer's advice or handling of the client's problems. The relationship is typically seen as one of imbalance in that the lawyer is the possessor of expert knowledge of the sort not readily attainable by the client with the client therefore dependent upon the lawyer. The client is in an inferior position whereas the lawyer exercises an enormous amount of power because of his experience and knowledge. Accordingly, the lawyer is able to either benefit the client or alternatively where there is a competing interest affecting the lawyer's professional judgment the lawyer can harm the client.

The situation is analogous to a "black box"[6] in that the client's putting his problem into the hands of the lawyer is like putting it in a black box and out of the box comes the result based upon the client's trust of the lawyer to achieve the right result. The danger to the client is that the client will not have access to the reasoning that goes on in the lawyer's mind and will not know what factors have affected his professional judgment. Since the lawyer/client relationship in practice results in the lawyer having discretion and the exercise of such discretion could harm the client, an ethical rule prohibiting the conflict of interest is justified. Because there is no way of measuring the factors and reasoning influencing the lawyer's advice to the client it is considered morally justifiable to rule out all likely situations in which there is chance of his judgment being tainted. Even though a lawyer's judgment may not necessarily or always be affected by a conflicting interest it is impossible because of the "black box" nature of the relationship to know when professional judgment will and will not be impaired. Accordingly a conflict of interest rule is accepted as a justifiable response to an equisystemic problem in the lawyer/client relationship.

The client expects the lawyer to exercise professional judgment in handling the client's problem and such judgment can be tainted if there are competing claims upon the lawyer. In practice, although the client makes the final decision, he has effectively delegated the care of his rights to the lawyer. If there are competing influences upon the lawyer, then the lawyer's loyalty to his client can be affected. Accordingly the moral justification for prohibiting conflicts of interest is to prevent the dilution of the lawyer's loyalty to his client. The effect of the rule against conflict of interest is to limit the lawyer's discretion that occurs as a result of the nature of the imbalance in the client/lawyer relationship. The rule against conflict of interest recognises that lawyers are like everyone else, plagued by the evils of mankind and are prone to temptations such as personal gain at the expense of a client or favouring one client over another (such as a more prestigious or wealthier client), which will have the effect of betraying the client's trust.

Where the lawyer has a personal interest in a matter in which he is advising the client a conflict of interest will result. Such an example would be, when the client is entering into a transaction with a company owned by the lawyer. The presumption is that the lawyer's basic instinct is to advance his company with the effect that his professional judgment is distorted and client loyalty diluted. The avoidance of this type of situation justifies the rule preventing conflict of interest.

Contingency fee

Another example of a personal interest affecting professional judgment is the possibility of New Zealand legal practitioners charging a contingency fee.[7] This can cause a conflict of interest contrary to the Law Society's own rules of professional conduct. By providing for a contingency fee, the lawyer has a significant interest in the litigation and so has the danger of affecting the lawyer's advice and loyalty to the client. Contingency fees provide compensation which is often unrelated to the value of the legal services performed. For instance, there is a great incentive for the lawyer to settle the case so as to maximise the lawyer's return of the effort expended instead of concentrating on the actual benefit achieved for the client. If the moral justification for the rule against conflicts of interest is correct, then contingency fees should be specifically prohibited.

The second type of conflict of interest the Code of professional ethics prohibits is the acting against a former client. The obligations to a client continue after he ceases being the client's lawyer. The lawyer remains a repository of information conveyed during the client/lawyer relationship. The justification for this particular rule is the possible occurrence of a particular mischief, namely the use of confidential information[8] obtained from a former client being used against that client in subsequent proceedings. It is also the use of knowledge about the client obtained from the former client as well as specific information that could be used contrary to the interests of the former client.

The confidentiality of client information is one of the foundational elements of the lawyer/client relationship. The rule against conflicts of interest is intended to preserve confidentiality and accordingly, protect the lawyer/client relationship. Additionally a person is thought to be a Judas, that is, morally suspect where he changes allegiance and gives support to a party to whom he was earlier opposed not for some conviction but merely for a fee or a few pieces of silver.

The moral justification for the rule against conflict of interest in this instance is strong enough to prevent one lawyer in a firm acting against a former client of another lawyer in the same firm. This is based on the principle of imputation, being that one lawyer in a firm is likely to have access to or become knowledgeable of client information in regard to another lawyer's clients or former clients. The basis for this is that lawyers in the same firm have strong financial and personal reasons for talking to each other about their files and clients. There is a presumption of a transfer of information for which the rule against conflict of interest is intended to prevent.

The final area of conflict of interest identified by the New Zealand Law Society code of professional rules is that of simultaneous representation by the same lawyer or same law firm. Often a lawyer is needed merely to fulfil the objects of two parties, namely, to prepare a contract. It is thought that the use of a single lawyer avoids unnecessary expense, is quicker, with less confrontation and so justifies "a lawyer for the situation". The rules of professional conduct produced by the New Zealand Law Society acknowledges this possibility. They state that conflict of interest does not result simply because a lawyer acts for one or more parties in a transaction.

Chinese walls

Where the parties have divergent interests, lawyers in a firm will have different lawyers acting for each party and will create a "chinese wall" which is the setting up of physical and procedural boundaries within the organisation to prevent one lawyer from being exposed to information handled by a colleague in the same firm. This arrangement traditionally adopted by lawyers in the same firm, is intended to rebut the imputing of knowledge between colleagues in the same firm. However, the validity of the "chinese wall" has always been suspect and the New Zealand Law Society's rules of professional conduct has now specifically barred such arrangements where a conflict does arise between clients represented by lawyers in the same firm.

Although the New Zealand code permits a lawyer for the situation, simultaneous representation does generate a moral issue for the lawyer. The code requires the lawyer to make disclosure of the simultaneous representation. The parties must give prior and full consent to such representation. This creates a difficulty for the lawyer. The code of professional conduct specifies that information relating to a client's affairs is confidential. In making full disclosure to the client to allow for prior informed consent, the lawyer at the same time will disclose the other client's confidential information and accordingly, breach confidence. The lawyer can only act after he discloses the identity of the other client and the nature of their interest. However the trust in the lawyer can be eroded before this when the lawyer indicates he acts for the other side and seeks permission to continue acting until a specific conflict arises. In addition a lawyer is obliged in his professional role to use information for a client that comes into his knowledge where such information will assist a client. Everything a lawyer learns about a situation must be used for the client's benefit.

When a conflict of interest has arisen through simultaneous representation and the lawyer discloses the problem to the clients and decides to refer one party away this will create another moral issue for the lawyer. Which client and upon what grounds is one client referred away instead of the other. If the lawyer uses an economic index to retain one client instead of another is this immoral? What about the feelings of a client referred away? What about the sense of betrayal felt by the client when, say, after years of allegiance to their family lawyer another client is preferred over them to be retained instead of referred out.

The competing obligations create a moral dilemma for the lawyer. The above moral issues would be avoided in New Zealand if the code for lawyers followed its American counterpart and forbade the lawyer acting for more than one party at a time in the same transaction.

In all of the above, it becomes clear that the lawyer's duty is to place the interests of the client first and foremost. The lawyer's dealings with his client must not only be fair but be seen to be fair and it is for this reason that the rule against conflict of interest arises.

Finally it is reiterated that the conflict of interest rules are "instrumentally" justified to ensure the lawyer's professional judgment is not tainted and interfered with by a competing interest. The purity of the lawyer/client relationship is preserved.

In conclusion it can be said the conflict of interest rules are justified by the adversary system which requires the avoidance of any behaviour by the lawyer that will dilute his loyalty to the client and undermine the thrust of the adversary system. □

---

1 The term "professional judgment" is borrowed from G Hazard in *Ethics in the Practice of Law* and used in a very general sense to mean everything a lawyer does in his lawyering role. It is not intended to elaborate on it any further other than to refer the reader to the idea of "phronesis" in the article by Anthony Kronman entitled "Practical Wisdom and Professional Character" (1986) 4 *Social Philosophy and Policy* 203-204 as one analysis of the term "professional judgment".

2 The rules are 1.03, 1.04 and 1.06 and a copy of these rules and commentary are contained in the appendix 1. The three types of conflicts of interests are outlined by Thomas D Morgan in "The Evolving Concept of Professional Responsibility" *Harvard Law Review* 90 (1977) 702-743.

3 These models are discussed more fully in "Developments in the Law-Conflicts of Interest in the Legal Profession" *Harvard Law Review* 94 (1981) 1244-1503.

4 The most recent example is *Mouat v Clark Boyce* (1992) 2 WLR 558. In this case an elderly widow agreed to offer her house as security for a loan to her son. The widow wished to use her son's lawyer, probably to minimise legal costs. The son's lawyer refused to act in this matter. Another

continued on p 74

The relationship between Part II of the Resource Management Act 1991 and resource consents: Recent developments

By Martin Phillipson, Lecturer, Faculty of Law, Victoria University of Wellington.

The Resource Management Amendment Act 1993 has effectively altered the decision in Batchelor v Tauranga District Council *by clearly making environmental matters pre-eminent in resource consent hearings, the author of this article argues. The article also considers the question of Maori interests and the need for "consultation" as involving more than merely informing local Maori groups of proposals.*

The author wishes to thank L J Lee and Richard Boast for help.

Introduction

Two recent developments have considerably affected the relationship between Part II of the Resource Management Act 1991 (1991, No 65) and resource consents. In particular, s 54 of the Resource Management Amendment Act 1993 (1993, No 21) has clarified what was becoming an increasingly difficult issue. What priority, if any, should consent authorities give Part II matters when considering resource consent applications? Under the Resource Management Act 1991, s 104 listed a number of matters, the "actual and potential effects" of which the consent authority had to consider when deciding whether to grant a resource consent. The terms of Part II of the Resource Management Act 1991 were listed as one such matter, but were placed in s 104(4)(g), following several other matters, including relevant rules in policy statements and plans; relevant policies and objectives of such plans and any relevant water conservation orders.

It is submitted that the placement of Part II issues after these other matters was not intended to illustrate their subservience or to even indicate their mere equality. Rather their placement was simply a signpost to ensure that Part II matters were addressed in the course of resource consent hearings. The terms of Part II are the most significant enactments within the Resource Management Act 1991, because they enunciate both the environmental philosophy (sustainable management[1]) which is to drive the Act and those environmental issues which are of such significance that they must be "recognised and *provided for*" (my emphasis) by all parties exercising authority under the Act (including the Tribunal).

However, the placement of Part II matters in s 104(4)(g) led to the promulgation by the Tribunal and the High Court of a significant body of jurisprudence which placed Part II matters only on an equal footing with the other matters listed in s 104. While undoubtedly correct, as a matter of strict statutory interpretation, this jurisprudence led to the unfortunate situation where environmental matters (ie the provisions of Part II) were not necessarily given the attention which their status under the Act deserved.

In *Batchelor v Tauranga District Council* [1992] 2 NZRMA, 137, 140. the comments of the High Court were clear as to the weighting, if any, to be accorded to Part II matters when considering them in the context of s 104:

> Although s 104(4) directs the consent authority to have regard to Part II, which includes s 5, it is but one in a list of such matters and is given no special prominence.

This decision was subsequently adopted by the Tribunal in several decisions. The comments of the Tribunal in *Kennet v Dunedin City Council* [1992] 2 NZRMA 22, 31 are clear:

> [T]he matters in Part II of the Act which are referred to in s 104(g) are not necessarily to be given the primacy that one might expect having regard to the way in which they are expressed in Part II.

This passage was cited with approval by the Tribunal in *NZ Rail v Port of Marlborough* [1993] 2 NZRMA 449, 463, which added the comment:

> With respect, that view now appears to be confirmed in . . . the judgment of the Full Court of the High Court in *Batchelor.*

The priority given to Part II matters in resource consent hearings was not the only significant contribution the High Court in *Batchelor* made to the interpretation of s 104. At first instance the Tribunal, in considering an appeal against the grant of a resource consent, ruled that the "effects" referred to in s 104(1) included not only the effects of the proposed activity itself, but also the effect on public confidence in the relevant Plan and its administration resulting from the activity.[2] In the High Court, Mr Justice Barker stated:

> Section 104(1) requires that regard be had to the "effects" (widely, but not comprehensively defined in s 3) of allowing the particular activity. Section 104(a) and (b) require that regard also be had to the rules of a Plan and its relevant policies or objectives. In our view, these provisions envisage consideration of the integrity of the Plan. ([1992] 2 NZRMA 137 at 141)

These passages clearly illustrate that the effect of the decision of the High Court (affirming the decision of the Tribunal) in *Batchelor* was two-fold. Firstly, it became clear that Part II matters were not to receive preferential consideration during deliberations over resource consent applications. This approach led directly to the second effect of the decision, namely, that the effect of an activity on the environment was not the pre-eminent consideration in deciding whether to grant a resource consent. This was clearly an unacceptable situation for those who viewed the Resource Management Act 1991 as being primarily concerned with environmental protection.

The Resource Management Amendment Act 1993 came into force on July 7, 1993. The Act repealed s 104 of the Resource Management Act 1991 and replaced it with a new section, considerably changing the approach adopted by the Tribunal, effectively overturning the decision in *Batchelor*. The section begins by stating that:

> Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to—
>
> (a) Any actual and potential effects on the environment of allowing the activity.

The changes enacted by s 54 of the Resource Management Amendment Act 1993 clearly place environmental matters as pre-eminent in resource consent hearings. This change is made abundantly clear by the use of the phrase "subject to" which was characterised in the following way by Cooke P in *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257, 260:

> The qualification "subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict.

It should be noted that a new subsection (s 104 (1)(i) of the Resource Management Amendment Act 1993) was added to s 104 which allows consent authorities to "have regard to any other matters the authority considers relevant" when considering a resource consent application. This ensures that non-environmental effects can still be considered in the consent approval process, but the changes made to s 104 by the Resource Management Amendment Act 1993 have clearly placed environmental considerations ahead of other considerations, such as public confidence in the integrity of the Plan.

The second significant recent development, although not altering the weight attached to Part II in resource consent hearings, has significantly clarified what consideration of certain Part II matters entails for appropriate consent authorities. This clarification is found in the Tribunal decision of *Gill v Rotorua District Council and Schwanner* [1993] 2 NZRMA 604 (Planning Tribunal, Wellington, W 29/93, June 3, 1993, Kenderdine J).

In *Gill*, Rotorua District Council had approved an application for a resource consent to build eleven condominiums on a site adjacent to a Maori Reserve. The site was zoned Rural 3 in the Transitional District Plan (allowing predominantly rural development only) and was subject to a designation as a Proposed Scenic Reserve. The council had supported this designation until the resource consent application was received. Following the approval of the resource consent application, several parties including local iwi, local historians and descendants of an early missionary buried on the Reserve (the site of a former mission) appealed to the Tribunal under s 120 of the Resource Management Act 1991 against the council's decision to grant the consent.

Although several arguments were put forward by the appellants, I will focus on those arguments pertaining to Part II considerations. The decision was delivered before the Resource Management Act 1993 came into force, and stated:

> Part II matters, it may be noted, are not to be given primacy, as in the Town and Country Planning Act 1977, as the section merely requires the consent authority "to have regard to" the various issues raised there. (above, at 14.)

This decision is still of great significance because it is one of the first occasions that the Tribunal has considered the meaning of certain Part II matters in detail. As stated above, it is now clear that Part II matters have primacy. The vital question now facing consent authorities, therefore, is how to fulfil their duties under those pre-eminent provisions? Despite the changes made by the Resource Management Amendment Act 1993, this decision is significant as it has major implications for consent authorities exercising powers vested in them under the Resource Management Act 1991.

In particular, many of the Part II provisions relating to Maori issues came under close scrutiny. (Namely, s 6(e), s 7(e) and s (8). The appellants stated that several Maori chiefs were believed to be buried in the vicinity of the proposed site and that the area had been the site of several battles. In addition, the land was of further historical interest as it was the site of a mission station in the mid 19th century. In addition to these matters, the Tribunal found as a fact that the proposed site was of ecological significance due to the predominance of native bush which covered the site. Most of the surrounding area had been been developed and cleared of native vegetation, leaving this site as especially important, in the context of the surrounding area.

Under Section 6 of the Resource Management Act 1991, consent authorities are required to "recognise and provide for" the matters listed therein. The Tribunal held that the council had neither recognised nor provided for the preservation of the natural character of the area (under s 6(a)) or the protection of the landscape of the area, which the community attached

special value to due to its native nature. However, the Tribunal made more detailed comments on the Council's failure to address those matters contained in s 6(e) and 7(e) and to fulfil its duty under s 8 of Resource Management Act 1991.

The Tribunal's consideration of ss 6(e), 7(e) and 8

Under s 6(e) consent authorities are required to recognise and provide for the relationship of Maori with their ancestral lands. Under s 7(e) they are required to have particular regard to the heritage values of sites. Section 8 requires that the consent authority take the principles of the Treaty of Waitangi into account. Although these sections apply different standards on local authorities the Tribunal did not consistently maintain this distinction throughout the decision in *Gill*. Indeed, the Tribunal expressly stated that it would consider ss 6(e) and 7(e) together. Despite this somewhat confusing approach, the Tribunal's conclusions were clear:

> The land is ancestral Maori land and an ancestral site within the provisions of s 6(e) of the Act, and that it holds much significance for the descendants of those who lived there, irrespective of the fact that it is land in individual title. The evidence has established to our satisfaction that this site has heritage value because of its association with one of the early mission stations in the Rotorua district and as an early pa site of a famous chieftain. In respect of the heritage value of the site (under s 7(e)) the site's significance does not depend, in Maori terms, upon any relic or archaeological remains which would normally be the subject of heritage orders. To Maori it has a value which transcends such issues. (Planning Tribunal, Wellington, W 29/93, above, at 28-29.)

However, the most significant element of the Tribunal's judgment related to the actions of the consent authority during the resource consent approval process. The Tribunal noted:

> One of the nationally important requirements of the Act under Part II considerations is that account be taken of the principles of the Treaty of Waitangi 1840 under s 8 of the Act. One of these principles is consultation with tangata whenua. (Planning Tribunal Wellington, N 29/93, above, at 26. The Tribunal also cited *NZ Maori Council v Attorney-General).*

The Tribunal found that the Council had not actively consulted with the local tribe over the resource consent application. The facts indicated that the Council had informed the local Maori Trust of the application and then "left the matter for the Trust to deal with" (at 26.) The Tribunal stated categorically that this was not sufficient:

> This is not what the legislation requires. The Council's actions appear to have been merely passive. The test which the Council has to meet under all provisions of s 7 is a high one. The section imposes a duty to be on enquiry. The Council should have investigated further why the Maori people supported the proposed scenic reserve designation originally and to have been on the alert as a consequence. (at 26-27.)

This statement by the Tribunal may well have far reaching implications for consent authorities. Under s 7 of the Resource Management Act 1991, bodies exercising powers under the Act must have "particular regard to" the matters listed. It is an acknowledged principle of statutory interpretation that "particular regard" imposes a lesser duty than "recognise and provide for."[4] *Gill* has made it clear that the s 7 test is a high one. The only logical conclusion that can be drawn as regards the standard of duty imposed by s 6 is that it is an even higher one than that imposed by s 7.

The implications for consent authorities of this decision are clear. It will not be sufficient for a consent authority to discharge its duties under the "Maori" provisions of Part II by merely informing local groups of applications. It is beyond the scope of this piece to investigate the meaning of the term "consult," but *Gill* makes it clear that consultation involves consent authorities taking a positive and active role in ascertaining the opinion of local iwi as to the desirability of a proposed activity. The level of consultation required may well involve a significant (but undeniably necessary) diversion of resources to this activity.

It is submitted, however, that the extent of the positive duty required by s 7 may be limited by one statement in *Gill*. The Tribunal stated that via the Proposed Scenic Reserve Designation:

> The Crown has given the tribe an ecological basis by which to preserve its heritage. (Planning Tribunal, Wellington, W 29/93, above, at 28.)

The Tribunal did not elaborate on the necessity for such an ecological basis, but stated that the undisturbed nature of the site assisted in the recognition and appreciation of the land as a place or site of ancestral and historical importance. It is submitted that this statement should not be taken as requiring an ecological basis for protecting heritage values, rather, that if a heritage site is ecologically significant a presumption of protection may well arise.

Conclusion

The decision in *Gill* has made a significant contribution to the long definitional process which follows any major law reform. The Planning Tribunal is to be commended for taking its first tentative steps towards clarifying some of the pivotal provisions of Part II. Although *Gill* may have resource implications for consent authorities, the decision provides valuable assistance in clarifying the nature of their duty to consult with tangata whenua under the Resource Management Act 1991.

Similarly, the changes affected by the Resource Management Amendment Act 1993 have placed environmental effects as the primary factors in deciding whether to grant a resource consent. Given the overtly environmental focus of the Resource Management Act 1991 this change can only be commended as a necessary clarification of the original legislative intent. □

---

1 Sustainable management is defined under the Act as:

> Managing the use, development, and protection of natural and physical

continued on p 80

High Court goes flat

By Andrew Beck, Barrister, Senior Lecturer in Law, University of Otago

On 1 April 1994, one of the most radical changes ever will take place with regard to the format of documents in the High Court. Instead of being folded vertically, all documents will be filed flat. This change in policy, effected by the revoking of r 31 by the High Court Amendment Rules 1993 (SR 1993/420) will also result in several other consequential changes, which will alter to some extent the appearance of High Court documents.

Of course flat filing is not entirely novel. It has been used in the Commercial List since its inception in 1987. Presumably the experience there has been one of the factors contributing to its general adoption in the High Court. Another factor appears to have been a desire for flexibility and practicality. This is reflected in some of the accompanying rules changes brought about by the 1993 Amendment Rules:

- Both sides of the page may be used.
- Page numbers may be anywhere on the page.
- Any type of secure fastener will be acceptable.
- Backing sheets disappear.

Both sides of the page

Rule 28, which stipulated that only one side of the page could be used, is revoked by r 4 of the Amendment Rules. It is not clear whether this change has been motivated by conservation, or whether it is a consequence of not having to fold documents. From an environmental point of view, it is certainly to be welcomed. With the ready availability of double sided photocopying facilities, dealing with such documents should not prove unduly burdensome.

The one disadvantage of using both sides of the page relates to the margin requirements. For the reverse side of pages, the quarter page margin is required to be on the right hand side of the page (r 26(2)). For lengthy documents on word processors this means that alternate binding margins will have to be set. It may be questioned whether a quarter page margin is really necessary: most judgments produced by the Courts have a much smaller margin. It would be far simpler to require an adequate margin on the right and left of every page.

A change has also been made to the rule relating to page numbering. In the past, r 30(1)(b) required all pages other than the first to be numbered consecutively at the top. The new r 30(b) requires all pages to be numbered consecutively. There is accordingly some flexibility as to where the page number appears. It would seem, however, that the first page is required to be numbered as well.

Fastener

The rather precious requirement of a sufficient paper-paper fastener in the top left hand corner, with the open end on the inside when folded has been abandoned in favour of a much more sensible requirement. The new rule 30 simply provides that pages are to be "securely fastened together".

The immediate benefit of this is that appropriate means of fastening can be used in accordance with the size of the document. Plastic bindings or multiple staples, which are in any event common in cases on appeal, are now recognised as acceptable.

Backing sheets

The disappearance of backing sheets marks the end of an era. However, to ensure that the information previously endorsed on the backing sheet will still be easily accessible, the endorsement on the first page of each document will be different.

The heading of documents remains as before. Immediately below the heading, every document will be required to have a description indicating its precise nature. In other words, the description which was previously required on the backing sheet is now to be on the front of the document. At the foot of the first page of each document there is the subscription giving details of the filing solicitor, which used to appear at the foot of the backing sheet.

In addition, where the document is one commencing a proceeding or interlocutory application, the first page is restricted to the heading, the description, and the subscription. Between the description and subscription, sufficient space has to be left for the minute: r 33(1)(b). The first page of documents will therefore be in the format illustrated in fig 1. Although this format is only stipulated for originating documents, it will generally not be convenient to begin the substance of a document before the subscription, and this format will probably be useful for the first page of all documents.

In general, the new system will mean that the substance of documents will commence on the second page. It should not be necessary to repeat the title of the document or the date. It would therefore seem to be appropriate for a statement of claim to commence on page 2 with "The Plaintiff says that:". An affidavit would begin with "I, Helen Mary Watson, make oath and say that:".

Where two documents are filed simultaneously, such as a notice of proceeding and statement of claim, there may be some doubt as to which is the "originating document"

in terms of r 33. It appears that this must be the statement of claim: r 106 provides that a proceeding is commenced by the filing of the statement of claim. The notice of proceeding is an advice of that fact to the defendant. If all documents are constructed in the same way, however, no difficulty will be caused by the requirements of r 33.

Affidavits

Affidavits are required to comply with the same rules as other documents. It is, however, advisable to provide additional details concerning the deponent, and the number of the affidavit if more than one has been sworn. These requirements are set out in an Auckland Practice Note at (1987) 1 PRNZ 59. An example of the format is illustrated in fig 2.

The rule governing exhibits to affidavits has been amended to bring it into line with the new regime for documents. Exhibits may only be annexed if they do not exceed A4 size: r 511(1)(b)(ii). Where they are not annexed, they must either be filed in a bundle, securely bound with a sheet having a heading, endorsement and subscription, or with such a sheet firmly attached where a bundle is impracticable: r 511(3). Presumably the reference to "endorsement" is intended to mean the "description" required on the first page of each document.

District Courts

As yet, no corresponding amendment has been made to the District Courts Rules. Those rules have no folding requirement, so in one sense the move to flat filing has been anticipated. There is, however, still a backing sheet requirement in r 27, the fastener must be in the top left hand corner, and only one side of the page may be used. Presumably these matters will in due course be brought into line with the position in the High Court. □

Figure 1

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP1347/94

UNDER The Contractual Remedies Act 1979

BETWEEN ALFRED JOHN WESTON, of 10 Homely Close, Wellington, Builder

Plaintiff

AND UNITED BUILDING SUPPLIES LTD, of 43 Dock Street, Wellington, Building materials supplier

Defendant

AFFIDAVIT OF HELEN MARY WATSON IN SUPPORT OF APPLICATION BY DEFENDANT FOR SECURITY FOR COSTS
DATED 15 FEBRUARY 1994

PRESENTED FOR FILING BY: JOHNSON & SWIFT, Defendant's Solicitors, 8th Floor, Harbour Towers, Quay Street, Wellington
Tel: (04) 377-9520 Fax: (04) 377-982
Solicitor dealing with proceeding:
Mr M J Dry

1

Figure 2

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP1347/94

UNDER The Contractual Remedies Act 1979

BETWEEN ALFRED JOHN WESTON, of 10 Homely Close, Wellington, Builder

Plaintiff

AND UNITED BUILDING SUPPLIES LTD, of 43 Dock Street, Wellington, Building materials supplier

Defendant

NOTICE OF APPLICATION BY DEFENDANT FOR SECURITY FOR COSTS
DATED 15 FEBRUARY 1994

PRESENTED FOR FILING BY: JOHNSON & SWIFT, Defendant's Solicitors, 8th Floor, Harbour Towers, Quay Street, Wellington
Tel: (04) 377-9520 Fax: (04) 377-982
Solicitor dealing with proceeding:
Mr M J Dry

1

LAWASIA's Standing Committee on Labour Law: The Past and the Future

By Judge D D Finnigan, Chairman of the Standing Committee

Employment law everywhere has to deal with the same basic relationships of boss and worker, employer and employee, foreman and labourer, manager and clerk or whatever terms are used. The Labour Law Standing Committee of LAWASIA has had to recognise this basic fact irrespective of differences of language, culture, ideology or political system. In this article Judge Finnigan of the Employment Court, who is now chairman of that Standing Committee, describes his experience of conferences held by the Committee and refers to the one to be held in Beijing in October this year. New Zealand practitioners may attend the Conference, and papers from here would also be welcome.

Attending meetings of the LAWASIA Standing Committee on Labour Law is never dangerous, but it can be stimulating. The second of the three International Conferences which the Standing Committee has organised to date was held in New Delhi in September 1990, at a time when feelings in that capital and in many other cities of India were running white hot. There had been what was seen as a revival of caste and communal confrontations by a recent change in government policy. Simultaneously, violent demonstrations were brewing over a campaign to build a Hindu temple in Ayodhya in the State of Uttar Pradesh, on the site of a mosque. More has since been heard about that. The issues highlighted by the disturbances taking place in New Delhi, bore directly on the subject matter of the Labour Law Conference which included Discrimination and Equal Opportunity Law, Policy Relating to Unorganised Labour and The Right to Work.

The Chief Justice of India, The Honourable Justice Satyasachi Mukharji, had cut short a visit to Europe in order to address and open that Conference. In strange and tragic circumstances, on the eve of his departure from London, he died suddenly.

The fifty delegates for that Conference, only the second organised by the Standing Committee, came from nine of the countries in the LAWASIA region. Brought together by the Conference, they could if necessary have been kept together by the quiet warnings given of what might occur in the streets, although to the interested antipodean observer there was no visible sign of mayhem. What really kept the delegates together was the sheer volume of the work which they had undertaken to complete in the three days of the Conference.

That Conference became in the nature of things a sort of "in-house" Conference. We stayed almost the entire time within the confines of the Taj Palace hotel. That was not a hardship. There were only two delegates from New Zealand, Mr Bernard Banks of Wellington and myself. We both presented Papers. My chief memory of that conference is that for three days it vibrated with energy. The delegates were from Afghanistan, Australia, Bangladesh, China, Hong Kong, India, Malaysia, New Zealand and Pakistan. Most of them were from the Indian sub-continent and much of the discussion centred around the problems of that area. There were only two social functions, both within the hotel, and like all the business sessions fully attended. The discussions were frank and often heart-felt. There was a passion for equity in employment law. More than once a white-shirted union advocate on the floor and a black-jacketed High Court or Supreme Court Justice on the podium revived the hearing of some major case in which both had previously played their parts. Those discussions aside, when industrial law practitioners from countries as widely diverse as Afghanistan, Pakistan, China and Malaysia were speaking about the industrial law systems of their own countries, it was surprising and reassuring to hear them speaking in terms quite familiar to users of the New Zealand system.

The previous such Conference, the first that had been organised by the Standing Committee, was held in Sydney in 1985. The succeeding one, the third, was held in Kuala Lumpur in 1992. The environment of these two Conferences was the calmer atmosphere that practitioners of Labour Law at work customarily prefer for their deliberations. There have as well been other gatherings for Labour Law practitioners in LAWASIA. At the biennial Conference of the Organisation, held in years which alternate with the years of the Labour Law Conference, there is generally a full Labour Law programme. That was the case in September this year at the 13th Biennial Conference of LAWASIA which was held in Colombo, Sri

Lanka. It was the unfortunate fact that in the first week of May this year, at precisely the time when the organisers of the Conference sent out world-wide their brochures and application forms, the President of Sri Lanka was assassinated by a suicide bomber. News – and pictures – of that appeared on our breakfast tables on 3 May, a day or so before the registration forms arrived in our mail boxes. Intending delegates and Organising Committee alike held their collective breaths, each wondering whether the other would be first to move. The stillness as it happened was broken by the writer of this account who, anxious to secure accommodation on the top floor of the tallest hotel, while simultaneously remaining nearest its emergency exit, sent in the first registration on 17 May. Thereafter, as it happened, over 800 people were registered. They came from nearly every country in the LAWASIA region, as well as from the United Kingdom, Canada and the United States. Simultaneously there was as usual a meeting of Chief Justices from the nations of the region and at that Conference twenty nations were represented. For the combination of reasons which presented themselves, security for the Conference was visible and impressive. The constant presence of policemen with arms at the ready and of motorcycle escorts as the delegates journeyed around Colombo was a shade titillating for delegates from sleepy hollow. However, the unruffled atmosphere favoured by practitioners of Labour Law at work pervaded the Conference, although the pace was fairly fast.

Tuesday 14 September at this Conference was the day for Labour Law with eleven major Papers being read in two sessions on such diverse topics as Equity and Equality in Employment in New Zealand, and in Australia, The Developing Law of Redundancy in Australia, Trade Unions and the Rule of Law in Hong Kong, and Privatisation in the Contexts of India and of Sri Lanka. Several of the topics flowed over to topics covered in other streams at the Conference such as Women's Rights, Human Rights, and even the Future Practice of Law in Hong Kong.

As well, the Chairman and Secretary of the Standing Committee were fully engaged that day in negotiations between LAWASIA and the China Law Society about the details of the Fourth Labour Law Conference which will be held in October next year in Beijing. Some of the details are yet to be settled but much is already in place.

Standing Committee on Labour Law

There are presently seventeen members of the LAWASIA Standing Committee on Labour Law. The countries represented are New Zealand, Australia, Bangladesh, China, Fiji, India, Malaysia, Pakistan, Philippines, Singapore, Sri Lanka and Thailand. The Standing Committee remains active throughout the year although it meets only annually. Its main function is to organise what has become the Biennial International Conference on Labour Law. The next of these as mentioned, is the one to be held at Beijing in China.

The author is presently Chairman of the Standing Committee having succeeded the founding Chairman (now Chairman Emeritus) Dr Anand Prakash. Dr Prakash is a Senior Advocate in New Delhi and is well known in New Zealand legal circles. The Secretary is Mr Bernard Banks (Crown Counsel) of Wellington.

Topics discussed

In New Delhi, some of the more heart-felt discussion was about topics such as participation by workers and managements. That was a bubbling issue in India at the time and there was a Bill about the subject then before Parliament. The Bill did not proceed. The topic was then also of interest in New Zealand, the Committee of Enquiry into Industrial Democracy under former Chief Judge J R P Horn having reported in October 1989. The other major topics were Labour Disputes and Their Management, Freedom of Association, Strikes and Lockouts, Discrimination and Equal Opportunity, and The Right to Work Including Poverty Alleviation and Social Security. Although only 50 delegates were registered, the number of Papers prepared for the Conference was 37.

In Kuala Lumpur the theme was the ambiguously worded "Security of Tenure in Employment and

Labour Law Conference, Beijing

The 4th LAWASIA Labour Law Conference will be held in Beijing, China on 9-11 October, 1994.

Theme

The Legal Protection of Workers and of Employers in Foreign Invested Enterprises and in Employment Abroad

Topics

1 The Legal protection of the Basic Rights of Workers and Employers and Labour Contracts and Labour Disputes Resolution

2 The Legal Protection of the Basic Rights of Workers and Welfare Treatment in Foreign Enterprises and in Employment Abroad

3 The Legal Protection of the Position and Rights of Women Workers in Foreign Invested Enterprises and in Employment Abroad.

Registration Fee

1 LAWASIA Member US$160
2 Non-LAWASIA Member US$210

The Chairman of the LAWASIA Labour Law Committee is Judge Finnigan of the New Zealand Employment Court, and the Secretary is Mr Bernard Banks of Crown Law Office, Wellington. They hope there will be a substantial New Zealand involvement in, or at least attendance at the Conference. They would be happy to discuss it with anyone interested.

Pre-registration forms indicating an interest in attending, and in possibly presenting a paper, are available from:

Margaret Stewart
New Zealand Law Society
P O Box 5041
Wellington

Privatisation". The four sessions were constructed as follows:

1 Security of Tenure in Employment.
2 The Concept of Privatisation and Corporatisation.
3 Privatisation and Its Impact on Trade Union Membership.
4 Wage Fixation and Terms and Conditions of Service: The Effect of Privatisation.

The organisers of the Kuala Lumpur Conference have produced a bound volume of the Papers from that Conference, published by the Malaysian Current Law Journal Sdn Bhd. For those with a continuing interest, the topics of these Conferences are based broadly upon previous discussions, including those at the intervening biennial conferences of LAWASIA.

The discussions at the Conference in Beijing likewise may be viewed in the context of discussions at Colombo and the previous Labour Law Conferences, but will be entire in themselves.

Publications

Each Conference publishes its own Papers. The Standing Committee on Labour Law has discussed more widespread publication of the proceedings of its Conferences. The present Chairman intends to edit such a volume for publication at about the time of LAWASIA's 14th Biennial Conference which will be held (also in Beijing) in August 1995. The volume will contain an edited selection of the Papers delivered at the four Labour Law Conferences organised by the Standing Committee in the preceding decade. It will be a unique record of Labour Law practice and jurisprudence in the turbulent and developing region served by LAWASIA.

The Fourth Labour Law Conference at Beijing

This Conference will be held on 9-11 October 1994.

The topic will be "The Legal Protection of Workers and of Employers in Foreign Invested Enterprises and in Employment Abroad". This topic is the business not only of those with an interest in Labour Law, but also of those interested in International Law, Business Law, Human Rights Issues, the Rights of Women and the Rights of Children, Dispute Resolution, the Legal Profession, the Judiciary and Public Interest Litigation.

There will be three major subtopics which are as follows:

1 The Legal Protection of the Basic Rights of Workers and of Employers in Foreign Invested Enterprises and in Employment Abroad.

2 The Legal Protection of Workers' Labour Insurance and Welfare Treatment in Foreign Invested Enterprises and in Employment Abroad.

3 The Legal Protection of the Position and Rights of Women Workers in Foreign Invested Enterprises and in Employment Abroad.

While at first glance these topics might seem of limited relevance to those engaged in the hurl and burl of employer/employee relationships in 1994 New Zealand, there is indeed much that New Zealanders can contribute, and much that they can learn. In particular, what the organisers in the China Law Society – and in LAWASIA – are hoping to attract from practitioners in countries like Australia and New Zealand is input casting light upon the three topics from the perspective of experience in these countries. The delegates attending the Conference are, as much as anything, waiting to hear what we have to share.

There is an edifice of employment law being constructed. This is occurring in individual countries, such as China, and across the LAWASIA region. The theme of the Colombo LAWASIA Conference this year was "Asia on the Leap – the Role of Law". Multi-nation employment relationships are already becoming a feature of the burgeoning development that is making the LAWASIA region once again in our lifetimes economically and demographically prosperous. New laws, new rights and new responsibilities are in the making. We are being asked to participate in the design. □

---

continued from p 66

solicitor was found who advised the widow she needed independent advice but she said she did not want it and trusted her son. The lawyer obtained an acknowledgment from the widow of his advice for her to have independent legal representation. The matter proceeded. As can be guessed the son defaulted under the loan and was made bankrupt. The widow sued the law firm. The Court affirmed the client/lawyer relationship was based on a fiduciary duty.

5 It is widely accepted by writers on legal ethics, such as David Luban that a "client-centred" ethic is essential to the effectiveness of the adversarial legal system we have in the Western world. It promotes important values, such as protection of client's legal rights, maintaining of our social fabric, etc.

6 The idea of a "black box" has been put forward by Dr T Dare to explain the mystery surrounding the individual's experiences when instructing a lawyer. The client never really knows what the lawyer does in handling their file.

7 A contingency fee is where the lawyer is paid by result. The lawyer is paid out of the plaintiff's successful claim. If the plaintiff is unsuccessful the lawyer is not paid. As a result of this the fee is based on a percentage of the damages awarded the client and the amount is usually much greater than if the matter was charged on the normal hourly basis of an hourly rate. The lawyer benefits from the risks taken for the client in running the case. Originally contingency fees were permitted to enable the indigent persons to obtain legal representation when they could not otherwise afford a lawyer. However it would not be too far removed from the truth to suggest that lawyers will only take a case on a contingency basis when they believe the client is bound to get damages of one level or another.

8 Although a civil claim is always open to a client based on breach of confidence it must be understood that the professional rule identifying a potential conflict of interest is intended to go further. It is conceivable that a lawyer may be prepared to risk damages in a breach of confidence claim for the damages may be insignificant when balanced against the advantages gained from use of a client's information against them. However a lawyer is less likely to adopt such an approach if he is likely to suffer professional censure and even disbarment. The rule against acting against a former client has been used overseas as a weapon in litigation and will no doubt be adopted in New Zealand in the future.

The development of law reporting in New Zealand

By Associate Professor Peter Spiller, University of Waikato

Law reports and statutes constitute the two basic and essential tools of trade for the lawyer. What Parliament has enacted (and the Executive Council has decreed), and the interpretation of this are the two basic sources — indeed they might be said, in the biblical phrase, to contain the whole of the law and the prophets if one might refer thus to the Judges as oracles. This article by Professor Spiller traces the history of law reporting in New Zealand from 1861 until today. As the author concludes it is the existence of a comprehensive and accessible body of case law that has provided the necessary foundation for the development of distinctive and definable New Zealand jurisprudence.

It is a matter of considerable satisfaction to the Council of Law Reporting and to Butterworths as publishers that the New Zealand Law Reports *third bound volume for 1993 was published before the end of the calendar year. In publication terms this is a substantial benefit for the profession and is itself worthy of historical note.*

The author acknowledges the helpful comments of the Butterworths staff, notably Christine O'Brien, Managing Editor of the New Zealand Law Reports, *on an earlier draft of this article.*

Introduction

> Law reports are authoritative and permanent, and, errors and omissions excepted, may be regarded as the practitioner's Bible. The statutes are vital: textbooks are important; but the last and most rewarding resort is to the law reports. It is imperative therefore that full regard should be had to the stuff of which they are made. ("Law Reports and Law Reporting" [1960] 36 NZLJ 294.)

As the above quote acknowledges, law reports are amongst the most important of the common lawyer's resources. They are "authoritative" in that they are the repository of judge-made law which is of fundamental importance in common law jurisdictions such as England and New Zealand. The principles enunciated by judges in past cases assist with the resolution of similar disputes, and may in certain circumstances have binding effect. They form a "rewarding" record in the sense that they chronicle the orderly resolution of human disputes, which is one of the essential functions of law in society. In providing this record, law reports give vivid insight into the development of a country's legal system within the context of its society.

This article will trace the history of law reporting in New Zealand over the past 130 years and evaluate the progress that has been made. The term "law reporting in New Zealand" will be used in the sense of the collecting, editing and publishing of judgments of New Zealand Courts and tribunals.

Early developments (1841-80)

During the first twenty years after the creation of the New Zealand Court structure in 1841, the Colony's Judges drew their case-law authorities mainly from available English law reports and other overseas legal sources. The local legal system, including the local legal profession, was at too embryonic a stage to provide any system of reporting of judgments. However, local judgments were reported in local newspapers, certain of the Judges kept records of their decisions, and the occasional judgment was sufficiently well documented and publicised to play a role in subsequent legal developments. The best-known judgment of this early period is that of Chapman J in *R v Symonds*, recorded in the Parliamentary Papers of December 1847, and this was regularly quoted by Judges from the 1870s onwards in cases concerning Maori land tenure. (Spiller, P *The Chapman Legal Family* (1992) 44-7 and 230-6. See eg *Bishop of Wellington v Wi Parata* (1877) 3 NZ Jur (NS) 72, 78.)

As had happened in England, it was left to a member of the bar, reporting on the decisions of his local Court, to commence the tradition of law reporting in New Zealand. From 1861 to 1872, James Macassey, a leading barrister in Dunedin, published reports of cases heard in Otago and Southland. (Macassey is thus described as "the Father of Law Reporting" (Chapman, "Law Reporting in New Zealand" (1933) 9 NZLJ 53). Macassey was an Irishman of great enterprise and energy, Dunedin at this time was the mercantile centre of New Zealand, and the legal fraternity was headed by two Judges who had been trained at the Middle Temple and who helped to entrench the traditions of the English legal system. Further, by the 1860s, the New Zealand Court structure had become more sophisticated with the arrival of additional Judges and the establishment of a Court of Appeal, there was a clear need to make accessible the local case-law

especially on issues peculiar to New Zealand (such as those arising out of local practice and procedure, the interpretation of local statutes and Maori tenure), and there was the growing importance of the notion of judicial precedent in a legal hierarchy. The reports published by Macassey were limited to his own area because of the difficulty of communications (conducted on foot or horseback or by sea) in an elongated and sparsely-populated colony. However, because Otago and Southland were at the time important mining and commercial areas, with the largest concentration of people in the colony, the *Macassey Reports* incorporated judgments which were of considerable contemporary significance, not least in areas such as goldfields law and the law relating to Crown lands and conveyancing.

In 1875, Macassey made a further contribution to early New Zealand law reporting by helping to produce the *Colonial Law Journal*. This contained a brief set of Supreme Court and Court of Appeal judgments of 1865 and 1874-5, along with a magazine section. During the same period, Macassey's efforts were complemented and extended by those of a Wellington Supreme Court Judge, Alexander Johnston (who had formerly practised at the English bar). Johnston J produced the *Court of Appeal Reports*, volume I (published 1872, covering 1867-71) and volumes II and III (in 1875 and 1877). (A review of the second volume of the *Court of Appeal Reports* stated: "Perhaps nothing would tend more to destroy the illusion, which pervades Europe, of painted maneaters as figurative of New Zealand, than to offer a few copies of this work in the cities of the Old World" (supra, "Law Reports and Law Reporting" [1960] 36 NZLJ 294 at 314).)

In 1873, a year after the *Macassey Reports* ceased, G D Branson (an English barrister practising at the New Zealand bar) began to issue, at monthly intervals, the *New Zealand Jurist Reports*. The following year, Frederick Chapman, who had recently arrived in Dunedin after having been called to the bar at the Inner Temple, took over the editorship of the *Jurist Reports* and issued them at quarterly intervals. The *Jurist Reports* (which came to be published in two volumes) were an improvement on the *Macassey Reports* in that they covered cases heard in all the judicial districts in New Zealand and in the Court of Appeal, but the editors had great difficulty in maintaining breadth of coverage. (Spiller, supra, 162.) In 1875, G B Barton, a barrister from Sydney practising at the Dunedin bar, succeeded Chapman as editor, and over the ensuing four years produced four volumes of the *New Zealand Jurist (New Series)*. Barton introduced the first list of reporters, who operated in Dunedin, Christchurch, Westland, Nelson, Wellington and Auckland, and published with admirable regularity cases grouped according to judicial districts and the Court of Appeal. However, with Barton's departure for Melbourne in 1879, the enterprise ended with an incomplete fourth volume. (Supra, "Law Reports and Law Reporting" [1960] 36 NZLJ 294, at 314-5.)

By this time, the creative energy in law reporting had shifted to Wellington, the capital of New Zealand and the seat of the Court of Appeal. Here, three practitioners, F M Ollivier, H D Bell and W Fitzgerald, banded together to produce reports (known as *O B & F Reports*) for the years 1878 to 1880, published in 1880. These reports bridged the gap left by the demise of the *Jurist* reports. But the lack of resources of the three editors and the continuing difficulties of communication meant that these reports could not pretend to completeness or promise any hope of permanence. ("Law Reports and Law Reporting," supra.)

From 1865, the Native Land Court had existed alongside the main body of Courts in New Zealand, and it was entrusted with jurisdiction over questions of Maori land title (Native Lands Act 1865). The First Chief Judge of this Court was Francis Fenton, an English solicitor of great ability and enterprise. In 1879, he published "Important Judgments Delivered in the Compensation Court and Native Land Court", covering the period 1866-79. (The Compensation Court awarded compensation for lands taken by the Crown (Lands Clauses Consolidation Act 1863).) Although these reports were not continued, they signalled the presence in New Zealand of distinctive issues and processes, and are an important record of the history of Maori title and the early workings of the body that is today known as the Maori Land Court.

The reports produced during the period 1861 to 1880 were admittedly limited in their coverage and heavily dependent on the continued energy of particular individuals who had limited time at their disposal. Nevertheless, from the 1860s, New Zealand established a permanent tradition of law reporting, and its lawyers and Judges had access to a steady stream of local case-law. Through reference to the *Macassey Reports* and its successors, the New Zealand bench could more readily fashion local legal traditions in a coherent and consistent way. (Spiller, supra, 99.)

The *New Zealand Law Reports* (1883 to present)

By 1889 there were calls (notably from the Canterbury District Law Society) for a general system of law reporting for the whole Colony. (Cooke, R B (ed) *Portrait of a Profession* (1969) 265.) On 7 June 1881 the Wellington District Law Society resolved that the *O B & F Reports* be taken over; that the District Law Societies of Wellington, Auckland, Christchurch and Dunedin annually elect members to form a Council of Law Reporting; that each of the four Societies appoint a paid reporter in their respective districts; that reports compiled be sent to the Council for revising, editing and publishing; that meetings of the council be held at Wellington twice a year and at such other times as may be necessary, and that the four Societies contribute to the cost of the published reports to be known as the *New Zealand Law Reports*. (*Portrait of a Profession*, supra, 389-90. These developments mirrored events in England: in 1865 the English Council of Law reporting started the publication of the *Law Reports* to overcome the problems of erratic and multiple reports ((1960) 36 *NZLJ* 295).) Within twelve months the other District Law Societies had accepted the Wellington resolutions and the New Zealand Council of Law Reporting (comprising the Attorney-General, the Solicitor-General and

two members from each of the four District Law Societies) was formed ([1960] 36 *NZLJ* 326-7).

The first volume of the *New Zealand Law Reports* appeared at the end of 1883. The first editor was William Fitzgerald, who had been one of the editors of the *O B & F Reports*. He was succeeded by Martin Chapman in 1888, who remained as editor until 1906! During these early years the *Reports* were established on a sound footing, thanks to efficient management, "a well defined policy and co-operation of the profession as a whole".[2] The *Reports* presented the principal judgments emanating from the Supreme Court and Court of Appeal (and from 1933 also included decisions of the Privy Council on appeal from New Zealand Courts). In 1915 professional production was assured when the Council of Law Reporting entered into an arrangement with Butterworths and Co for the publishing and distributing of the *Reports*, and this continues to the present.[3]

In 1938, the New Zealand Council of Law Reporting Act was passed "to provide for the incorporation and reconstitution of the New Zealand Council of Law Reporting". The Act directed that the Council consist of the Attorney-General, the Solicitor-General, the President of the New Zealand Law Society, and five members appointed by the Council of the New Zealand Law Society. (s 6.) The Act also established the authority and exclusiveness of the publication rights of the Council and gave the *Reports* the official character they continue to enjoy. The Act directed that there be an official system of reporting decisions which were necessary or of value to practitioners or those administering the law of New Zealand, and that it would not be lawful for anyone other than the Council of Law Reporting to publish reports of decisions of the Supreme Court or Court of Appeal without the consent of the Council of the New Zealand Law Society. (s 12(1) and (3). In 1949 the Land Valuation Court was added to the list of institutions covered by the Act.) Throughout the history of the Council, prominent members of the profession played an active role: included amongst the Council members and reporters were future Chief Justices (Stout, Myers, O'Leary and Barrowclough CJJ), members of the Court of Appeal (notably Cooke P) and other Judges of renown (notably Salmond J).

From the 1960s onwards, the editors of the *New Zealand Law Reports* faced growing difficulties in coping with and selecting from the continually increasing volume of judicial decisions.[4] This increase stemmed from the creation of a separate Court of Appeal in 1958 and from an enormous increase in workload which required a corresponding increase in Judges. Between the period 1953-1988, the superior Court judiciary alone increased three-fold.[5] In 1973, in response to the increase in reported decisions, the single annual volume of *Reports* was increased to two and over the ensuing fifteen years approximately 1500 pages of reports were published each year in the combined annual volumes. However, even these measures proved inadequate, with the result that by the mid-1980s many decisions "necessary or of value" were not published, and there developed an increasing time lag between date of judgment and reporting.[6] In 1987, the Council of Law Reporting acknowledged the existence of a backlog in reported cases and agreed with Butterworths as publishers to set up new arrangements for the editing and publishing of the *New Zealand Law Reports*.[7] In September 1990, it was announced that "in the last 12 months, Butterworths have published 18 Parts in three bound volumes of the *New Zealand Law Reports* and after some years of frustration, production of the *New Zealand Law Reports* in a timely way is now assured". ([1990] *Law Talk* 336, 3.) Since then Butterworths on behalf of the Council has continued to publish the *Law Reports* in three volumes annually, with soft-cover sections of these parts being issued six to seven months after the dates of the judgments contained in them.

Notwithstanding the problems which have beset the *New Zealand Law Reports*, they have played and continue to play a central role in the New Zealand legal system. For the past 110 years, New Zealand lawyers and Judges have had a continuous, national system of law reporting reflecting the emergence of an increasingly sophisticated and distinctive system of Judge-made law. The ready accessibility of authoritative New Zealand legal precedents meant that New Zealand lawyers and Judges could draw upon the accumulated wisdom of their predecessors in deciding issues which were relevant in the local context. Certainly by the early twentieth century, New Zealand Judges were declaring themselves bound by *New Zealand Law Report* decisions of the Court of Appeal or which were of long standing, even where these diverged from English precedents, and this pattern has been reinforced in recent years. (Spiller, *The Chapman Legal Family*, at 192-3.)

Other New Zealand law reports (1890s to the present)

The Gazette Law Reports

The selective nature of the *New Zealand Law Reports* prompted the emergence and long continuance of a rival set of law reports. In 1898, the *Gazette Law Reports* were commenced by Thomas Russell, a Christchurch practitioner. Russell, an indefatigable worker and outstanding businessman, remained as managing editor of the *Gazette Law Reports* until his death in 1935. Thereafter the *Reports* were compiled by a succession of editors until 1953 when they were sold to Butterworths and incorporated in the *New Zealand Law Reports*. The *Gazette Law Reports* claimed to have printed every judgment given in New Zealand from 1898 to 1953, except cases dealing with facts only or cases in which there was nothing of value to the profession. Judgments of particular value were published as soon after receipt as possible, and many cases which did not appear in the *New Zealand Law Reports* were printed in the *Gazette Law Reports*. ("The Gazette Law Reports" (1953) 29 *NZLJ* 105.) In this way, the *Gazette Law Reports* extended the range of precedents available to New Zealand lawyers and Judges and so were extensively used in the New Zealand Courts. (Spiller, *The Chapman Legal Family*, at 271.)

Reports of particular Courts and tribunals

The concentration of the *New Zealand Law Reports* on judgments of the Supreme Court and Court of Appeal necessitated the publication of reports of decisions of other legal institutions. A notable example was the publication in 1938 of *New Zealand Privy Council Cases,* reflecting Privy Council decisions on appeal from New Zealand cases during the years 1840 to 1932. This was in response to the desire of the local profession to have in convenient and readily-accessible form the reports of appeals to the ultimate appellate body. *(New Zealand Privy Council Cases,* Introduction ix.)

In 1894, New Zealand introduced a pioneering system of compulsory arbitration in industrial relations, headed by a Court of Arbitration. From the outset, the awards, orders, recommendations and agreements which emerged from this system were published in the *Book of Awards.* Significant decisions in the Court of Arbitration were also published in the *Gazette Law Reports* and in a short-lived separate publication known as *Decisions under the Workers' Compensation Act* (1901-14). In recent decades the New Zealand system of industrial relations has undergone repeated change. This has been reflected in the successive titles of the collections of significant judgments, notably, the *Industrial Court Judgments* (1976-7), the *Arbitration Court Judgments* (1978-86), the *New Zealand Industrial Law Reports* (1987-90) and the *Employment Reports of New Zealand* (1991-). Since 1986, the publishing company CCH has issued an accompanying series entitled the *New Zealand Employment Law Cases.*

From the 1840s, New Zealand had inferior Courts of limited civil and criminal jurisdiction. The most important of these came to be the Resident Magistrates' Courts (which were in 1893 upgraded and renamed the Magistrates' Courts) and the District Courts (which functioned from 1858 to 1909). In 1906, Russell contributed further to New Zealand law reporting by founding the *District Court and Magistrates' Court Reports* (known from 1910 as the *Magistrates' Court Reports*). In 1953 these were sold (along with the *Gazette Law Reports*) to Butterworths, and were incorporated into the *Magistrates' Courts' Decisions* which Butterworths had published from 1939. The *Magistrates' Courts' Decisions* continued in existence until 1979. The reports of magisterial decisions over 73 years provide a "grass-roots" account of law in action in areas extending to the remotest parts of New Zealand.

In 1980, the Magistrates' Courts were replaced by the District Courts. In the ensuing thirteen years the District Courts were given a massively extended jurisdiction, and this now includes most major crimes and civil claims up to $200,000. The *District Court Reports,* which have been published from 1980, are thus an increasingly important legal resource in the New Zealand legal system. In 1981, Family Courts were established as a branch of the District Courts but with distinctive procedures (including mediatory facilities). Since 1981, Butterworths have published the *New Zealand Family Law Reports* of family law cases decided in the Family Court and also in the District Court, High Court and Court of Appeal. These reports have been supplemented since 1983 by the *Family Reports of New Zealand,* published by Brooker and Friend.

For some 80 years after the publication of Fenton's *Judgments in the Native Land Court,* nothing was done to render accessible the further decisions of this Court and the Native/Maori Appellate Court. In 1960, Chief Judge Morison of the Maori Land Court compiled a Digest of selected judgments of the Maori Courts up to 1958, with a focus on cases relevant to the law and the Courts' workload as at 1958. During the 1980s, the Department of Maori Affairs responded to the concern that important decisions of the Maori Courts had not been included in the published Law Reports and that there was no useful compendium of Maori Court decisions after 1958. The most important of the Department's publications was *Tai Whati: Judicial decisions affecting Maoris and Maori land* (1958-1983, with a supplement 1984-5), which also contained the decisions of the High Court and other bodies on Maori issues (thus reflecting the increasing role of the general Courts in Maori matters). However, the absence of any succeeding set of Maori Court decisions since 1985 represents a serious gap in the New Zealand reporting system.[8]

Other reports of special boards and tribunals are found in *Transport Licensing Appeals* (1942-74); *New Zealand Taxation Board of Review Decisions* (1961-74), *Tax Reports (New Zealand)* (1975-), and *New Zealand Tax Cases* (1973-); *New Zealand Town (and Country) Planning Appeals* (1955-91) and *New Zealand Resource Management Appeals* (1991-); and *New Zealand Administrative Reports* (1976-). These reports have provided invaluable and readily-locatable assistance to those lawyers and adjudicators who have had reason to be involved in institutions of special jurisdiction.

Specialist reports

The trend towards specialisation of lawyers in modern New Zealand law has produced a demand for reports which group together cases in particular areas of the law. These reports, produced by the publishing companies Butterworths and (more recently) CCH and Brooker & Friend, have included cases decided in the superior courts of New Zealand, thus resulting in a measure of overlap with the *New Zealand Law Reports.* Early examples of these reports were the *Local Government Reports* (1935-71, reprinted from the *New Zealand Law Reports*), and the *Australian and New Zealand Income Tax Reports* (1944-69), the *Australasian Tax Decisions* (1945-69) and the *Australasian Tax Reports* (1970-). Since the 1970s, there has been a proliferation of these reports, mainly in the commercial area, stimulated by the failure of the *New Zealand Law Reports* to publish the relevant cases timeously or at all. In one of the few instances where the publisher of a specialist report obtained the prescribed consent of the Council of the New Zealand Law Society, that Council found that the New Zealand Council of Law Reporting had failed to publish adequate reports of the cases concerned within a reasonable time and at a reasonable cost. (Laster, "Unreported judgments and principles of precedent in New Zealand" (1988) 6 *Otago Law*

Review 562, at 577.) Notable amongst the specialist reports are the *Butterworths Company Reports* (1970-90, continued since 1990 as *Morison's Company Law Reports*), *Australian and New Zealand Conveyancing Reports* (1978-), *New Zealand Conveyancing and Property Reports* (1978-), *Trade and Competition Law Reports* (1978), *Australian and New Zealand Insurance Cases* (1979-), *New Zealand Company Law Cases* (1981-), *Procedure Reports of New Zealand* (1983-), *Criminal Reports of New Zealand* (1983-), *New Zealand Business Law Cases* (1984-), *Equal Opportunity Cases* (1984-), *New Zealand Intellectual Property Reports* (1988-, publishing cases from 1967 onwards), and *New Zealand Conveyancing Cases* (1989-). The most recent addition has been the *New Zealand Bill of Rights Reports* (1993-, publishing cases from 1990). The specialist reports have been especially useful and convenient for those requiring speedy and comprehensive publication of judgments in particular areas of the law.

Quasi-reports and "unreported" judgments

From the 1970s, supplementary steps were taken to overcome the problems of delay and lack of comprehensiveness which beset the *New Zealand Law Reports*. In 1974 Butterworths introduced "Current Law" as a supplement to the *New Zealand Law Journal*, and this continues to provide, at fortnightly intervals, notes of recent cases (as well as Bills, Acts, Regulations, and Articles). This service was prompted by Butterworths' increasing awareness "of the gap that exists between developments in the law occurring, and their coming to the attention of those most affected by them — the legal practitioner".[3] In 1978 *The Capital Letter* followed suit, declaring that it was "conceived to render intelligible the vast number of binding decisions handed down by government agencies", and this also continued to appear at weekly intervals. These publications, termed "quasi-reports" because they are not full-text reports but brief notes of cases, have served a useful role in quickly alerting the legal profession to recent important decisions as yet unreported in the *New Zealand Law Reports*. Such decisions (some of which never appear in published reports) are obtainable as "unreported judgments" from Butterworths, *The Capital Letter* publishers or the Court concerned. There is no practice statement or rule which bars citation of and reliance on unreported decisions before the Courts, although a note of the High Court requires counsel to provide the Court with a full copy of any unreported judgment to which counsel refers. (Laster, supra, at 578 and 580.) The regular practice has been for lawyers to cite and Courts to rely on unreported judgments. (See eg *Darvell v Auckland District Legal Services Subcommittee* [1993] 1 NZLR 111, 120.)

Conclusion

The New Zealand legal profession of the late twentieth century is in the enviable position of having at its disposal a set of continuous, authoritative and professionally produced law reports, supplemented by specialised collections of judgments and by up-to-date reference works providing access to unreported judgments. The law reports and publishers of today have built upon the pioneering services of the early practitioners and have maintained a strong tradition of expertise and input from the legal profession.

It may be conceded that there are areas of concern in the present state of law reporting in New Zealand. The plethora of overlapping law reports can result in difficulties in ascertaining the relevant law and in escalating costs of legal research. However, valuable assistance to the profession is provided by publications such as *The Abridgement of New Zealand Case Law* (published since 1963) and by the *New Zealand Recent Law Review* (published since 1975, formerly as *New Zealand Recent Law*), which group case-law developments under specific subject headings. Further, the entry of judgments into the *Kiwinet* computer databases means that legal researchers have on-line access to legal concepts, principles and phrases in New Zealand judgments from the 1980s onwards. A further cause for concern is the temptation for counsel and Judges, in the face of the greatly-increased store of accessible judgments, to indulge in a proliferation of authorities. This problem is well-recognised by the country's leading Judges, and may foreshadow more stringent controls on the time allowed for the hearing of cases.

Perhaps the most significant outcome of the emergence of a comprehensive and accessible body of New Zealand case-law has been the part this has played in the development of a definable New Zealand jurisprudence. While New Zealand, as a small country with strong historical links, will continue to derive valuable judicial assistance particularly from England and other Commonwealth countries, it is certain that the New Zealand judiciary will increasingly draw upon its burgeoning local case-law to fashion legal principles appropriate to its own environment. Analysis of the "stuff" of which the New Zealand practitioner's Bible is made reveals that it, like the legal system as a whole, has an increasingly local flavour and less of an imported, colonial look. The evolutionary nature of this process is eloquently summed up in the introduction to *Tai Whati*, the collection of Maori-related judgments issued in 1983:

> *Ka whakarereke te nuku e nga tai whati*: Each wave breaking on the shore alters the landscape slightly. □

---

1 Spiller P, *The Chapman Legal Family*, 1992, at 151. Chapman was succeeded by H Ostler (1906-10), J Logan Stout (1910-16), A R Atkinson (1916-20), W F Ward (1920-32), H von Haast (1932-49), J P Kavanagh (1949-60), C N Irvine (1960-6), F R Macken (1967-9), A B Thomson (1969-72), R J M Shaw (1973-5), C P Hutchinson QC (consultant editor 1971-5, editor 1975-7), F D O'Flynn QC (1977-8), Frances Wilson (1978-90) and Brian Blackwood (publishing editor) (1987-90), and M J O'Brien QC (editor-in-chief) (1990-) and Christine O'Brien (managing editor) (1991-).

2 One early subject of debate was the Council's policy of publishing notes of argument of counsel in Supreme Court suits. This was later restricted to the argument in Court of Appeal cases ((1960) 36 *NZLJ* 326) and since 1970 no arguments have been included (information supplied by C O'Brien, Managing Editor, NZLR, 13 May 1993).

3 Butterworths took its responsibilities as publisher of the *Reports* seriously, and in 1925 and 1970-2 reprinted the *Reports* to date so as to keep copies of decisions

available to the profession ([1984] *NZLJ* 119). Butterworths are always monitoring the stocks of volumes of the so-called modern series (ie from 1962) and are reprinting as necessary to maintain complete sets available to the profession (O'Brien, supra n 2). In 1949 the Land Valuation Court was added to the list of institutions covered by the Act.

4 On 12 November 1970, the Council of Law Reporting acknowledged that, over a number of years, problems had faced the publisher and the editor. The Council announced that it had assumed full responsibility for the editing of the Reports and would directly engage the services of the editorial staff.

5 In explanation for the increase, Cooke P in 1986 pointed to "the greater availability of legal aid in criminal cases in particular and also in civil cases", and to a society which was more restless and "more conscious of its rights, where individual citizens and pressure groups are more alive to the possibilities of legal remedies" ([1986] *NZLJ* 176).

6 Laster, "Unreported judgments and principles of precedent in New Zealand" (1988) 6 *Otago Law Review* 562, 575-6. In 1987 Cooke P remarked that "it is very hard to form a reliable picture of what is actually happening in our Courts without an adequate system of law reporting", and that the output of judgments had increased enormously and far out of proportion to the limited space in the *New Zealand Law Reports*. In particular, he noted that "the themes and approach being developed in the appellate Court tend to be obscured by the present reporting system". He stated that the Court of Appeal disposed of some 500 cases a year, and, because this Court was "necessarily the main precedent-making Court in the country", there was a need for a series of New Zealand Appeal Reports (Cooke, "The New Zealand National Legal Identity" [1987] 3 *Canterbury Law Review* 172).

7 These arrangements included the appointment of a Publishing Editor, and the invitation to selected practitioners throughout the country to write headnotes for judgments. An Editor-in-Chief was to continue to be responsible directly to the Council of Law Reporting ([1987] *NZLJ* 259). This arrangement was modified in 1990 when M J O'Brien QC became the Editor-in-Chief, the position of Publishing Editor was discontinued and a Butterworths' staff member was appointed as Managing Editor (O'Brien, supra n 2).

8 Note, since 1987, *Waitangi Tribunal Reports* have published the work of a body that is not an adjudicative tribunal but which plays a major advisory role in the New Zealand legal system.

9 [1974] *NZLJ* 481. The immediate stimulus was the fact that in 1974 Judges' clerks began to "catchline" decisions of the Supreme Court and Court of Appeal for the Judges, and Butterworths then stepped in to assist the profession with recent decisions (Laster, supra n 6, at 576).

continued from p 69

resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while–

(a) Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

2 Under the Town and Country Planning Act 1977, there was a considerable body of jurisprudence, concerning the effects of Planning decisions on public confidence in the Plan. The wording of s 104(1) allowed the Tribunal to re-introduce this matter.

3 However, after a thorough review of the evidence the Tribunal stated that it was "very doubtful" if there were any *waahi tapu* on the site.

4 In *Minister of Works and Development v Waimea County Council* [1976] 1 NZLR 379 Wild CJ stated:

> The Section itself declares in terms that the three topics it prescribes "shall be recognised and provided for . . . "[T]hat means just what it says. It follows that every . . . authority acting under the Act *must do* what the section requires. (Emphasis added).

By way of contrast, in *R v CD* [1976] 1 NZLR 436, 437 Somers J stated:

> [W]hat is meant by the words "shall have regard to?" I think the legislative intent is that the court has a complete discretion but that the matters (to be regarded) are to be considered. In any particular case, all or any of the appropriate matters may be rejected.

Recent Admissions

Barristers and Solicitors

Beresford SPC	Dunedin	27 August 1993
Dryden RJ	Dunedin	27 August 1993
Fettes EF	Dunedin	27 August 1993
Harvey NJ	Dunedin	27 August 1993
Hethering SB	Dunedin	27 August 1993
Jackson TJ	Dunedin	27 August 1993
Lovelock JH	Dunedin	27 August 1993
Lucas CJG	Dunedin	26 August 1993
McAulay KL	Dunedin	27 August 1993
McConnell SA	Dunedin	27 August 1993
Marshall TJ	Dunedin	27 August 1993
Ming-Wong MS	Dunedin	27 August 1993
Morgan RE	Dunedin	27 August 1993
Tapueluelu AT	Dunedin	27 August 1993
Wills JM	Dunedin	27 August 1993

Australian and New Zealand Law and History Society Conference

Call for Papers

The Australian and New Zealand Law and History Society Conference will be held in Wellington on 1-3 July 1994.

Themes:

Law and colonial societies
Law and labour
Law and the family

Presentations are welcome on these themes or other aspects of law and history.
Anyone wishing to give a paper, workshop, panel/roundtable discussion or a discussion of work in progress should send a one page abstract by 30 April 1994 to

Bronwyn Dalley
Conference Convenor
Historical Branch
Department of Internal Affairs
Box 805
Wellington
NEW ZEALAND
Fax (04) 499 1943