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Privy Council, New Zealand, and the common law

Part 1 of *The All England Law Reports* for 1994 contains two cases of particular interest. The first is *Attorney-General for Hong Kong v Reid and others* [1994] 1 All ER 1, which went on appeal to the Privy Council from the Court of Appeal of New Zealand. Sir Thomas Eichelbaum was one of the members of the Privy Council who sat on that case. The judgment of the Board was delivered by Lord Templeman. The Privy Council allowed the appeal and held that the Attorney-General for Hong Kong was entitled to recover not only moneys that had been taken as a bribe by Mr Reid when Acting-Director of Prosecutions in Hong Kong, but also was entitled to recover the increase in value of the assets that had been purchased with the bribe moneys.

Lord Templeman commented on the relationship between the decisions of the Court of Appeal in England and the decisions of the Court of Appeal in New Zealand. He emphasised the independent responsibility of the New Zealand Court of Appeal. His comments are contained in two paragraphs at p 11 as follows:

> The New Zealand Court of Appeal in the present case declined to enter into the merits of *Lister & Co v Stubbs* founding itself on a passage in the judgment of this Board delivered by Lord Scarman in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 at 958, [1986] AC 80 at 108 where his Lordship said the duty of the New Zealand Court of Appeal was not to depart from a settled principle of English law. While their Lordships regard the application of stare decisis in the New Zealand Court of Appeal as a matter for that court, they desire to make the following remarks, in case Lord Scarman's comments in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* have in any way been misunderstood.
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> In the present case the Court of Appeal did not say and could not have meant that it was bound by a decision of the English Court of Appeal, since for many years the New Zealand courts have not regarded themselves as bound by decisions of the House of Lords, although of course continuing to pay great respect to them. The reasoning of the Court of Appeal, as their Lordships understand it, was rather that in the absence of differentiating local circumstances the court should follow a decision representing contemporary English law, leaving its correctness for consideration by this Board. Without in any way criticising that approach in the circumstances of this case, where the decision in question was of such long standing, their Lordships wish to add that nevertheless the New Zealand Court of Appeal must be free to review an English Court of Appeal authority on its merits and to depart from it if the authority is considered to be wrong. *Hart v O'Connor* [1985] 2 All ER 880, [1985] AC 1000, to which Lord Scarman referred in the passage mentioned by the Court of Appeal, concerned the very different situation of the Court of Appeal wishing to apply English law but, in the judgment of this Board, misapprehending the state of the contemporary law. In any case where the New Zealand Court of Appeal has to decide whether to follow an English authority, its own views on the issue, untrammelled by authority, will always be of great assistance to the Board.

In view of the sometimes misleading way in which politicians and civil servants talk about appeals to the Privy Council and reasons for abolishing them, and using such expressions as that our Courts should be "free to shape a body of distinctively New Zealand law" (Department of Justice, Briefing papers, November 1993), these two paragraphs make enlightening and very relevant reading.

The other particularly interesting case is what is commonly known as the Cambridge Water case being *Cambridge Water Company v Eastern Counties Leather plc* [1994] 1 All ER 53.

In that case a chemical solvent used in a tanning process was spilt in relatively small amounts over a period of years. This solvent seeped into the soil below the tannery and eventually percolated through to a borehole, over a mile away, from which the plaintiffs extracted water for domestic use. The plaintiffs brought an action against the defendants claiming damages in negligence and nuisance and the rule in *Rylands v Fletcher* for contamination of the water extracted from the borehole. In the Court at first instance the action under *Rylands v Fletcher* was held to have failed on the ground that the tanning business constituted a natural use of the land. The Court of Appeal, however, held that the defendants were strictly liable on the basis of the decision in *Ballard v Tomlinson* (1885) 29 Ch D 115 for the contamination of

the water percolating under the plaintiffs' land. The storage and use of chemicals on property was held to be a non-natural use of the land. The nuisance and negligence claims were not pursued on appeal.

In the House of Lords however it was held that the rule in *Rylands v Fletcher* was not one of strict liability in the sense that foreseeability of damage was a prerequisite of liability. The rule was said to be one of strict liability in the sense that the defendant could be held liable where there was an escape occurring in the course of the non-natural use of land when the damage was foreseeable, notwithstanding that the defendant had exercised all due care in preventing the escape from occurring. Foreseeability was seen as an essential element in a claim based on nuisance following the decision in *The Wagon Mound* [1967] 1 AC 617, [1966] 2 All ER 709. Consequently, or at least by analogy of reasoning, it was held to be a necessary prerequisite to a claim based on *Rylands v Fletcher.*

While the point on which this decision turned was that of foreseeability of the likelihood of mischief, the Court also held, in agreement with the Court of Appeal, that the storage of substantial quantities of chemicals on industrial premises was an almost classic case of non-natural use of land. This was so even in an industrial complex. Lord Goff at p 79 stated the principle in the following words:

> Indeed I feel bound to say that the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use; and I find it very difficult to think that it should be thought objectionable to impose strict liability for damage caused in the event of their escape. It may well be that, now that it is recognised that foreseeability of harm of the relevant type is a prerequisite of liability and damages under the rule, the courts may feel less pressure to extend the concept of natural use to circumstances such as those in the present case; and in due course it may become easier to control this exception, and to ensure that it has a more recognisable basis of principle.

There is a useful summary of the case and of the issues by James Driscoll in *The New Law Journal* for 14 January 1994 at p 64. As he points out the views on strict liability under *Rylands v Fletcher* expressed in *Fleming on Torts* (8th edition) and as the decision notes in *Clerk and Lindsell on Torts* (16th edition) have not been accepted by the House of Lords which favoured the views in *Salmond and Heuston on Torts* (20th edition). The question now will be whether the New Zealand Court of Appeal will agree with the House of Lords' decision.

As an incidental matter of interest the amount at issue was approximately NZ$3m – plus interest. On the evidence the House of Lords accepted the view of the Judge at first instance that the damage was not foreseeable and hence the claim failed.

P J Downey

Recent Admissions

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Allan DA	Auckland	11 February 1994
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Butler MCB	Auckland	11 February 1994
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Chong AD	Auckland	11 February 1994
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Morris JS	Auckland	11 February 1994
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Pecotic MN	Auckland	11 February 1994
Pidgeon JM	Auckland	11 February 1994

Case and Comment

Privy Council decision:

Mouat v Clark Boyce (PC 49/93)

On October 4, 1993 the Privy Council reversed two decisions of the Court of Appeal and restored the High Court judgment of Holland J in *Mouat v Clark Boyce* (PC 49/93); 4/10/93, Lords Goff, Jauncey, Lowry, Mustill and Slynn). The facts of the case should be well known, but, briefly, an elderly widow and her son instructed solicitors to prepare and register a mortgage security against the widow's home, the money being advanced to the son. The solicitor advised the widow to obtain independent legal advice, but she declined to do so. The son was in a precarious financial state and later defaulted on the mortgage.

In the High Court Holland J found on the evidence that none of the loss suffered by the plaintiff was due to the actions of the solicitor. This was because the plaintiff was "a woman with a strong mind of her own, who knew what she was doing and who firmly expressed a view that she did not want advice, independent or otherwise . . ." (1992) 2 NZ Con C 191, 188; 191, 190.

The Court of Appeal (Gault J dissenting) however disagreed, finding the solicitor liable in negligence and breach of fiduciary duty. The solicitor should have been "more pressing" (per McGechan J) or "tactfully persistent" (ibid) and a conflict of interest was found due to the solicitor's failure to disclose (i) that former solicitors had declined to act (because it indicated that the former solicitors knew of the son's parlous financial state) (ii) that he possessed little knowledge of the son's inability to service the mortgage and (iii) that it was not in the plaintiff's interests to sign the mortgage. The cumulative effect of this lack of disclosure was that the plaintiff could not consent to the solicitor acting on the basis of a fully informed judgment.

The point of distinction between the High Court and Court of Appeal can be seen to be one of care. How far does a solicitor's obligation to his client go? The trial Judge had specifically found that the plaintiff recognised that her interests conflicted with their son's and that she refused independent advice knowing that she might be advised as to the wisdom of the transaction. But the Court of Appeal was prepared to go further under the fiduciary label. The Privy Council has now, however, held that a solicitor's duty to disclose does not extend to information he did not have or the fact that he does not have it, except if he recognises that it is material. This negates points (i) and (ii) of the Court of Appeal's finding. As to point (iii) the Privy Council saw no reason to differ from the trial Judge's evidential conclusions and stated:

> When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor . . . that solicitor is under no duty . . . to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

Thus the nature of the contractual arrangement entered into with the client is important, that is to say what one is employed to do sets the stage.

The decision raises a number of issues, one, as just noted, being an indication of a swing back to the primacy of contract law (See also *Kavanagh & Hutt City Council v Continental Shelf Company (No 46) Ltd* [1993] BCL 512) and a judicial perception that, as it represents the accord between the parties, it must be given effect to; viz: "a fiduciary duty cannot be prayed-in-aid to enlarge the scope of contractual duties."

Mouat had been considered seminal, along with the *Day v Mead* [1987] 2 NZLR 443 (CA) 451 decision, in establishing that a plaintiff could recover loss suffered by reason of breach of fiduciary duty but that the amount recoverable could be apportioned if the plaintiff had to some extent been the author of her own misfortune. Debate has arisen over whether this ability to apportion is a result of common law principles being appended to the equitable remedy of compensation or whether equity has the ability to apportion inherent in its jurisdiction. This debate has yet to be resolved although gaining ground seems to be the assumption that a "basket of remedies" is now available (see in particular *Aquaculture Corporation v New Zealand Green Mussel Co* [1990] 3 NZLR 299; *Watson v Dolmark Industries* [1992] 3 NZLR 311), or at least "remedies have been affected". (Professor Maxton [1993] *NZ Recent Law Review* 141, 143).

One of the reasons for the appearance of apportionment in equity has been the burgeoning circumstances in which solicitors are acting in conflict of interest situations. Necessarily equity must grow to accommodate this. However, if a loyalty based obligation is imposed in circumstances in which more than loyalty is exacted, it provides further motivation to interfere with the remedy which supports that obligation, and increases the possibility that the fiduciary label will grow out of control. This point, it is suggested, has been highlighted by the Privy Council decision.

How then can imposition of fiduciary obligations be contained in the solicitor/client context, a relationship which is itself fiduciary, and in which non-disclosure is regulated by *Brickenden,*

(Brickenden v London Loan & Savings Co (1934) 3 DLR 465 (PC), viz:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor . . . Once the Court has determined that the non-disclosed facts were material speculation as to what course the constituent, on disclosure, would have taken is not relevant.

In *Mouat* the Privy Council provides the means through a flexible assessment of what is a material fact. If the fact is not held to be material then it is not a question of non-disclosure and thus no breach of fiduciary obligation accrues. But to what extent, and in what regard, material? How this will affect development of the principles relevant to the equitable remedy of compensation remains to be seen.

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The "bank cheque" resurrected: *Yan v Post Office Bank Ltd* (Court of Appeal, 24/93; Richardson, Hardie Boys and McKay JJ.

> The use of bank cheques payable to order is commonplace for settlement of commercial and conveyancing transactions, and they are generally treated as equivalent to cash to the extent that the only risk is that of the solvency of the bank. It is clear that they are not the same as cash, but if they are at the risk of dishonour because of a failure of consideration as between the bank and its customer, the trust which the market places on them would be misplaced, and their usefulness substantially diminished.

With the above observations, Justice McKay, in the Court of Appeal, helped resurrect to its perceived certainty the role of a bank cheque as an instrument for settlement of payments. But His Honour's judgment has left room to question, whether such a role is legally tenable – both under statute as well as the existing judicial precedent.

In *Yan v Post Bank*, Mr Yan, the plaintiff, obtained a cheque for $50,000, drawn by Post Bank and handed to one Mr Dong, in return for $32,000 he gave to one Mr Lam/Wong. The difference in the consideration exchanged, according to Yan, was in expectation of future business relations. Yan paid the cheque into his account with Westpac but it was dishonoured by Post Bank when presented for payment, on the ground that the funds subject to which the cheque was issued were not realised. Yan's action against Post Bank for wrongful dishonour was defended by the latter, on the grounds of failure of consideration and also because the cheque was endorsed "not negotiable". In the High Court, Master Williams, QC held that the Australian decision in *Commonwealth Trading Bank of Australia v Sidney Raper Pty Ltd* (1975) 2 NSWLR 227 applied to the facts of the present case in that, if the consideration subject to which the bank cheque had been issued failed before it was presented for payment, then the bank had the right to dishonour payment, and dismissed Yan's claim. The Court of Appeal, however, found in Yan's favour, McKay J holding that the contract between the customer and the bank for the receipt of the bank cheque was separate from the contract created between the payee (Yan) and the bank by the instrument (which he profiled as a promissory note), and therefore the failure of consideration in the first should not adversely affect the enforceability of the other, provided the payee had given sufficient consideration for the cheque. If such conclusion was not correct, His Honour remarked, that the same result would follow on the basis of common law estoppel –

> Post Bank must be taken to be aware of the fact that bank cheques are commonly relied upon in commercial transactions as being almost equivalent to cash, and that the purpose of obtaining a bank cheque, rather than the customer proffering his own cheque, is to enable the payee to have the added assurance of payment.

Surprisingly, however, His Honour dismissed as irrelevant any importance arising from the "not negotiable" endorsement placed on the cheque, and said that that would be relevant only if the cheque had been negotiated beyond the payee, and used that as a reason to distinguish the present case from *Sidney Raper.*

In his judgment McKay J had gone to considerable length to profile a bank cheque as a promissory note, and then found, under s 85 of the Bills of Exchange Act 1908 (BEA), that until it was delivered to the payee the instrument was incomplete. The position is the same if it is treated as a bill of exchange (which is permitted under s 5(2) of the Bills of Exchange Act), and the same requirement of delivery is demanded under s 21(1) before a bill becomes complete. What is questionable though is His Honour's finding, that delivery is not complete until the cheque is received by the payee. Section 2 of the Bills of Exchange Act provides "delivery means transfer of possession, actual or constructive, from one person to another". Therefore when the customer – who nominates the payee to the bank, because payment is owing to the payee from him – obtains the cheque, there is "constructive delivery to the payee", and the instrument is complete – whether it is treated as a bill of exchange, or a promissory note. What is more important in dealing with a bank cheque, is the effect of s 81 of the Bills of Exchange Act. Section 81 simply states that a person who takes a crossed cheque with the endorsement "not negotiable", cannot have a better title than the person who gave it to him had. The section uses the words "the person who takes" and the "person from whom he took", and therefore refers to the immediate transferee and transferor and not necessarily to the parties to a cheque. In the case of a bank cheque, it could be argued, that the customer always remains the transferor of the cheque to the payee – whether first having obtained the cheque from the bank and then delivering it to the payee, or by impliedly appointing the bank as his agent to do so. Bank cheques

being always endorsed "not negotiable", this would result in the payee's rights for payment against the bank always subject to any defences the bank may have against the customer for non-payment (see also the author's comment on the High Court decision in [1993] NZLJ 236).

McKay J's apparent reasons in *Yan v Post Bank* – that a cheque drawn payable to order is incomplete until physically received by the payee – while questionable under the definition of "delivery" in s 2 of the Bills of Exchange Act, could also greatly undermine the importance of s 81 of the Act as a protection for drawers. To take an example, if A sells goods to B under a contract and obtains from B a cheque written in favour of "C or order", crossed and endorsed "not negotiable", and gives it to C under a separate contract with C, does it mean that C would have the right to enforce payment of the cheque against B even if A was in breach of the contract with B by selling goods of wrong specification? Here too, A takes constructive delivery of the cheque – which makes it complete – and then becomes the transferor of it to C, whose title therefore could be no better than that of A.

McKay J also referred to the position in the USA and Canada, to stress the importance of providing certainty of payment of bank cheques. However the statutory regimes in the USA and Canada in this respect are quite different to that of New Zealand under the Bills of Exchange Act. In the USA the Uniform Commercial Code (UCC), in Article 3-305, defines the rights of a holder in due course in the following terms:

> To the extent that a holder is a holder in due course he takes the instrument free from
>
> (1) All claims to it on the part of any person; and
> (2) All defenses of any party to the instrument with whom the holder has not dealt except
> (a) Infancy, to the extent that it is a defense to a simple contract; and
> (b) Such other incapacity, or duress, or illegality of the transaction, as renders the obligations of the party a nullity; and
> (c) Such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
> (d) Discharge in insolvency proceedings; and
> (e) Any other discharge of which the holder has notice when he takes the instrument.

And under Art 3-302, "even a payee may be a holder in due course". Therefore the objective of the provisions in Art 3 of the Uniform Commercial Code is to identify and protect the interests of holders in due course who become parties to commercial paper, and in the absence of a provision similar to s 81 of the Bills of Exchange Act, the rights of holders in due course are not overridden by other provisions of Art 3 (see also Art 3-306(d)). In spite of these statutory provisions, the question whether a bank can dishonour its own cheque for failure of consideration by the customer, is far from clear. The position in the USA is summarised by Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards* (revised ed, 1981), in the following terms:

> . . . The bank should not be able to stop payment on behalf of the customer who purchased the cashier's check to satisfy an obligation with the payee; any defence that the customer might raise against the payee is jus tertii, not assertable by the bank itself. In spite of this strong position in the UCC, however, litigation continues apace on this issue. The customer is uniformly unsuccessful in upholding a stop payment on a cashier's check, even if the bank is willing to go along. But if the issuing bank has its own defence to payment, such as inability to get reimbursement from the customer, it may refuse to honour the cashier's check, at least if it is not in the hands of a holder in due course.

The position in Canada in favour of certainty, which was referred to by McKay J by quoting a passage from Crawford and Falconbridge's *Banking and Bills of Exchange* (8 ed, 1986), is also because of the differences in the Canadian statute. The Canadian Bills of Exchange Act (RS, cB-5, s 1) does not extend the "not negotiable" endorsement provided for crossed cheques under s 174 to "bank cheques", in that there is no provision similar to ss 5(2) and 6 of the Cheques Act (NZ). The amendments introduced in the UK in 1932 extending the provisions of ss 76-82 of its Bills of Exchange Act to bank drafts as well (which were later re-enacted in the Cheques Act 1957 (UK)), were not adopted in Canada. Therefore the only issue under the Canadian law, too, for a payee of a bank cheque in enforcing payment against the drawer, is to qualify as a holder in due course, and the only problem in so qualifying is the exclusion of the payee from such status (see ss 2 and 55 of the Bills of Exchange Act (Can) and also the House of Lords decision in *R E Jones Ltd v Waring and Gillow Ltd* [1926] AC 670).

It is to be noted that since the decision in *Yan v Post Bank Ltd* the Court of Appeal, in *A A Williams and Anor v Gibbons* (Court of Appeal, 141/93; Casey, McKay and Sir Gordon Bisson JJ), has reiterated the position that a bank cheque provides a guarantee of payment. In that case one of the issues on appeal was whether a bank cheque constituted legal tender for the settlement of a land transaction, and whether the refusal to accept it amounted to a breach of the purchase agreement by the vendor. Casey J, noting that this issue has now been finally settled by *Yan v Post Bank Ltd* – that short of insolvency of the issuing bank, a bank cheque guarantees payment – held that the vendor's refusal amounted to a breach.

Failure of consideration for a bank cheque is not an issue that would arise often, as such cheques are usually issued by banks having first secured funds. But when such issue arises, in spite of these Court of Appeal decisions, as argued in this comment, it is difficult to see how the provisions of s 81 can be overcome to provide the promised certainty to bank cheques.

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Chief Justice at the Privy Council:

Interview with Sir Thomas Eichelbaum on 2 March 1994, concerning the Privy Council and other topics

Chief Justice, you were I understand recently in London at the end of last year for some time sitting on the Privy Council. When were you there?

I was there substantially for October and November 1993.

And during a period like that about how many cases would you have sat on?

One case, from New Zealand as it happened, settled and I had a free week. Apart from that I sat on most days over a two month period. I sat on a case that is well known here and has been reported – *Attorney-General for Hong Kong v Reid* and in addition was on three other New Zealand cases – *Citibank v Stafford Mall* a breach of duty case arising out of hedging contracts, where the decision of the New Zealand Courts in favour of the plaintiff was reversed, *New Zealand Maori Council* case relating to Broadcasting rights, and the *Goldcorp* litigation – the last case took six days and judgment has not yet been delivered. There were two interesting cases from Hong Kong – one an insurance claim; the second where judgment is also outstanding, a bailment – strictly sub-bailment – case involving fundamental contractual concepts. When delivered the judgment is likely to excite academic interest. There was a fascinating case from Trinidad where a senior Superior Court Judge who had been suspended sought to have the proposed inquiry into his conduct stopped on the grounds of failure to comply with natural justice. All these had real meat in them and in addition there were two other mundane appeals – one from Brunei in which I wrote the judgment and another from Mauritius.

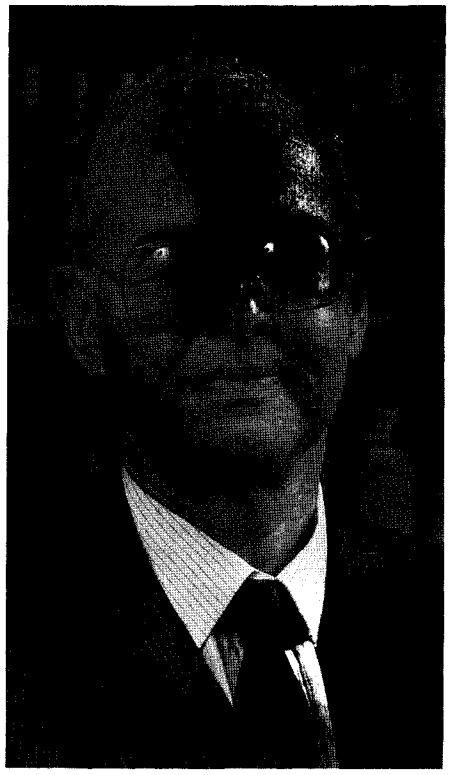
When you say you wrote the judgment, it reminds me that when Sir Robert Stout sat in the Privy Council many years ago he had to write some judgments from unusual jurisdictions, or rather dealing with unusual problems — I think one of them related to an Indian temple didn't it?

An Indian temple or an Indian god.

I'm just wondering how you found having to deal with cases that can come from such a wide variety of backgrounds and the different values that might be involved in them in cultural terms. Did you find this interesting, a problem, or what?

Undoubtedly there must be cases before the Privy Council that place the Board in that type of situation, and I think New Zealand cases dealing with, what you might broadly call Waitangi issues, are in that category. So far as my personal experience went I was fortunate perhaps in not striking any where I was conscious of any problem of that kind.

To just go back to the Reid *case for a moment, there was a comment by Lord Templeman in that case as to the relationship, if I can use that word, between the New Zealand Court of Appeal and the English Court of Appeal indicating that if the New Zealand Court of Appeal felt the English Court of Appeal should not be followed they should feel free to go along their own way and then let the Privy Council take that into account. Is that a new development in the attitude of the Privy Council?*



Rt Hon Sir Thomas Eichelbaum, CJ

I don't think so. The New Zealand Courts decided many years ago that technically they were not bound by the House of Lords although they would give any judgment of the House of Lords great respect. It must follow in logic that our Courts are not bound by the English Court of Appeal. I think the only point the

Privy Council particularly made was that, although a New Zealand Court might feel, as it indeed did in the *Reid* case, the English authority had stood so long that it should be followed without examination, the Privy Council said that in those circumstances they would be assisted if in fact the New Zealand Court, notwithstanding it might feel that way, expressed views on how it might feel if it didn't regard itself as bound to follow longstanding English precedent.

The Privy Council I know is like the House of Lords in that the members of the Board vary a good deal in composition from case to case. Who were the Judges you sat with and you particularly remember now?

I was very fortunate to sit with all ten of the current Lords. Lord Keith of Kinkel, Lord Templeman, Lord Goff of Chieveley, Lord Jauncey of Tullichettle, Lord Lowry, Lord Browne-Wilkinson, Lord Mustill, Lord Slynn of Hadley, Lord Woolf, and Lord Lloyd of Berwick. Lord Keith and Lord Jauncey are the two Scots Lords and Lord Lowry is the former Lord Chief Justice of Northern Ireland.

And, of course, you add the Scottish Lord Chancellor in — the Englishmen will be beginning to feel they are on the outer.

Contrary perhaps to general perceptions the ten come from a variety of backgrounds. Although with the long experience each of them has had in the English legal system they have much in common, they certainly are a diversity of personalities. In their different ways they all made strong impressions on me. There would not be time for a series of thumbnail sketches nor would it be appropriate, but I could just mention that I sat a good deal under the chairmanship of Lord Templeman who is well known in New Zealand for his judgments, but has never been here. I was enormously impressed by him as an all-round lawyer and a Presiding Judge and by his quite remarkable speed during argument.

After the case has been heard — I'm not trying to dig behind the scenes — but is there a different attitude that the Judges take in discussing cases or do you find that judicial reasoning is much the same everywhere? Is there a distinction?

In the case that goes on for more than one day there is, of course, the opportunity for a good deal of interchange, although of quite a brief kind, between the Judges sitting. But a feature of the workings of the Privy Council, (and I'm not giving away any secret because this is well known) is that immediately on conclusion of the argument counsel and parties are requested to withdraw and the Judges still sitting at the hearing table and in the presence only of the Registrar, formally deliberate. That doesn't, as some might think, involve a general discussion or a conference of the American pattern but simply each of the Judges giving their personal decision on the case in the form of a synopsis of reasons which, depending on its complexity or otherwise, might take a minute or two or perhaps ten minutes.

How is it decided, who writes the judgment?

The Presiding Judge allocates the writing of the judgment to himself or another member of the Board, that is the writing of the judgment in accord with the unanimous or majority view as the case may be. And in all but exceptional circumstances that is the end of the matter except for the approval of the written judgment in due course. Now, without wishing to sound as if I am advocating such a system for New Zealand, which it is not my business to do, I would like to stress that it has the effect of compelling every member of the Court to articulate not only his decision, but also his reasons. It seems preferable to a procedure where, having heard the case, a Court splits up without any discussion or any full discussion and the next thing that happens is that one member presents a draft judgment; sometimes of necessity weeks later. And, of course, the draft argues only the point of view consonant with the conclusion the particular Judge has reached. There is a danger that, although the parties have had a hearing before three or five Judges, in the end they are obtaining the judgment — at any rate the in depth judgment — of only one.

What other notable experience is in your mind?

Perhaps you would like me to say something about my impressions of the approach by both bench and bar emphasising of course that, while I did see something of other Courts working, what I am about to say applies to the Privy Council. In the first case on which I sat, which was *Attorney-General for Hong Kong v Reid* the Board overruled a 100-year-old authority, a decision of a strong English Court of Appeal, so it may seem a surprising opening remark that the English legal system shows a stronger adherence to precedent, a higher emphasis on the value of precedent than is the case in New Zealand and in Commonwealth countries which have already broken away from the Privy Council. Counsel spend much more time analysing authorities in depth than is the case here at present. It may be difficult to tell that counsel's approach is a product of what they know is expected, or whether the attitude of the Judges is shaped by counsel's emphasis on precedent.

What is the approach of counsel in practical terms?

I found with some regret that the photocopying disease is as rampant there as it is here and that each side put vast bundles of authority before the Court, not all of which were referred to. However, the principal cases were dealt with very thoroughly; much more so than would be the current custom here. The emphasis on precedent leads on the one hand to greater certainty and must mean that when counsel advise they can do so with a greater degree of firmness and confidence. From the point of view of avoiding unnecessary disputes and litigation those are pluses. On the other hand innovation is inhibited and I imagine most people outside the United Kingdom would take the view that the development of the law there proceeds conservatively. Developments at the highest level in Australia and Canada were regarded as interesting but no longer representative of the pure stream of the common law. I did not detect that New Zealand was seen in the same light, but perhaps this reflects the fact that only a smattering of New Zealand law reaches the Privy

Council. Certainly in some fields – for example matrimonial law, administrative law, equitable remedies, and negligence (I mention these only by way of example) I do not think the New Zealand approach of recent years can be described as conservative.

You have already said that there was the New Zealand case of Reid *where, of course, New Zealand authority would need to be cited because it would have been argued at first instance, but in any of the non-New Zealand cases you sat on were the* New Zealand Law Reports *ever referred to that you remember?*

They were once or twice.

Was that in deference to the fact that you were sitting there?

I confess that that thought crossed my mind!

Was there anything else about the actual presentation of the cases — I'm thinking not just of the way in which the English barristers would have presented the cases, but presumably you had some barristers from other jurisdictions that you heard. Were there any differences?

I was very fortunate in hearing a number of leading London counsel. The silks included David Oliver, the son of Lord Oliver, who argued *Attorney-General for Hong Kong v Reid.*

This Lord Oliver is a Member of the House of Lords?

A recently retired Law Lord. Christopher Clarke, Geoffrey Robertson and Lord Lester. On two occasions the great Sydney Kentridge appeared who, like Lord Lester, argued with impressive – one might say almost irresistible – authority.

That's the authority of his presentation rather than of his being able to cite himself as a case I presume!

The most noticeable feature of the style of leading English counsel compared with the general standard of advocacy in New Zealand is the speed and silky smoothness of delivery. Can I just interpolate here in case the New Zealand Bar is too discouraged by these comments – that I also spent a morning at the invitation of the Chief Justice sitting on his Bench when he and two other Judges were hearing criminal appeals and I have to say that both in terms of content and subject matter (and regretfully a good deal of the standard of advocacy), it reminded me very much of home.

I take it that in the Court of Criminal Appeal there is the ghost of Rumpole . . . at least as a presence.

He was more evidence than he was in the Privy Council.

I interrupted you, I fear.

Going back to the Privy Council the qualities I mentioned enable counsel to get across a much greater volume of material than ordinarily would be achieved in New Zealand in the same time. On the other hand one is conscious of the risk of being seduced by the form rather than the substance. As to counsel from other jurisdictions some, particularly leading barristers from Hong Kong, held their own, others did not. The Lords spoke appreciatively of New Zealand counsel with whom they were familiar and some who appeared I thought did very well by any standard.

There has been a good deal of talk over the year about appeals to the Privy Council and discontinuing the system, but I was wondering what value, if any, do you think from your own experience sitting on the Privy Council there is in having the Privy Council as an integral part of our judicial system?

I have never been an abolitionist, although I recognise that eventually abolition is inevitable. The experience very much reinforced me in the views of the value of the institution which I had previously. To be exposed to the variety of styles and the reasoning process of the top English legal brains undoubtedly is of a value to any New Zealand Judge and, of course, the earlier in his career that he is able to obtain the experience the more valuable it would be. For the same reasons I am sure it has been of great benefit to New Zealand lawyers – broadening their own experience, working with English counsel and solicitors, and absorbing something of the life of the Inns of Court and the English legal system, and bringing back insights and experiences simply not available in New Zealand. From these points of view abolition will be a distinct loss.

As you say it seems inevitable because politicians have consistently talked of it happening, but they have also said that there is a problem in finding a suitable alternative. Do you have any views on what might take its place, or if anything should take its place?

When the time comes, abolition of the Privy Council appeal will be the easiest part. The New Zealand system needs to be prepared, as is implicit in your question, for that happening and the most critical issue is how many tiers of appeal it should have. My views about this are already on record. An ideal system would have two appeals, the second no doubt only by leave, but I do not believe there is any absolute right to more than one appeal and surely the nature of the system must be adjusted to the size and resources of the particular community. Suggestions of a third tier comprising or including the Judges of other countries are illogical if we are abolishing the Privy Council appeal on account of the affront to our sovereignty or because foreign Judges do not have sufficient knowledge of New Zealand conditions. No, a third tier if there was one would have to come from within New Zealand, and so our best Judges would be on the Supreme Court – let us call it that – with comparatively little to do while the bulk of the appellate work was by an intermediate Court with a changing membership. A type of appellate Court we abandoned as unsatisfactory as long ago as 1957. Such an intermediate Court would absorb the best High Court Judges with the result that at one stroke we would weaken both the present Court of Appeal and the premier first instance Court. And all this apparently for the sake of providing a third tier when, at the moment, we're functioning quite comfortably without any real third tier at all given the extremely limited number of cases that actually go to the Privy Council; three criminal cases that have gone to a full hearing in the past 20 years and an average of fewer than three civil appeals per year. The only persons advantaged would be those convicted of serious crimes, most of whom

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would wish to exercise the right of the second appeal if one were available, and those sufficiently affluent to be able to afford a trip to the highest Court.

Is there a cost factor?

A considerable increase of resources would be required in the form of extra Judges, more Chambers, Appellate Courtrooms, and a considerable expenditure on Legal Aid. There seems to be a seductive preoccupation with an elegant and elaborate appeal structure. I think the resources would be better focused on improving the bottom end of the system which is where, in terms of the person in the street, access to justice really counts.

Could I just raise a question with you regarding that. I was just wondering about criminal appeals and in particular jury trials in the District Courts. At the moment appeals from jury trials in that Court go direct to the Court of Appeal, don't they — to the Criminal divisions? Could there be an argument that they could go to a Full Court of the High Court in the first instance and then, if someone wished to, pursue them to the next stage. Because after all District Court decisions are still going to have two tiers in the civil side.

I think there is merit in that and, in fact, the system is developing that way. As more important civil work is done in the District Court we are getting more situations where we think it right to sit a Court of two or three High Court Judges, voluntarily as it were, no compulsion about it; but I deal with requests of that kind quite often. I dealt with one yesterday where there was an important case coming up, not as it happens an appeal, but under new provisions in the Commerce Act where it's appropriate to sit a Full Court although a single Judge could have dealt with it.

Well, that's for the future to decide, or perhaps for you to decide in conjunction no doubt with others. Now talking about the work of the High Court and the relationship with the District Court, is the current number of High Court Judges adequate in the way things have developed over the last few years?

High Court Judges are as busy, if not busier, than they have ever been. If there is any feeling that the giving of increased jurisdiction to the District Court has brought about a situation where High Court Judges' workloads have become comfortable, let me reject this emphatically. People who claim that have the misconception of a finite quantity of work and reason that, since the District Court Judges are taking more, it must follow that the High Court Judges are doing less. The fact is that criminal work keeps on growing, and the complexity of all types of work has increased enormously with the result that cases are longer, more stressful and more difficult than they have ever been before. The main effect of the changes in jurisdiction has been that all the so-called easy work carried out by the High Court and Supreme Court Judges of previous generations has now been hived off to the District Courts, specialist Courts or Masters. There is little left in the High Court but the most difficult, stressful and high profile of the first instance work, and that is what the High Court Judges mostly do.

Just as an incidental to that, from your perspective does it seem that counsel now have to adopt a rather different attitude to their own work. I'm thinking particularly of long-running cases that now go on sometimes for months at a time. Are you aware of any change that's occurring within the profession as a result of those sorts of pressures?

I would think that that trend has accelerated the development of the separate Bar because, speaking from experience now rather sometime in the past, it is extraordinarily difficult to be running an office practice and taking part in the management of a firm if you are caught up in the case that goes on for weeks or months. That sort of case is best handled by people at the separate Bar and I suspect it is one of the reasons why the separate Bar has grown in the way it has.

Well, to return to the question of Judges, is there a place for temporary Judges something like the system of the Recorders in England. Do you see any place for that?

We are too small and our legal population too tightly knit to contemplate that a person may be counsel before a Judge one week and for the Judge to be counsel before him the next.

As far as the appointments of Masters are concerned, from a judicial point of view, has that been a success in practical terms?

For the disposition of High Court work the three most signal advances of the past decade have been the introduction of jury trials in the District Court, the Summary Judgment procedure, and the establishment of Masters. All have been highly successful.

Is there a likelihood of there being a greater degree of specialised judicial work. I'm thinking of something like the commercial list being developed into other areas. Do you see anything likely or possibly happening in that area?

The commercial list has been a success, although it is a case management system rather than a specialised Court of hearing. There was no justification for continuing with an administrative division. One has to question the need for a separate Court to deal with employment disputes. I must keep emphasising the smallness of our population and our resources. Even in England specialisation has not gone very far. English High Court Judges, many of whom came from the Commercial Bar, do a lot of crime and incidentally a lot of circuit work. When I visited the Old Bailey I found a highly qualified commercial lawyer, until his elevation, the head of one of the leading sets of commercial Chambers, presiding in criminal trials.

The recent resignations of a High Court Judge and then shortly thereafter of a District Court Judge resulted in some newspaper comment about the judiciary. Do you have any comments you wish to make on that particular question?

Since the initial wave of understandable sympathy for the High Court Judge there has been some attempt to analyse what his resignation means for the future. Of course if a person has given a new position in any field a fair go and finds that he is incompatible with its demands, one should not insist that he sticks it out. Although I suspect many Judges, especially those with little criminal experience have come through after suffering a rough initial period on the Bench. There are, however, two concerns affecting the integrity, independence and strength of the judiciary. First the judiciary draws a good deal from its collective and collegial strength. We need experienced people to front up in the especially hard cases and show leadership and give help to new additions to the ranks. We cannot have future candidates regarding the judiciary as a bus on which lawyers may take a short trip in the course of their journey through professional life. Imagine what the All Blacks would be like if a substantial number of new members quit the game after two years in the team. The second aspect relates to the perception of justice. I worry about how the public will see the appearance of a former Judge arguing a case before his one-time colleague. I am concerned about the reaction of the losing party. I already get letters making extraordinary and unwarranted allegations of bias. Won't the losing party say "how could my opponent help but win. His lawyer had been a colleague of the Judge, had been in and out of his room, shared innumerable cups of tea and meals with him, visited his house, knows how he thinks – how could he lose?" What will happen if one of the former Judge's own judgments is cited in argument. It's just not a tenable situation. The convention that a Judge does not return to practise at the Bar in New Zealand, ever, is a sound one that should be upheld. Judges in that situation can practise overseas, they can become mediators – there are a number of options open – but they should not return to practise at the Bar. That's not just my strong personal view, it is one widely held by the High Court judiciary.

One of the things that is of concern to the public, at least as we get stories appearing in the press, is the question of sentencing. Now my understanding is that the length of sentences over the past few years has increased substantially and I wondered if you would like to comment on that, and in particular as to why it would be?

One of the most significant factors, which has been established statistically is the rise in the level of serious crime, particularly of the graver type of offences. Violent crime has become more so; sexual offending more gross, and so on. Sometimes, as has happened with drug offending and more recently with rape, it is because the statutory changes have required higher sentences. Finally I have no doubt that consciously or otherwise Judges' responses have been affected by public attitudes. Certainly, however, there have been no direct political pressures. That sort of thing does not happen and would not be allowed to happen in New Zealand. The trend is worrying to many Judges because we all know that imprisoning people without more achieves little. In respect of violent criminals, it can be said that they are kept out of circulation, but in most cases sooner or later the offender must be released. By international standards the length of our sentences is high and I doubt we can push the boat out much further, or that there is any point in doing so. After all the Courts are the ambulances at the bottom of the cliff; the community must concentrate its

efforts a lot more on education and rehabilitation.

Is there discussion or consultation — whatever is the appropriate term — between yourself and say the Prime Minister or between Ministers and Judges — does that occur and if so what sort of areas would be discussed?

Of course there is a considerable range of issues on which the Chief Justice and the Chief Judge have to have dealings with the Minister of Justice and officials in his department. Contact with the officials, whether through the framework of various committees or directly, is on a constant and daily basis. Administrative functions form a significant part of my own workload and, in the case of the Chief Judge, in fact take up most of his working day. Much of the subject matter relates to administrative support for the Courts, something in which the judiciary is more heavily involved than was once the case. At the other end of the spectrum, from time to time structural issues affecting the judiciary have to be discussed. For example, earlier you mentioned the establishment of the office of Master. That required a great deal of judicial involvement. The Attorney consults with me on appointments, the appointment process and other matters at that level. I do not think there would be any call to involve the Prime Minister unless something of constitutional importance arose. If the point of your question was to probe about Government "interference" with the judiciary's decision-making function, there is none.

You referred to consultations and discussions with officials, and on occasion the Minister of Justice or the Attorney-General, is there the possibility of the creation of a formal Judicial Commission that has been mooted from time to time and, if so, do you see any value in it and how should it be constituted?

We in fact have a committee which fulfils many of the functions of the Judicial Commission model except it has nothing to do with the appointment process. I'm referring to the Courts Consultative Committee and it may be of interest to mention its membership which is a Judge of the Court of Appeal, a High Court Judge, two members appointed by the Minister to represent the interests of the public, the Solicitor-General, the Chief District Court Judge, the Principal Family Court Judge, the President and another representative of the Law Society, Departmental representatives and the Chief Justice as chairman. It meets six times a year and since its establishment in 1986 has accomplished a good deal. We do not have time to go into detail but its annual reports are publicly available and would be of some interest. When the then Minister of Justice, Sir Geoffrey Palmer, established the committee he was urged to make it a statutory body, but at that time quangos being out of favour he preferred to start on a trial basis without giving the committee any statutory teeth. The time may have arrived when this would be a worthwhile further step in the direction of confirming a true partnership of those working in and making use of the Court system and the administrators.

If there was a Judicial Commission what functions do you consider it could have and, I might add, what functions do you consider it should not have, and how should it be set up?

The Courts Consultative Committee maintains the type of overview of the workings of the Court system and resources which I think would be one of the functions of a Judicial Commission. As I mentioned before the only thing it has nothing to do with is the appointments process. I have not myself advocated the establishment of a Judicial Commission, although I see it as one of the possible alternatives to the present rather unstructured and opaque appointment process. What I have advocated is that we should have an appointments procedure that is more generally known, something that could be defined and published and is more systematic and transparent. The final power of judicial appointment must continue to rest with the Attorney-General in the case of High Court and Court of Appeal Judges, and with the Minister in the case of District Court Judges. I do not think anyone seriously disputes that.

Are there any other matters you would like to discuss?

Can I say something general in conclusion? Last year I had the opportunity to meet a number of overseas Chief Justices and Judges and to study information about the state of their judicial systems. While there is always room for improvement, I want to say that by overseas standards we measure up well. There are problem areas here and there, but overall our case load is under good control and despite criticism, much of it ill-informed, we have an able and dedicated judiciary which would stand comparison anywhere.

Thank you, Chief Justice. □

Correspondence

Dear Sir,

Law Reporting in New Zealand

I have one comment on the interesting and comprehensive article at [1994] NZLJ 75. In the category of "other reports of special boards and tribunals" (p 78) mention is made of the NZTPA and NZRMA series. In fact, from their inception in 1955 this series reported not only the most significant decisions of the Planning Tribunal (and its predecessor the Town and Country Planning Appeal Board) but also High Court and Court of Appeal decisions in this area. Few of these were reported in NZLR, and when they were it was almost always months later.

Much the same applies to the New Zealand Administrative Reports, a series which since 1976 has published reports of a wide variety of administrative tribunal decisions, particularly those of the Accident Compensation Appeal Authority. This series too has published High Court and Court of Appeal decisions in the administrative law field, few of which have been reported elsewhere.

Peter Haig

Mistake and statutory defences

By Gerald Orchard, Professor of Law, University of Canterbury

In two recent cases arising out of the prosecution of anti-abortion protesters the Court of Appeal has held that a reasonable but mistaken belief in the existence of facts which would provide a statutory defence is not itself a defence. This article critically examines these decisions.

In recent years the New Zealand Court of Appeal has consistently upheld the need for a significant degree of moral fault for criminal liability, by generally requiring subjective mens rea in relation to the physical ingredients of serious offences, and by recognising the defence of absence of fault in the context of regulatory offences. See, *Millar v MOT* [1986] 1 NZLR 660 CA. Further, in *R v Thomas* [1991] 3 NZLR 141 CA the Court accepted that the terms of s 48 of the Crimes Act 1961 (as amended in 1980) are such that the use of force in private defence may be justified by reason of an honest but possibly unreasonable mistake of fact. Previously, in *R v White (Shane)* [1988] 1 NZLR 122 CA the Court did not exclude the possibility that the codified partial defence of provocation might be based on a mistake of fact, provided it was one an ordinary person might make (see, in particular, p 127 per Casey J); and in *Kapi v MOT* (1991) 8 CRNZ 49 CA it recognised that according to English authority a defence of necessity or duress at common law may be based on an honest and reasonable mistake of fact (in *R v Raroa* [1987] 2 NZLR 486, 494-495 CA the Court thought this was not true of the codified defence of compulsion, but this was obiter and the Court mistakenly supposed that this was the rule at common law).

The Court has now, however, upheld the imposition of absolute liability in relation to a statutory defence when the terms of the legislation do not make provision for the possibility of mistake.

Bayer and *O'Neill*

Section 3(1) of the Trespass Act 1980 makes it an offence for anyone to trespass on any place and to neglect or refuse to leave after being warned to do so by an occupier. Section 3(2) then provides that it is a defence

> if the defendant proves that it was necessary for him to remain in or on the place concerned for his own protection or the protection of some other person, or because of some emergency involving his property or the property of some other person.

In *Police v Bayer* (22 Nov 1993 CA 363/91) and *Police v O'Neill* (22 Nov 1993 CA 392/93) the defendants had entered premises licensed for abortions and had sought, by passive obstruction and persuasion, to prevent the performance of abortions which had been authorised under the Contraception, Sterilisation and Abortion Act 1977. In each case the defendants had been in breach of s 3(1) of the Trespass Act 1980, and the question arose whether they might have a defence of necessity by reason of s 3(2), on the basis that they had acted in order to protect the women seeking abortions, or the foetuses (assuming that a foetus is a "person" in this context, an issue which the Court of Appeal found it unnecessary to decide).

The Court of Appeal held that the defence could not succeed in either case, there being two essential steps in its reasoning.

First, it held that the test for the defence is entirely objective. No account can be taken of any mistaken belief by a defendant that there were circumstances which if true would support the defence; instead the question is whether the trespass was in fact reasonably (rather than absolutely) necessary for any of the stated purposes. In *Bayer* it was an "honest but mistaken belief" which was thus held to be irrelevant, but in *O'Neill* the same is held to apply even if such a belief was formed on reasonable grounds.

Secondly, although in *Bayer* statistical and other evidence had been adduced which raised suspicion about the lawfulness of many certified abortions in New Zealand, in neither case was it established that any of the abortions in question were unlawful. It followed that the defence failed because, the Court held, "where an abortion has been lawfully authorised in accordance with the [Contraception, Sterilisation and Abortion] Act, and is subject to its safeguards, trespass to prevent it cannot be regarded as reasonably necessary on any objective approach". This is convincingly supported by the observation that "to hold otherwise would mean recognising the right of individuals to override and frustrate lawful procedures established by Parliament to resolve this difficult question" (although it reserved the question whether protection from the effect of *any* "lawful process" must be outside the defence). For a similar conclusion in the High Court, see *Police v O'Neill* [1993] 3 NZLR 712, 719.

These decisions are of immediate importance in relation to instrusive protests or actions against apparently lawful abortions, but they also have a much wider significance because of the Court's refusal to accept that it could be a defence that a defendant mistakenly believed in the existence of circumstances which, if true, would satisfy an objectively worded statutory defence, whether or not any such belief was based on reasonable grounds. This conclusion is not supported by the citation of any authority, and it is submitted that the rather perfunctory reasoning is less than compelling.

The rejection of a defence of mistake
The Court gave three reasons for this decision.

1 The ordinary meaning of the language of the statute: "the language of this subsection, creating a limited defence in defined circumstances, does not admit of any allowance for the defendants' belief".

As to this, it is true that the words of the subsection read literally do not support a defence of mistake, but in so far as the object of the defence seems to be to authorise continued trespass for the purpose of protecting a person or property it is arguable that s 5(j) of the Acts Interpretation Act 1924 allows a different reading. If a person truly believed that it was necessary to remain for such a purpose it is not a complete distortion of language to say that it "was necessary *for him* [or her] to remain". In *Police v O'Neill* [1993] 3 NZLR 712, 717 Holland J had thought that s 5(j) was in point, but this is not discussed by the Court of Appeal. Moreover, if there is a principle of the common law by which a belief in facts which would constitute a defence is itself a defence, this should be available pursuant to s 20 of the Crimes Act 1961, unless such a principle is "inconsistent" with the relevant legislation. This is not mentioned by the Court of Appeal either, but it will be suggested below that it is possible to extract such a principle from the authorities.

2. The Court thought it significant that there is specific reference to the accused's belief in some sections of the Crimes Act 1961 which deal with matters of "justification or defence", citing s 41 (prevention of suicide or injury), ss 44-46 (suppression of riot), and s 48 (self-defence).

With respect, these sections seem to have been intended to codify established common law principles, or, in the case of s 48, to enact a particular recommendation of a law reform committee, and their express reference to a defendant's belief should not be taken to imply that this is irrelevant when it is not mentioned when another statute, enacted at a different time, provides a particular defence to an offence created by that statute (the offence of trespass having been introduced in 1952, with the defence of necessity being first provided for in 1968: see *Police v O'Neill* [1993] 3 NZLR 712, 715-716). Such variation in legislative drafting in different statutes provides little more than pedantic support for the conclusion in *Bayer* and *O'Neill*, particularly when the result is a large and apparently unwarranted difference in the principles governing different defences which have a common rationale – reasonable necessity. The fact that Parliament often expressly specifies the mens rea required as an element of an offence has not prevented the Courts holding that such an element is required when the statute is silent on the subject, and it is submitted that such silence in the context of a statutory defence should not have greater significance. This, however, brings us to the third of the Court's reasons.

3 The Court of Appeal drew a sharp distinction between the ingredients of an offence and statutory defences. Having said that the language of the provision creating the defence "does not admit of any allowance for the defendants' belief", the Court added:

> Considerations of that kind, along with those of mens rea or guilty mind, have their place when it comes to proving the offence itself. However, a statutory defence confers a benefit on an accused and there is no warrant for reading into its terms those considerations which are appropriate to penal provisions.

This distinction between an offence and a defence has previously been employed by the legislature, the Courts, and by some writers, to justify variations in the distribution of the burden of proof, or a requirement that there be reasonable grounds for a mistaken belief in facts constituting a defence. See, eg, the critical discussions by Glanville Williams, "Offences and Defences" (1982) 2 *Legal Studies* 233, and A T H Smith, "Rethinking the Defence of Mistake" (1982) 2 *Oxford Journal of Legal Studies* 429; cp *Kapi v MOT* (1991) 8 CRNZ 385, 389 CA; *Albert v Levin* [1981] 2 WLR 1070, 1083. There have even been occasional cases concerning regulatory offences where the classification of facts as "defence" facts has been thought to justify imposing absolute liability in respect of them (Glanville Williams, supra, 239-240; and see *Roberts v Humphries* (1873) LR 8 QB 483, where this was left open), and it is this extreme position which is now endorsed in *Bayer* and *O'Neill*. It is submitted, however, that there are a number of objections.

Objections to the distinction
First, any extension of the relevance of the distinction is unfortunate because in many cases when legislation provides for some ground of exculpation in relation to a particular offence it may be far from clear whether this is properly regarded as providing a defence, or as adding an essential ingredient of the offence (cf *R v Rangi* [1992] 1 NZLR 385 CA). The objection of uncertainty does not apply to s 3(2) of the Trespass Act 1980, which describes the necessity referred to as a "defence", and expressly requires the defendant to provide it, but the Court of Appeal's rule is not confined to clear cases.

Secondly, the rule is objectionable in principle in that it is based on a distinction which may be no more than an arbitrary matter of form. The difference between a case where the scope of liability is limited by the addition of an essential ingredient to an offence, and a case where the same restriction is achieved by the provision of a defence, is a difference of form rather than substance. Whichever device is used, a "benefit" is conferred on the defendant (and if it is regarded as a justificatory factor it will also negate the wrongfulness of the conduct), and this does not vary in kind or scope according to whether it is categorised as part of the offence, or as a defence. For fuller discussion, see eg Glanville Williams, supra; Orchard, "The Golden Thread – Somewhat Frayed" (1988) 6 *Otago LR* 615, 624-628. The distinction does not justify a significant difference in what fault may be required for guilt.

The approach of the Court of Appeal to consent as a factor negating liability for assault is consistent with this view. The statutory definition of this offence (Crimes Act 1961, s 2; Summary Offences Act 1981, s 2) does not require an "unlawful" act, and nor does it make any provision for cases of consent. Nevertheless, to the extent that the common law recognises it, there has never been any doubt that consent prevents liability for assault, and in *R v Nazif* [1987] 2 NZLR 122

CA it was held that D is entitled to acquittal if the evidence raises a reasonable doubt whether D honestly but mistakenly believed there was consent, even if this was not supported by reasonable grounds. At common law this conclusion has been justified by the Courts holding that the definition of assault requires an unlawful act, an ingredient which must be intended and which is negated by consent (*R v Kimber* [1983] 3 All ER 383 CA; the same theory is applied to private defence: *Beckford v R* [1988] AC 130). But in New Zealand the terms of the statute do not seem to allow this reasoning and it appears to be clear that consent must be seen as a matter of defence, albeit a defence provided by the common law. This was assumed to be the case by the Court of Appeal in *Nazif*, but in contrast to the approach to statutory defences in *Bayer* and *O'Neill*, and to the general defences of duress or necessity in *Kapi v MOT* (1991) 8 CRNZ 49, 45, it was not regarded as affecting the rules determining what might negate the fault required for criminal liability.

Thirdly, there is authority from which it is possible to extract support for the existence of a common law principle that an honest but mistaken belief in facts which would constitute a statutory defence may itself be a defence, at least if it is based on reasonable grounds. If there is such a principle it should remain available unless as a matter of construction it is found to be inconsistent with the particular legislation: Crimes Act 1961, s 20; *Tifaga v Dept of Labour* [1980] 2 NZLR 235, 242-243 CA. Mere statutory silence as to a defendant's state of mind should not suffice for such inconsistency, any more than it excludes the requirement of mens rea.

Support for the existence of such a principle may be found in general statements which have been repeated in numerous cases, and also in some particular decisions.

In the High Court in *Police v O'Neill* [1993] 3 NZLR 712, 717 Holland J cited the statement of Lord Diplock in *Sweet v Parsley* [1970] AC 132, 163 that there is a general principle of construction that although the words of a statute defining an offence make no provisions for a mental element,

> they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent.

Holland J observed that he was not aware of this principle having been applied to a statutory defence, and in *Sweet v Parsley* Lord Diplock carefully expressed it as qualifying only the words used to describe the prohibited conduct, or the elements of the offence. Nevertheless, facts supporting a defence are at least as capable of rendering conduct "innocent" as facts which would negate an ingredient of an offence, and the considerations of justice which underlie the principle suggest that it should also apply to at least some statutory defences. Thus in the next paragraph Lord Diplock added that the implication "stems from the principle that it is contrary to a rational and civilised criminal code . . . to penalise one who . . . has taken all proper care to inform himself of any facts which would make his conduct lawful"; and in an early, seminal, statement of the principle what was required by Brett J was a reasonable belief in facts which would make the defendant "guilty of no criminal offence at all": *R v Prince* (1875) LR 2 CCR 154, 169-170.

There is one Australian decision where it was thought to be wrong to apply this principle to effectively enlarge a statutory defence, but there the Court also thought its conclusion was justified by the fact that the defence in question (the fact that a killing was pursuant to a suicide pact) merely reduced murder to manslaughter, and did not make the act "innocent", and was concerned that there was no explicit statutory authority for such a conviction in the case of mistake: *R v Iannazzone* [1983] 1 VR 649, 654-655 FC.

As to particular decisions which might be against the conclusion in *Bayer* and *O'Neill*, perhaps the most important is *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105. There the House of Lords considered the effect of s 3 of the Criminal Law Act (Northern Ireland) 1967, which provided that "a person may use such force as is reasonable in the circumstances" in the prevention of crime or in effecting a lawful arrest, it being further expressly provided that this replaced the relevant common law rules. It would be very artificial to regard this kind of general provision as modifying the ingredients of all offences involving force, and it seems to be a clear example of a statutory defence, in the nature of a justification. The section makes no mention of the knowledge or belief of a defendant seeking to rely on it, but Lord Diplock held that in assessing the reasonableness of the force used the jury were to have regard, not merely to the circumstances which actually existed, but rather to the facts that existed and were known to the defendant, and to such facts as were mistakenly but reasonably believed by the defendant to exist (ibid 137). The reason for this expansive view of the defence was not that such a belief would negate required intent to act unlawfully (cf *Beckford v R* [1988] AC 130 PC), but rather that "an honest and reasonable belief by the accused in facts which if true would have rendered his acts lawful is a defence" (supra, 136, per Lord Diplock).

Consistently with this, in Canada it has been held that where the Criminal Code provides a general defence authorising the use of reasonable force "to remove a trespasser", then "the defence of mistake is also available", so that it suffices if the defendant honestly, or honestly and reasonably, believed in facts which would make the other a trespasser: *R v Keating* (1992) 76 CCC (3d) 169 (Alta CA).

Conclusion

It is easy to suppose that in *Bayer* and *O'Neill* the Court of Appeal was concerned that to allow a defence of mistake would encourage the kind of interference with presumptively lawful processes which had given rise to these prosecutions. It is doubtful, however, whether this required the unqualified rejection of the possibility of such a defence. It would appear that none of the defendants could establish a reasonable belief that an unlawful abortion was to be performed on the occasions in question, and this will no doubt be the position in almost

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Ashby v Minister of Immigration: Overruled?

By J B Elkind, Associate Professor of Law, Auckland University

Immigration issues are consistently a problem in developed countries. What might be called the "reservoir" of those desiring entry is practically unlimited. In many cases a decision may affect other people than the individual concerned. This can include children. A not altogether unfair analogy may be the effects that imprisonment for instance has on the children of a person imprisoned — particularly let us say in the case of a solo mother. This article looks at the obligations of the Minister of Immigration in respect of the provisions of International Covenants where a father was deported, although his daughter had been born in New Zealand. An application for judicial review of the Minister's decision in respect of the deportation relied on the International Covenant on Civil and Political Rights and also on the Convention of the Rights of the Child. The Court of Appeal cited two decisions of the European Court of Human Rights and indicated there seemed to be a balancing exercise that needed to be done and that the basic rights of the family and the child should be the starting point. The case has been adjourned by the Court of Appeal to enable the Minister to give further consideration to the whole issue. The Court of Appeal at least seems to be suggesting that the principle laid down in Ashby *that a failure to consider International Covenants could not be a basis for a judicial review if statutory effect had not been given to these International Treaties, might no longer be tenable.*

The case of *Ashby v The Minister of Immigration* [1981] NZLR 222 came before the Court of Appeal in a great hurry. Each of the three Judges who decided the case lamented at the haste with which the case had been prepared and brought on for a hearing. (Ibid at 224 (per Cooke P) at 226 (per Cooke P) at 228 (per Richardson J) at 235 (per Somers J.)) In the words of Somers J:

> I would wish only to add that this appeal has raised matters of great importance and some difficulty. For obvious reasons a decision on this matter is called for today. For my part I regret that there has not been available a greater time for reflection upon the issues raised.

The Judges were unwilling that the case should serve as a significant precedent. None the less it has come to be viewed as a leading case on administrative law.

The *Ashby* case involved an attempt to stop the 1981 tour of New Zealand by the South African Springbok Rugby Team. The plaintiffs in that case claimed that the tour would involve a violation by New Zealand of its international legal obligations under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination to which New Zealand is a Party. That Convention provides in Article 2(1)(b) that:

> Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organisation.

The argument was that by allowing a Springbok rugby team to play in New Zealand, the New Zealand Government would, in effect be sponsoring, defending and supporting the practice of apartheid.

The second provision of the Convention that was allegedly violated was Article 3 which provides:

> States Parties particularly condemn racial segregation and apartheid and undertake to prohibit and eradicate all practices of this nature in territories under their jurisdiction.

The argument was that, because the Springboks were selected in South Africa under the system of apartheid they would be practising apartheid wherever they went. Thus, if they came to New Zealand, they would be practising apartheid here, in territories under New Zealand's jurisdiction. Since a Minister of the Government, the Minister of

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all cases, notwithstanding the evidence adduced in *Bayer*.

On the other hand, the implications of the judgments go far beyond the context of abortion. They settle the rule to be applied in all cases under s 3 of the Trespass Act 1980, and the reasoning would appear to be applicable to any objectively worded statutory defence. For the reasons outlined above it is submitted that the rejection of a defence of reasonable mistake is unfortunate and wrong. Of course, it is accepted that recognition of such a defence would have to be subject to the defendant's having the persuasive burden of proof, if that is the rule applicable to the statutory defence, for a more benevolent rule in the case of mistake would not be consistent with the intention of the legislation. □

Immigration, has a discretion as to whether to issue entry permits, it was contended that he should exercise this discretion consistently with New Zealand's international legal obligations and deny entry permits to the South African team which would allow them to come here to play rugby. The case was heard by the Chief Justice on 9 July 1981 and on the following day he gave judgment dismissing the claim. Plaintiffs appealed to the Court of Appeal against that decision.

Of course the interpretation of the Convention was controversial. It might have been argued that the words "sponsor, defend and support" did not carry the meaning contended for by the plaintiffs and that Article 3 was also inapplicable. At least one Justice thought that this was a possibility, Justice Cooke said:

> Whether the Convention applies to sporting contacts with visiting teams from South Africa where apartheid is practised, is by no means clear. ([1981] NZLR 222 at 224. See however the opinion of Richardson J at 227-8.)

This issue was never reached however.

The Chief Justice had considered the Convention a relevant consideration. But he was unwilling to assume that the Minister of Immigration had not considered it. The Court of Appeal asked the Minister to file an affidavit stating the extent to which he had taken the Convention into account in reaching his decision to issue the permits. The affidavit filed by the Minister said that the Minister had not given specific consideration to the Convention but that he was aware of the active opposition of the United Nations and of the New Zealand Government to apartheid.

Nonetheless, the Court of Appeal dismissed the appeal. The primary ground was that Treaties are not justiciable in New Zealand Courts unless they receive legislative implementation. And even when they are implemented by legislation, the Court can only apply the legislation and not the Treaty. The legislation which a previous government had passed to implement the Racial Discrimination Convention was the Race Relations Act 1971 and there was nothing in that statute relating to sporting contacts with South Africa. Thus the chief principle which *Ashby v The Minister of Immigration* is taken to stand for is that Ministers cannot be judicially compelled to comply with international Treaties, even those to which New Zealand is a Party when they are exercising their ministerial discretion.

A recent case appears to cast doubt on the absolute nature of this principle. The case is *Tavita v The Minister of Immigration* (CA 266/93, 17 December 1993). Viuliamu Tavita arrived in New Zealand from Western Samoa on 22 December 1987. He was granted a visitor's permit, which is a type of temporary permit under s 24 of the Immigration Act 1987 and there were subsequent extensions to 22 March 1989. He applied for a residence permit. Both this application and an application for reconsideration were declined. On 12 March 1990 the Lower Hutt District Court granted a removal warrant under s 54, subject to residence and reporting conditions pending removal. Mr Tavita appealed to the Minister under s 63 to cancel the warrant on humanitarian grounds or for a reduction of the five-year period following removal for which such a warrant remains in force. This appeal was declined by the Associate Minister.

Twenty-nine June 1991, saw the birth of a child in New Zealand. The child was named Natia Tavita. Her birth in New Zealand makes her a New Zealand citizen under s 6 of the Citizenship Act 1977. The child is the daughter of the applicant and his wife Keiana whom he married on 7 July 1991. Mrs Tavita is employed. The applicant is a house husband and looks after the child. He does some panelbeating at home. Neither parent receives a Social Welfare benefit.

In an affidavit sworn on 5 October 1993, Mr Tavita indicated that his father was dead and that the only close relative to whom he could turn for support in Samoa is his mother who has no house of her own, owns no land and is being supported by him and other family members who send her money from New Zealand. He further stated that if he were forced to leave New Zealand he would lose contact with his wife and his daughter and that if he went to Samoa he could not support them. Nor could he support them if they all went to Samoa.

An affidavit sworn on 28 October 1993 by Dr A A Kerr of Lower Hutt, a consultant pediatrician, said that Mr Tavita was the chief caretaker of the three-year-old daughter. The family situation appears to be a stable one with Mr Tavita providing good and appropriate care and security for the child. If he were to leave New Zealand, that care would no longer be available and this would have a detrimental effect on the child's emotional well-being and development. It would therefore be against the best interests of the child.

> If the father were to be separated from this child, I believe that in addition this is counter to the spirit and requirements of the Children, Young Persons, and Their Families Act 1989, in which the interests of the child are stated as being paramount, and which sets responsibility for the welfare of children as being ordinarily with the family, and not the state. (CA 266/93, at 4.)

In September 1993 the Immigration Service took steps to execute the removal warrant granted in 1990. A judicial review proceeding was brought on Mr Tavita's behalf. He was taken to the airport but his removal was halted on notice of a stay granted in the proceeding.

A judicial review proceeding was commenced on 5 October 1993. The proceeding sought an interim order preserving the position of the applicant, his child and his wife; an order quashing the removal order; an order directing a rehearing of the applicant's appeal or appeals; an order requiring the Minister to cancel the removal order and issue a permit under s 35 or otherwise allow the applicant to remain in New Zealand; and further or other relief.

The applicant relied on the International Covenant on Civil and Political Rights 1966 (999 UNTS 171; 6 ILM 368 (1967)), and the Optional Protocol thereto. (999 UNTS 302; 6 ILM 383 (1967)). New Zealand ratified the Covenant on 28 December 1978 and acceded to the Optional Protocol on 26 May 1989. Reliance was also placed on the Convention on the Rights of the Child 1989 (UN Doc A/Res/44/25). New Zealand ratified this Convention with certain

reservations inapplicable to this case on 13 March 1993.

The Articles of the Covenant relied on are Articles 23(1) and 24(1). Article 23(1) says:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 24(1) says:

> Every child shall have, without any discrimination as to race, colour, . . . national or social origin . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The applicant also relied on Article 9(1) read together with Article 9(4) of the Convention on the Rights of the Child. Article 9(1) states:

> States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Article 9(4) says:

> Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

The application for an interim order under s 8 of the Judicature Amendment Act 1972 came before McGechan J on 1 November 1993 and was dismissed by him on 3 November of that year, but the Judge made an interim order for a stay of the removal pending appeal.

The Court of Appeal noted that on the dates of the declination of the residence application, the granting of the removal warrant and the Associate Minister's decision to reject the appeal, the appellant's child had not been born. "The circumstances now", said the Court "are of course quite different". (CA 226/93, at 5.)

In an affidavit sworn on 21 October 1993 the Hon R F H Maxwell, the former Associate Minister who, by the time the case was decided, had become the Minister, stated that:

> 15. The applicant's marriage and the birth of his child both occurred after I had made my decision to decline the s 63 appeal. I can say however that had these new facts been before me it is unlikely that my decision would have been any different. For an appeal to succeed under s 63 I had to be first satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh for the person concerned to be removed from New Zealand or for the removal warrant to remain in force for the full five years. In my experience it is common to find persons, in New Zealand unlawfully, who have entered into relationships or marriage with New Zealand citizens or residents; it is also common to find persons, in New Zealand unlawfully who have children born in New Zealand. While the new circumstances which have arisen since I declined the applicant's appeal are clearly of a humanitarian nature, they are not exceptional. (CA 266/93, at 6.)

The Court noted that this affidavit made no reference to the international instruments. In the statement of defence it was admitted that the Minister did not take either the Covenant or the Convention into account when he made his decision. The Crown argued that they were not obliged to do so.

The Court cited two decisions of the European Court of Human Rights: *Berrehab v The Netherlands* (1988) 11 EHRR 322; *Beljudi v France* (1992) 14 EHRR 801. It noted that neither of those cases was cited to it in argument but said:

> that implies no criticism, for the case had to be prepared under pressure and such decisions are not always easy to locate.

The two cases relate to Article 8 of the European Convention on Human Rights which is quite similar to the Covenant provisions. Each of these cases held that deportation of the applicant would be a violation of the right to respect for private and family life protected by Article 8 of the European Convention. (CA 266/93 at 8-13.)

Said Cooke P:

> It would appear therefore that under the European Convention a balancing exercise is called for at times. A broadly similar exercise may be called for under the two international instruments relevant in the present case, but the basic rights of the family and the child are the starting point. It is accepted by the Crown that this case has never been considered from that point of view. Consideration from that point of view could produce a different result.

The Court of Appeal adjourned the Appeal sine die "to be brought on at seven days' notice, to enable the appellant to make such application as he is advised to make in the light of current circumstances; and to enable the Minister and his Department to consider any such application". In the meantime the Court continued the stay in force (CA 266/93 at 17.)

Counsel for the respondent argued that the Minister and his Department were entitled to ignore the international instruments. Under the authority of *Ashby v The Minister for Immigration* he was

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Consumer Guarantees Act
More than just liability for defective products

By Miriam Dean and Bernadette Jew, Barristers and Solicitors of Auckland

The Consumer Guarantees Act 1993 takes effect from 1 April 1994 and requires some immediate changes in business practices. It is important to appreciate that the implications of the Act extend well beyond liability under the implied guarantees. The authors have selected some practical issues such as those relating to the use of exclusion clauses which may catch businesses unaware and which lawyers will need to draw to the attention of their clients in order to ensure compliance from 1 April 1994.

From 1 April 1994, the use of exclusion clauses in terms and conditions of sale and warranties could be an expensive exercise unless careful consideration is given to whether the Consumer Guarantees Act 1993 (the "Act") applies. This is because it is not only the supply of defective goods or services that can give rise to liability under the Act: it is also possible to commit an offence simply by attempting to "contract out" of liability under the Act.

It is important to understand that the Act has implications which extend well beyond liability under the implied guarantees. This brief article seeks to highlight some of the practical issues arising from the legislation which are not directly related to product standards per se and which may not yet have been sufficiently appreciated. As already noted, a major area of concern which lawyers will need to address on behalf of their clients relates to the use of exclusion clauses after 1 April. Other areas which lawyers will need to consider carefully when advising clients on this new legislation include the remedies provided by manufacturers, and the supply of goods in circumstances where the consumer does not obtain the right to undisturbed possession.

1 Exclusion of liability

General rule: no contracting out

The Act contains a general prohibition on contracting out, except where the consumer acquires the goods or services for business purposes or holds himself or herself out as acquiring them for business purposes. This prohibition on contracting out has implications for all types of exclusion clauses – not just the "no responsibility" or "no liability for negligence" types of clauses, but also those limiting the remedies available to consumers. By way of example, where the Act applies it will generally not be possible to exclude liability for claims made after a certain period, claims in excess of a maximum amount, foreseeable loss or negligence; or to stipulate "no refund" or "no exchange".

When does the Act apply?

It is thus important to ascertain correctly at the outset whether or not the Act applies to any given situation, as the consequences of a mistake could be unfortunate. If liability is excluded in the normal manner and it is later determined that the Act does apply, then penalities could be imposed. Contracting out of the Act is deemed to be an offence under the Fair Trading Act 1986 and penalties can be imposed up to $30,000 on an individual, and up to $100,000 on a company. Where the Act does not apply, a supplier may continue to exclude liability in the same manner as in the past – if it does not, it will have less protection than it would otherwise be entitled to reserve for itself at law.

However, the initial step of determining whether or not the Act does apply is unfortunately fraught with difficulties. The style of drafting adopted involves the use of the broadest possible statutory provisions with few or no de minimis provisions to take account of practicalities. For example, the Act applies to the supply of goods or services "of a kind ordinarily acquired for personal, domestic or household use or consumption" (except where acquired for resale, manufacturing or for use in repair/treatment). There is no limitation on the application of the Act to goods or services over a certain value.

While a similar regime operates in Australia, the approach adopted there is more pragmatic. In recognition of the practical difficulties involved in determining whether or not each good or service is "of a kind ordinarily acquired for personal, domestic or household use or consumption", the equivalent Australian legislation generally applies to goods and services priced at A$40,000 or less, and to goods or services priced at more than A$40,000 which are "of a kind ordinarily acquired for personal, domestic or household use or consumption".

Under the New Zealand legislation, it will often be extremely difficult to determine whether or not a good or service falls within this classification. For example, while a telephone is ordinarily acquired for personal, domestic or household use or consumption, does the supply of 500 telephones take on a different character because 500 telephones would never be purchased for

personal, household or domestic consumption? On the other hand, it can be argued that the Act applies because, regardless of the number of telephones purchased, the product remains one that is ordinarily acquired for personal, household or domestic use.

The area of professional services also raises countless questions. Does the Act apply to the provision of investment advice to an individual in relation to share trading, as opposed to advice relating to investment for retirement purposes? Frequently there will be discrete parts of a service which, while provided in the business context, could reasonably be classified as being ordinarily acquired for personal or domestic use. For example, does the Act apply to the drafting by a solicitor of large numbers of transfers and mortgages of residential properties on the instructions of a financier or property developer? In this regard, it must be remembered that it is the kind of goods or services supplied that is determinative – it is irrelevant whether or not the consumer happens to be acquiring those goods or services for business purposes.

This all-encompassing approach is similar to that employed in the income tax amendments of recent years, which have caused much controversy and later resulted in specific amendments to take account of problems arising in practice. Understandably, the legislation is designed to provide the widest possible protection to consumers. However, this may result in considerable difficulties in practice when we consider how the Act will be enforced. There is no statutory watchdog appointed to protect the rights of consumers under the Act – except for the offence of contracting out, which is to be enforced by the Commerce Commission. Consumers must enforce their rights by bringing a claim in the Disputes Tribunal or proceeding through the Courts – and in many instances it will not be worthwhile for a consumer to take action other than through the Disputes Tribunal, given the likely dollar values involved. It seems inappropriate for the Disputes Tribunal to be burdened with interpreting legislation which is so widely drafted that it requires the development of a body of case law in order to assist with interpretation.

Business consumers — contracting out

Whenever supplies are made to business consumers and it is not immediately apparent whether or not the Act applies, ie: whether the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption, the sensible approach is for businesses to seek to contract out of the Act and so avoid needless arguments and liability in the future, eg; in the case of the supply of 500 telephones.

However, while the consumer has rights against both the supplier and the manufacturer, manufacturers are unfortunately constrained in their ability to contract out of the Act. The Act specifically authorities a "supplier" to contract out of the Act when entering into an agreement with a consumer – a supplier being the person directly supplying goods or services to that consumer. The manufacturer is deemed to have the benefit of such an agreement but cannot itself take any action to exclude liability under the Act.

Therefore, a manufacturer could be exposed to considerable liability if suppliers of the manufacturer's goods fail to contract out of the Act when dealing with business consumers. This is because the Act entitles a consumer to claim damages for foreseeable loss against both the supplier and the manufacturer if the goods supplied fail to comply with certain guarantees – and this could extend to loss of business income. Accordingly, manufacturers should seek an undertaking from suppliers that they will contract out of the Act whenever supplying business consumers. Manufacturers should also seek indemnities from suppliers in case they breach any such undertaking.

Suppliers should in any event seek to contract out of the Act wherever possible – not just when requested by a manufacturer – in order to protect their own interests. This is because the consumer can claim against either the supplier or the manufacturer if the goods fail to comply with the guarantees as to acceptable quality or compliance with description so that the supplier is also exposed to liability for foreseeable loss, including loss of business income. It would also be prudent for suppliers to obtain indemnities from manufacturers for liability incurred where goods do not comply with the guarantees contained in the Act due to an act or default by the manufacturer.

Standard term contracts

Standard term contracts will frequently need to apply to both:

- goods or services "of a kind ordinarily acquired for personal, domestic or household use or consumption" and goods or services which fall outside this classification; and
- persons acquiring goods or services for their personal use and persons acquiring goods or services for business purposes.

Contracts should still have the normal exclusion clauses to the extent necessary to ensure that the manufacturer and supplier obtain the maximum protection available wherever the Act does not apply. Great care, however, will need to be taken by lawyers in drafting appropriate clauses to accommodate these various situations.

2 Specifying manufacturers' remedies

Manufacturers generally prefer to repair or replace defective goods. However, they could now be obliged to provide monetary damages in circumstances where the Act applies, unless they have expressly specified that they will remedy a defect through repair or replacement. This is because s 27 of the Act provides that a consumer can seek monetary damages relating to loss in the value of the goods from a manufacturer that fails to comply with a guarantee. However, if the manufacturer actually specifies that the remedies of repair or replacement will be available, the consumer can only seek monetary damages after having first asked for repair or replacement. Consumers will in either case be entitled to claim damages for foreseeable loss.

Accordingly, even if a manufacturer determines that there is no need to provide specific warranties (because the consumer is adequately protected by the Act), it will generally still be necessary for the manufacturer to expressly state that the remedies of repair and replacement are available if a good fails to comply with a guarantee under the Act. Otherwise, the consumer could reject any offer of repair or replacement and claim monetary damages instead. Advisers should therefore ensure that manufacturing clients are aware that

they need to specify where the remedies of repair or replacement will be available.

3 Obligations relating to guarantee as to title

There has been some concern expressed about the obligation imposed on suppliers in some circumstances to obtain written acknowledgment from consumers in relation to the issue of undisturbed possession. This obligation is contained in the guarantee as to title (s 5(1)(c)), where the supplier is obliged to guarantee:

5(1)(c) That the consumer has the right to undisturbed possession of the goods, except in so far as that right is varied pursuant to—

(i) A term of the agreement for supply in any case where that agreement is a hire purchase agreement within the meaning of the Hire Purchase Act 1971; or
(ii) A security, or a term of the agreement for supply, in respect of which the consumer has received—
  (A) Oral advice, acknowledged in writing as to the way in which the consumer's right to undisturbed possession of the goods could be affected, sufficient to enable a reasonable consumer to understand the general nature and effect of the variation . . .

However, it seems that the significance of the supplier's obligation to obtain written acknowledgment from the consumer as to oral advice provided in relation to undisturbed possession may have been misunderstood and over-stated during the period leading up to the enactment of the Act. In fact, the obligation to obtain such written acknowledgment does not generally arise in the course of retail sales. This is because retail sales will comprise either of the following:

- *Credit sales*, where the consumer's right to undisturbed possession of the goods is never affected, so that the requirement for oral advice on this matter and written acknowledgment of advice does not arise. Both possession and ownership pass immediately to the consumer, and the consumer is allowed time in which to pay a number of instalments. if the consumer defaults in payment, the supplier's only remedy is a personal action on the debt.
- *Hire purchase agreements within the meaning of the Hire Purchase Act 1971.* Since such agreements are expressly referred to in s 5(1)(c)(i), that section will apply instead of s 5(1)(c)(ii) so that the requirement to obtain written acknowledgment does not arise. Hire purchase agreements are defined in the Hire Purchase Act 1971 to include conditional purchase agreements made at retail under which the consumer is given immediate possession of the goods but it is agreed that property in the goods will remain in the supplier until all instalments of the purchase price have been paid and the vendor can, whenever the consumer defaults, repossess the goods. Accordingly, this very wide definition includes not only the situation where the purchase price is payable in instalments over time, but also where the purchase price is payable in full within a certain number of days following supply of the goods and the supplier reserves title in the goods until payment in full.

When does s 5(1)(c)(ii) apply?

The question arises as to when the obligation to obtain written acknowledgment from a consumer under s 5(1)(c)(ii) does in fact arise. The following situations come to mind:

- A conditional purchase agreement involving the supply of goods in trade otherwise than at retail where the consumer is given immediate possession of the goods but property in the goods remains in the supplier until all instalments of the purchase price have been paid. Where such an agreement does not take place at retail, it will not be a hire purchase agreement within the meaning of the Hire Purchase Act 1971 and will therefore fall outside s 5(1)(e)(i). Consequently, s 5(1)(c)(ii) will apply, along with the accompanying obligation to provide oral advice of how undisturbed possession may be affected and to obtain written acknowledgment of that advice.

  However, in practice the Act is unlikely to apply in this situation for two reasons. First, the rights of a "consumer" under the Act do not extend to persons acquiring goods for the purpose of resale in trade or for use in manufacturing or production. In other words, businesses will generally only have rights under the Act in relation to capital goods. Second, if this type of sale is made to a "consumer" otherwise than at retail, it will generally be in a business context. In this case, it will be possible to contract out of the obligation to obtain written acknowledgment from a consumer.
- Contracts relating to the hire or lease of goods will also be caught under s 5(1)(c)(ii), eg: the hire of a television set for a twelve month period. The guarantee of undisturbed possession confers such a right only for the period of hire or lease. If a lessor or hirer needs to be able to gain earlier access to goods than is provided for by way of standard termination of the rental or lease agreement, it would accordingly be necessary to provide oral advice of this and obtain written acknowledgment of having done so. The means that where a business makes goods available for hire, it would theoretically need to provide notice to its customers of any debentures or other securities over those goods, and the rights of repossession inherent in those securities.

Lawyers need to be aware of the very limited circumstances when a supplier is required to obtain written acknowledgment from a consumer in relation to undisturbed possession. It is likely that there will be considerable confusion about this at first.

Conclusion

It is important for lawyers to consider carefully the steps which businesses need to take to ensure compliance with the Act from 1 April 1994. One of the most difficult areas to address will be the basic question of determining whether or not the Act applies to any particular situation. lawyers can assist to mitigate potential problems in this area by advising clients to contract out of the Act where possible or, in the case of

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Leaving Their Lordships: The Commonwealth experience

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

Talk of New Zealand abolishing appeals to the Privy Council has increased in intensity recently. The cynical would attribute the greater interest of National Party politicians in the issue perhaps to the apparent success of Mr Paul Keating in Australia in his assault on the concept of Australia being a Monarchy. The background to this issue needs to be borne in mind. In this article Mr Maurice Kelly looks at the historical developments in respect of appeal to the Privy Council in Canada, Australia and Ireland and then in other countries that make up the modern Commonwealth. A further article by Mr Kelly looks at the proposed establishment of a New Zealand Privy Council.

The author wishes to thank the Librarian and staff of the Lionel Murphy Library, Commonwealth Attorney-General's Department, Canberra, for substantial assistance in the preparation of this article.

For a venerated Imperial icon, the Privy Council had a strangely chequered beginning. It started in England as the mediaeval Curia Regis, an instrument of the King's justice extending offshore to possessions such as the Channel Islands. Under the Early Stuarts, it spawned the notorious Star Chamber.

The ensuing execution was bungled. Liquidated as a political force, the Privy Council languished on through the Restoration and the Glorious Revolution to enjoy its own glorious revival as the ultimate tribunal of appeal for colonial Courts. The intimate association with the Crown ensured legal support for the jurisdiction as an exercise of the prerogative.

Lord Brougham's Act of 1833 and the companion Privy Council Act 1844 (Imp) put the appeal process in the hands of a Judicial Committee and thus on a professional footing. Before the century was out, it would be strenuously contested whether the statutes supplanted the prerogative or merely regulated its exercise. Notwithstanding that ambiguity, the modern Privy Council arrived on the scene at exactly the right time. With the expansion of the British Empire, its ambit and mana grew and grew.

Colonial New Zealand was included in the jurisdiction as a normal application of the Imperial system. Even in 1833, that percipient administrator James Stephen had noted signs of "nationalist reluctance" toward London surveillance of local legal systems, but that attitude was not much in evidence in the scattered settlements of this country. Modest population and professional resources suggested the wisdom of relying on a metropolitan institution embodying broad experience and great legal prestige.

Some decisions, unquestionably, were found disturbing. After *Wallis v Solicitor-General*, [1903] AC 173, Sir Robert Stout CJ orchestrated the celebrated Protest of Bench and Bar – on the basis of settler law which the Privy Council had just scorned and which is nowadays consigned to the scrapheap. That kind of restiveness was infrequent. In 1930, Sir Michael Myers CJ echoed widely held opinion in intoning:

> (The Privy Council) is, I consider, the finest tribunal in the world, the greatest of all tribunals. You receive from it the judgment of the finest minds in the Empire, and you know there is a freedom from the unconscious local bias which, sometimes, try as he will, the man in a small country cannot avoid.

Such attitudes eroded slowly in a climate of sham independence, colonial deference and Imperial fervour.

New Zealand acknowledgment of the parochialism and professional limitations of the local scene may well have been realistic and was certainly consistent with Imperial design. For a very long time, the British political vision was of an essential unity of Empire. From that standpoint, the increasing autonomy of the colonies was a calculated risk. Ultimate legal control would be a useful counter to the process and a powerful unifying influence. Precipitate legal liberation would provoke "waywardness" and

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manufacturers, to obtain an undertaking that suppliers will do this whenever possible.

It is possible that suppliers currently providing good products and after-sales service may already be complying with the implied guarantees contained in the Act. However, the Act has implications which extend well beyond liability under the implied guarantees, such as in the area of exclusion clauses, and the legislation cannot be dismissed therefore as simply an updated version of the Sale of Goods Act 1908. □

have implications for the objective of maintaining a basic authority over the whole of the overseas Empire. To political figures of the ilk of Joseph Chamberlain, archpriest of Imperial Federation, the indivisibility of common law, Crown and Empire ranked almost equally as articles of faith.

Bonds of Empire also generated very practical interests in the retention of judicial control from London. In lands such as Australia and New Zealand, the British connection dominated external trade. Key services such as shipping, banking and insurance were almost exclusively in British hands. The "new" lands looked to Great Britain for the investment capital on which development depended. In the legal aspects of the resultant relationships, there was a strong British interest in calling the tune. The Privy Council jurisdiction established a basic guarantee that legal business would be dealt with in accordance with familiar and trusted norms. In different settings such as India and Africa, the impact of the jurisdiction was more complex. It ensured that Anglocentric legal concepts would prevail and entrenched the supremacy of "settlers' law".

In most emergent territories, including New Zealand, the jurisdiction persisted without the necessity for fundamental review. In Canada and Australia, by contrast, the necessity was imposed by federation. In both cases, the process of review was disruptive and debate was vigorous, demonstrating the strength and maturity of a national vision. In both cases, the jurisdiction was continued in the new constitutional setting, but residues of regret remained. Both countries eventually left their Lordships with relief, albeit on good terms.

Canada

The Privy Council jurisdiction for Canada was established at the congruence of metropolitan pressure and local blunder. When federation occurred under the British North America Act 1867 (now Constitution Act 1867), a superior Court was not directly entrenched in federal institutions. Section 101 of the Act did however give power to the Parliament of Canada to create a general Court of appeal and that step was taken in 1875. The majority intention (quite briskly contested) was that all decisions of the Supreme Court of Canada should be final and conclusive, without possibility of a Privy Council appeal. In London, the imminent extinction of this "last and most essential mode of exercising the authority of the Crown over its possessions abroad" caused great alarm. Disallowance of the Bill was threatened.

In the event, the Canadians tacked a fresh clause to the offending provision (s 47) expressed to save whatever had previously existed by way of *prerogative* appeal. Apparently they believed that the clause was a dead letter. The result was quite otherwise – to reinstate and support very broad rights of appeal. As Laskin CJ once put it, the Supreme Court of Canada was "left in the ambiguous position where it could not command appeals to it nor effectively control appeals from it".

The Supreme Court had no distinct constitutional role and was constrained by the paramount force of Imperial statutes. Appeals to London were not conditional upon its leave. The role of the Court was further prejudiced because the British North America Act had saved direct rights of appeal to the Privy Council which the Provinces had enjoyed as Imperial colonies. National self-assertion had been the main ground for misgivings in respect of the role of the Privy Council in relation to the Supreme Court. The hope was, in any event, that the very existence of the Court would contribute to the creation of a broader inter-provincial identity. Provincial particularism, notwithstanding, had very strong roots. The Supreme Court was greeted with suspicion and frequently bypassed by per saltum or direct appeals. In this way, the Privy Council became a permanent and prominent element in the intrinsic tension between the federation and its constituents.

In the eyes of the centralists, the Privy Council's role was so constituted as to drive a wedge into the Canadian legal system. When judgments began to impose a strong imprint on relations between Ottawa and the provinces, apprehensions became more specific. The legal connection with London was criticised as a new colonialism interfering in the natural evolution of Canadian life. In a line of cases from *Hodge v The Queen* [1883] 9 App Cas 117, the Privy Council set up (in relation to ss 91 and 92 of the Constitution) a federal principle of coordinate and separate sovereignties unwelcome to supporters of a strong centralised state. For more than two decades, Law Lords such as Lords Watson and Haldane resisted expansion of Ottawa's powers, and protected the particularism of the provinces, with constant vigour.

The "wicked stepfathers of Confederation" had a bad press in English Canada but were regarded differently elsewhere, particularly in Quebec. There the Privy Council tended to be seen not just as safeguarding the position of the provinces but also as a protection of minority rights. As in the New Zealand case of *Wallis*, also, long term appraisal tends to redress the effect of opinions given at the time. Early judicial interventions from London assisted Canada to a system less centralised than that of the United States or Australia which appears to suit the country quite well. Since the abolition of appeals, the Supreme Court of Canada has certainly permitted growth in federal power, but that may be no more than contemporary circumstances require. Privy Council formulas for identifying the federal-provincial balance largely remain in place and are probably described correctly as "irreversible".

Even when the federal balance was more or less settled, the Privy Council did not cease to be a public issue. Within the sphere of legislative capacity, Ottawa had always claimed the right to cut down the operation of the prerogative by legislation. As early as 1888, s 1025 of the federal Criminal Code presumed to bar criminal appeals to the Privy Council. Very belatedly, in *Nadan v R* [1926] AC 482, the Privy Council considered that gesture of self-assertion. Because the Dominion was still subject to the Colonial Laws Validity Act 1865, the Parliament could not validly enact statutes in conflict with Imperial laws. Since the Privy Council jurisdiction was regulated by Imperial laws, the provision in question could not be upheld. For its operation, moreover, the provision would require to have extra-territorial effect – and that too was barred by the 1865 Act. The decision created a furore throughout the Dominion and is usually

regarded as the main catalyst for decisions on Dominion autonomy at the 1926 Imperial Conference, as embodied in the Balfour Declaration.

Following these decisions, the obstacle of the 1865 Act was removed by the Statute of Westminster 1932. The offending abolition provision was re-enacted, now as s 17 of the Criminal Code, and again subjected to the scrutiny of their Lordships. In *British Coal Corporation v R* [1935] AC 500, it was not doubted that after the Statute of Westminster the only limitation on an Act of the Canadian Parliament that was within federal power was any flowing from its provisions.But s 17 purported to extend to all criminal cases, even those arising from provincial legislation. Did federal power extend so far? By necessary intendment, the Privy Council held, s 91 of the British North America Act had invested the Canadian Parliament with power to regulate or prohibit appeals in criminal matters. The abolition first contrived in 1888 was accordingly upheld.

Public attention was again directed on the Privy Council nexus in the 1930s in what was not quite a replay of Roosevelt's collision with the Supreme Court of the United States. New Deal type legislation relating to marketing boards was first upheld by the Canadian Supreme Court and then struck down by the Privy Council. Other interventionist and social legislation was declared ultra vires by both Courts. As had happened in the aftermath of *Nadan*, Canadians reacted emotionally in face of judicial frustration of the popular will. The role of their own Court, however, was rather brushed aside; the Privy Council became the scapegoat. The allegation was that the inarticulate premises of the English Judges amounted to an ideological agenda. The episode strengthened the hand of the abolitionists.

Canadian attitudes were also revealed in debates at Imperial Conferences on the question of replacing the Privy Council by an Imperial Court of Appeal. Chamberlain had dangled that prospect before the Australians as an inducement to their acceptance of the Privy Council jurisdiction at the time of Australian federation in 1901. To the embarrassment of the British (who had no intention of fusing the House of Lords into such a forum), the Australians took up the idea with enthusiasm, raised it persistently (at the Conferences of 1901, 1907, 1911 and 1918) and supported it with considerable noise. The other Dominions temporised, and precisely under Canadian leadership. One issue was a reluctance to trust their appeals to a new bench that would include "elsewhere" Judges. The greater fear was that such a Court would tend to impose uniformity when the movement Canadians perceived and welcomed was toward localisation of adjudication and individuality of legal procedures and norms.

By 1939, the federal consensus was that all Privy Council appeals should be terminated. A Bill to that effect was introduced in the Parliament, but without the concurrence of the Provinces. Some powers inhered in the Provinces to regulate their Privy Council appeals – Quebec and Ontario, for example, acted on appeals as of right by invoking the Constitutional Act 1791. But it was quite another question whether direct appeals from their jurisdictions (as well as those in the federal sphere) could be swept away by unilateral federal action. Proceedings in the Parliament were adjourned to enable Supreme Court consideration by way of reference. Did the Parliament have the legislative competence to enact the Bill?

In the view of the Provinces, direct appeals related solely to the "administration of justice in a province", a matter solely within their powers under s 92 of the Constitution and therefore beyond federal competence. By majority, the Supreme Court did not accept that submission. Section 101 of the Constitution provided specifically for appellate jurisdiction and must be given its full, and therefore prior, effect. That implied the power to make the Supreme Court ultimate and to deny appellate jurisdiction to any other Court.

In principle, the dispute now moved to the Privy Council by way of appeal, but the hearing was postponed until the conclusion of World War II. It is of interest that the United Kingdom Attorney-General took no part. *Attorney-General for Ontario v Attorney-General for Canada (Privy Council Appeals)* [1947] AC 127 was argued solely in relation to the distribution of federal power. As for the reference, the fundamental constitutional question was which of ss 92 and 101 should be read down in favour of the other. In relation to the problem in hand, their Lordships pointed out, it was a question beyond contemplation when the British North America Act was passed.

The specification of provincial powers, it was again held, could not detract from s 101. In so far as the matter was one of construction, it should be borne in mind that an organic statute was in question – to which a flexible interpretation must be given as changing circumstances require. But the matter was not just one of construction. The jurisdiction was an attribute of sovereign power and a prime element in Canadian sovereignty. It would be inconsistent with the Statute of Westminster to concede anything less than "the widest plenitude of power" to the Dominion Legislature. On that basis, an abolition Bill was enacted in 1949. The last Canadian case to reach the Privy Council was not determined until 1959.

Australia

The Australian Federation was another reluctant starter. In the circumstances of the colonisation of the country, diversity of opinion on the Privy Council connection is not surprising. In 1871, a Victorian Royal Commission suggested the formation of a Court of final appeal for the Australian colonies and New Zealand. The Inter-Colonial Conference of 1881 actually approved a draft Bill in those terms. Nothing came of it, but the spotlight rested on the prospective role of the Privy Council throughout the 1890s during the discussions on federation.

Alfred Deakin once suggested that Australian support was limited to "the conservative classes, the legal profession and all people of wealth". The lawyers, in fact, were far from solid. In *Viro v The Queen* (1978) 141 CLR 88 at 160, Murphy J recalled some of the evidence:

> Before Federation, the founding fathers realized the disadvantages of having an ultimate tribunal whose members were not acquainted with the circumstances under which Australian laws were passed and applied, and wanted to replace the Privy Council with a federal Supreme Court . . . . Several who later became Justices of this Court (Edmond Barton, Australia's first Prime Minister, Isaac Isaacs who also became Chief Justice and Governor-General and Senator O'Connor) made no secret in the debates on the Bill to establish the High Court of their lack of confidence in the Privy Council's handling of Australian cases.
>
> Barton complained that the appeal to the Privy Council was forced upon the Australian people by the British authorities and was accepted by the Australian negotiators only as the price that had to be paid to prevent more drastic amendments of the Constitution. He then said, "If I had my own way I would have no appeals to the Privy Council". Senator O'Connor described the Privy Council as "altogether an unsuitable body to interpret our Constitution". Isaac Isaacs said, "I do not hesitate to say that the Privy Council is not a Court in which we can place the fullest reliance in regard to the interpretation of our laws".

Acceptance of the jurisdiction by the Commonwealth had tortured antecedents. Abolition was apparently favoured by the most eminent practising lawyers at the Constitutional Convention (Atkinson for New Zealand was against abolition — the New Zealanders were apt to suppose, someone noted, that loyalty was involved in the matter). The first drafts of the Constitution retained an appeal from the High Court but not from State Courts and only where the "public interests of the Commonwealth or of any State, or any other part of the Queen's dominions, are concerned". That foreshadowed constitutional appeals but seemed to shut out access to London in matters of private law.

A few British officials were sympathetic but Colonial Secretary Joseph Chamberlain emphatically was not. Neither, in Australia, were the conservative groups identified by Deakin. A lusty campaign for keeping the Privy Council was orchestrated. An Australasian National League formed for the purpose trumpeted the harm that would fall upon business and investment if abolition came to pass. State Judges contributed. Many were comfortably encrusted in the colonial paradigm and more than a mite jealous of prospective encroachments on their bailiwick by the High Court. Led by Sir Samuel Way of South Australia, a number lobbied London with "unrepentant vigour".

For various reasons, including the protests, the founding fathers now reversed the original position. Constitutional matters were to be reserved for the High Court but private rights might be determined in London. For State appeals, a choice of forum principle would operate. Chamberlain's initial treatment of this text disclosed unflattering assumptions as to the relationships between London and the colonists. The relevant provision was — quite simply — deleted. Privy Council appeals would be dealt with only by a very broad saving provision in the covering clauses to the Constitution. Both camps canvassed support frenetically until the Colonial Secretary offered a compromise.

In the result, State rights would be unaffected, parties in private law matters would have an open channel to London and a limited range of constitutional issues involving *inter se* questions (disputes between the Commonwealth and a State or between States) would be reserved for the High Court. The concession was made that the Commonwealth Parliament might alter the scope of the jurisdiction. Apparently the leaders of the Constitutional Convention had decided that State appeals should be brought within any such provision, but the pressures were presumably too strong. After ten years at the anvil, it could scarcely have been welcome to the Australians that the appeal provision of their Constitution (s 74) was drafted in the Colonial Office.

The Australian relationship with the Privy Council was not always easy. Very early, there was a sharp conflict in constitutional cases. That happened because the Privy Council was taking direct appeals from States in matters the High Court took to be reserved to itself because inter se questions were involved. A 1907 amendment of the Judiciary Act resolved the conflict by shutting out direct appeals in all constitutional cases.

Inter se cases could still go to London if the High Court certified assent. That pathway was opened in the *Royal Commissioners* case (1912) 15 CLR 182; (1914) 17 CLR 644. During the Imperial War Conference of 1918, Prime Minister W M Hughes caustically epitomised the consequence:

> (the case) must have caused great embarrassment and confusion if it were not for the fortunate fact that the reasons for the Judicial Committee's decision are stated in such a way that no court and no counsel in Australia has yet been able to find out what they are.

Later commentators have endorsed the criticism. The Privy Council order did not even answer the specific questions certified for appeal. The High Court was not tempted to repeat the experience and the procedure became a dead letter.

Political factors coloured attitudes. From time to time, a State or the federal Government would look to the Privy Council as a refuge from the High Court. In the post-war climate of the 1940s, a Labor administration might have been expected to abolish the jurisdiction. H V Evatt courted it, in the recognition that the "strict and complete legalism" and conservatism of the High Court now contrasted with a socially innovative activism spreading from British politics into the orientation of the Law Lords. In the *Bank Nationalisation* case 1949) 79 CLR 497; [1950] AC 235 he tried to get the matter decided by the Privy Council. The attempt ultimately failed on technical grounds, though a Board of seven Judges did embark on a hearing and two of them died while it was in progress.

States too attempted to lean on the jurisdiction. Premier Bjelke-Petersen of Queensland whipped up fellow Premiers and purported to mobilise the Privy Council in the

cause of States' rights in the 1970s. The Appeals and Special Reference Act 1973 (Qld) provided that the Supreme Court of the State could invoke the Privy Council by giving a certificate on any matter under Queensland law. The procedure was to extend to advisory opinions. Its validity could be determined, however, only by the High Court. In *Commonwealth v Queensland* (1975) 134 CLR 298, unsurprisingly, the High Court declared the legislation to be invalid.

As the status of the High Court grew, it came to be thought of as more or less coordinate with the Privy Council. That, in the warning once given by Dixon CJ, might have produced "an antinomy inadmissible in any coherent system of law".

Formal subordination continued, but conflicts in respect of legal doctrine and dilemmas in the application of precedent did occur. The basic point was, as Gibbs CJ would put it in *Viro*, that the High Court Judges saw it as the role of *their* Court "to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment".

In respect of precedent, the initial position was excessively colonial. As well as the Privy Council, the High Court followed the House of Lords (until 1963) and even (until 1948) the English Court of Appeal. Sir Garfield Barwick CJ quickened the pace of nationalism. In *Skelton v Collins* (1966) 115 CLR 94, the High Court declared its judgments to be binding on all Australian Courts except in the case of a later Privy Council decision directly in conflict. The "multiple effect" of Privy Council decisions in other jurisdictions was not disclaimed. That may be thought surprising in view of the struggle toward judicial autonomy waged by the High Court in the 1960s and punctuated by collisions such as *Parker v The Queen* (1963) 111 CLR 610 and *Quinlan* [1964] AC 1054.

Federal inclinations to leave their Lordships faced the difficulty that Canberra apparently had no power to legislate unilaterally for direct State appeals – and States tended to regard the Privy Council as a protective mechanism. Further, a State which might be minded to do so could not shed the jurisdiction in its own right. In contrast with the position for the Canadian Provinces, the Australians had declined extension of the Statute of Westminster to the States. The Colonial Laws Validity Act still constrained them, and with it the Imperial Acts entrenching direct Privy Council appeals. For such reasons, abolition occurred in stages.

The first large step was the Privy Council (Limitation of Appeals) Act 1968 (Cth), which restricted appeals to London from the High Court to non-federal disputes coming through State Courts. The Privy Council itself upheld the Act as fitting the constitutional description of "limitation". In the early 1970s, the Whitlam administration tried to step up the pace by introducing a Bill to abolish all Privy Council appeals. Despite near unanimity in the debates on the principle of abolition, the Opposition brought the Bill down in the Senate.

There was much doubt in any case whether the Bill was within constitutional power. The Government retreated to safer ground. The Privy Council (Appeals from the High Court) Act 1975 abolished all appeals from the High Court. The Act was challenged in the Court and upheld, but uncertainties emerged. Was a party precluded from applying to the Privy Council where the High Court had only refused leave to appeal to itself? Were general issues tacked to a federal case still appealable to the Privy Council? What was to happen where (eg, in relation to damages) one party appealed to the Privy Council and the other to the High Court?

In respect of litigation, one of the implications was Gilbertian. The States still had the choice of forum in non-federal matters, but whichever choice was taken was now final. Since differences of perception existed as between the two ultimate tribunals, it could pay a litigant to lose to begin with in order to secure the choice of forum for the last round. The concept of "taking a dive" was not an apt recipe for the orderly disposition of Court lists.

The new situation also created profound dilemmas for precedent. As in the New Zealand jurisidiction, the Privy Council helped by relaxing the tradition of the unity and uniformity of the common law. Much more important, the High Court announced in *Viro v The Queen* that it would no longer be bound by the Privy Council. As Stephen and Aickin JJ acknowledged in that case, however, such a statement could not resolve the dilemma of States in case of a conflict of authority – despite imprecations by other Judges that High Court decisions in the ascertainment of Australian law "might well be regarded by their Lordships as compelling".

The trouble was that precedent is not to be equated with binding rules of law. In *Waind's* case [1978] 1 NSWLR 466, the Supreme Court of New South Wales took the view that the Privy Council should decline to differ from the High Court, but also acknowledged that the Supreme Court must resolve its own dilemmas. That led to a Practice Rule that the High Court should be followed in case of conflict. Moreover, no case could be envisaged which (in terms of the governing Order in Council) "ought" to go to London rather than to the High Court. On that basis, special leave would no longer be granted.

These complications served to confirm that an intermediate position was unsustainable. Australia had to go the whole hog. The Premiers' Conference of 1982 agreed unanimously on that point. In the Australia Act 1986 which followed, the last legal vestiges of the colonial past may be said to have been removed. London surrendered the power to legislate for Australia, the States were unshackled from the Colonial Laws Validity Act and the right of States to appeal to the Privy Council was terminated. Since doubts existed as to Australia's independent legislative capacity in the matter, and the position of the prerogative, parallel United Kingdom and Australian legislation was enacted and Her Majesty proclaimed the package in Canberra.

The implementation of this "piecemeal" abolition was as tidy as the circumstances allowed. With the 1968 and 1975 Acts, long-range warning of specific content was not possible. Some litigants would have had a legitimate expectation of a contingent Privy Council appeal. That suggested some latitude in the interests of fairness. In any event, quite a substantial Privy Council jurisdiction remained; there was not much point in forcing the pace. In both cases also, constitutional challenge was envisaged – there was merit in having that disposed

of before all the cases came through. Accordingly, the relevant appeal remained open for any "proceeding commenced in a Court before the commencement of the Act". The last "1968" appeal was determined in 1971 and the last "1975" appeal was heard and allowed in 1981.

The clear statement of intention in 1982 created a different situation for 1986. That total abolition was being effected strengthened the case for tidying up promptly. Under the formula adopted, "1986" cases could go to the Privy Council only if the appeal was instituted or application made or petition presented before the commencement of the Act. On 27 July 1987, the Privy Council dismissed an appeal from the Court of Appeal of New South Wales in *Austin v Keele* (1987) 72 ALR 579. That inconspicuous property dispute was the last Australian case heard by the Privy Council.

Two "old" Dominions

Ireland looked back in anger. Anger characterised the Irish struggle for Home Rule. Once the Irish Free State was established in 1922, the severance of the remaining constitutional links with Great Britain was a popular and emotional cause. Much more than in the other jurisdictions, the Privy Council connection was always in the forefront of political issues.

The Irish were locked to the jurisdiction in face of vehement protest at the time of political separation. Under the guise of applying a standard model, the British imposed under the 1921 Treaty which constituted the Free State the broadest appeal regime operating in any of the advanced territories of the Empire – the model Canada had created by mistake. As in New Zealand before the Statute of Westminster, moreover, the Irish Government had no power to restrict or abolish the regime except by way of an Imperial Act. To inherit such a position as a matter of historical development was one thing; it was quite another, in the Irish view, to be compelled to it by a contemporary treaty settlement for a sovereign state. That outcome illustrated that the British were not disposed to concede regular Dominion status to Ireland and that Anglo-Irish relations were still poisoned by the past.

For a long time, there had been speculation on the right of a Dominion to abolish Privy Council appeals. Most authorities were prepared to support it, on condition that the legalities were observed. What the legalities demanded was a moot point, especially in the federal states. Some Canadians and Australians held the view that withdrawal was not possible unless every Province or State (respectively) concurred. Among the New Zealanders, Sir Francis Bell took the rather quixotic position that agreement of all other Dominions would be necessary. The Irish Free State was less than ideal as the bellwether of departure – bustling to liberation in an atmosphere of acrimony. On the British side, also, legal argument scarcely masked an unrelenting political determination to maintain the unity of Empire.

Like the Australians, the Irish were able to make capital from episodes of error in the Judicial Committee's performance. In that respect, the *Transferred Civil Servants* case [1927] AC 674, a potentially explosive dispute in any event became notorious at the worst possible time. After the judgment, two very serious mistakes which ought to have been detected were exposed. In a gesture the *Times* called "paradoxical and almost without parallel", three of the Law Lords who had been involved in the hearing made public confessions of error. The farce did not end there. When the same issues were committed to the Privy Council in a second case, the original decision was affirmed: [1929] AC 242.

After an election victory which rested considerably on the Privy Council issue, de Valera at once pressed ahead with measures of abolition by way of an amendment of the Free State Constitution. The British (egged on by southern Unionists) challenged the validity of the legislation. The 1921 Treaty, it was argued, formed a contractual compact which the Irish could not unilaterally abrogate. The issues were elaborately discussed in *Moore v Attorney-General of the Irish Free State* [1935] AC 484. The fatal problem for the British was that the Irish Treaty had been promulgated as a Schedule to the Irish Free State Constitution Act 1922, an Imperial Act. Very recently, the Statute of Westminster had been enacted, applying expressly to the Free State and removing the constraints of the Colonial Laws Validity Act. The Free State's right to legislate in conflict with the Imperial Act that included the Treaty had to be upheld. But the legalities and Irish moral fervour did not seduce their Lordships into condoning what they considered to be a breach of faith. They concluded the judgment with a thinly veiled reproach.

Irish ruses contributed to their struggle for legal liberation. Before the 1926 Imperial Conference, they tried to mobilise nationalist feeling against the Privy Council jurisdiction, especially with an eye to the Canadian experience in *Nadan*. The jurisdiction, claimed the Irish, was "a standing insult to the competence of our Judiciary". That stance was too extreme for the other Dominions and the Irish found themselves isolated. After 1926, they supported fresh overtures for an Imperial Tribunal – simply because that would be the end of the Privy Council. During the Treaty negotiations, they had urged the adoption of a regime like that of South Africa as their preferred model. That model, embodied in s 106 of the South Africa Act 1909, allowed for appeals only by special leave from the Appellate Division of the Supreme Court and only in special circumstances. In the 40 years after 1909, only ten South African cases went on to London and none of them raised constitutional questions.

The unified South African jurisdiction had begun, in a sense, as a celebration of conquest by one of the white tribes. The other of those tribes consisted of a homogeneous society of European origin with a fairly advanced culture. The keystones of the society were the Lutheran religion, the Afrikaans language and Roman-Dutch law. That law, the uncodified law of Holland, had been retained after the conquest of the Cape from the Dutch in the course of the Napoleonic Wars. The background was thus quite different from that in most of the colonies and imposed restraints upon legal Imperialism. Notions of supremacy and of the benign civilising virtues of English law were not really applicable. After the Boer War, Roman-Dutch law continued as the foundation of the South African system.

An exotic European legal system thus coexisted with a British constitution and an appellate system expressly intent on unity of Imperial law. That raised the question of Privy Council fitness to adjudicate on the different intricacies and within the different spirit of Roman-Dutch law. The British greatly preferred that the question remain tacit; acknowledgment of any possibility of incapacity would have perilous implications for pretensions to legal authority throughout the sprawling diversity of Empire. But the second tribe sensed the problem and did not forget its origin in humiliation.

The South Africa Act empowered the Parliament to *limit* the matters on which the Privy Council might grant special leave. General Hertzog later claimed the Union had been given to understand when the Act was negotiated that no objections would be raised if South Africa wished to abolish the appeal. In 1928 he played down the issue and indicated that he would not wish to act for the time being. In the 1930s, Smuts would appear to have favoured abolition, but he considered the issue too dangerous to activate. It might very easily be exploited by the Nationalist Party to whip up sentiment against Empire-leaning moderates. Despite the Statute of Westminster and *Ndlwana v Hofmeyr* [1937] AD 229, moreover, it was not entirely clear whether the language of the South Africa Act should be construed as imposing difficulties for total abolition.

The more extreme Boer groups scorned such legal technicalities and strategies of moderation. In their eyes, the Privy Council never escaped the stigma of starting out as a sort of legal reparation for the Afrikaaners' attempted defence of their heritage. If ever the British-leaning ascendancy in South African politics was lost, the jurisdiction was doomed. That happened when the Nationalist Party of Dr Malan won office in 1948. South Africa abolished appeals to the Privy Council in 1950.

The multi-racial Commonwealth

In British opinion, at the apogee of Empire, British supremacy was an axiom of the international order. The axiom assumed the pre-eminent virtues of English law. Trade, the Gospel and the law all followed the flag. For many of the British, the greatest of these was the law.

With conscious altruism, that law was bestowed or imposed on the Empire as a key element in the civilising mission. By good fortune, its application also enhanced the material prospects of colonisation. These considerations fructified the vision of a world-wide legal order maintaining unity of structure and doctrine under the ultimate authority of the Privy Council.

Once the paradigm of assimilation was tempered by Lord Lugard's concept of indirect rule, however, it would have been inconsistent and unrealistic to base Imperial administration on a legal regime that was simply transplanted from Europe. Indigenous laws and customs could be given a useful and reassuring role. Eurocentric bias ensured that that role was not more than ancillary and never challenged the dominance of English law. In these matters, lesser breeds began precisely at the frontiers of European legal tradition.

After the Balfour Declaration of 1926, the Dominions (except for the Irish Free State) had some assurance that separation from the Privy Council would not be contested. Whatever political reservations remained, the Statute of Westminster brought the undertaking to legal realisation. But the Dominions were few. For the rest of the Empire, the Privy Council was not optional. As numerous colonies gained independence in the years that followed World War II, it was something of an irritation that the Statute of Westminster had never been applied to them. Legal questions had to be canvassed that were inappropriate to the realities of the new relationship. Some of those questions involved the role of the Privy Council. In the climate of Afro-Asian nationalism, newly independent states believed profoundly that judicial independence was not negotiable as an attribute of sovereignty.

National movements brought much of the New Commonwealth to independence. The process was not always a constitutional joyride. Lee Kuan Yew once said that he felt a bit out of it among the Prime Ministers of the new states because he had never done time in a British prison. Nehru, the first doyen of the group, had done 14 years. Leaders who had suffered in the struggle for independence could rise above resentment but tended to take no prisoners in perfecting independence. Even among the considerable number who were qualified in English law, that usually sealed the fate of the Privy Council jurisdiction.

Notwithstanding, attachment to the common past was still felt. The merits of some measure of legal conformity were acknowledged. The heritage of English law was still appreciated. Nehru himself was a firm admirer of the system and had counselled against Indian pressure to leave the Privy Council until the coming of swaraj. But in the event the sheer diversity of New Commonwealth states and systems overwhelmed impulses to commonality. When, belatedly, the British tried to turn the tide by offering (in 1965) a true Commonwealth Court of Appeal, the project at once foundered on a sense of the dignity of distinct legal identity, the facts of cultural incompatibility and the lack of a common ideology to hold a disparate membership together. Consistently with their variety, the nations of the New Commonwealth left the Privy Council by different doors.

There was no question of a stampede. Some new states had highly evolved legal institutions and a strong and numerous legal profession — as in the Indian sub-continent. Internal resources seemed quite sufficient for all purposes of adjudication. Except for the dubious benefit of having an external arbiter, there was no real ground for hesitation. Nationalism and pragmatism led to the same destination. As in the Old Commonwealth, large states tended to conclude that their interests would be best served by shifting for themselves. India left the jurisdiction in 1949 and Pakistan in 1950. When in both countries superior Courts became the ultimate tribunals, glowing tributes were paid to the work of the Privy Council.

Small jurisdictions were a contrast. A few were not very nationalistic and some had particularly close connections with the United Kingdom. The main question, however, was practical.

Would local resources be adequate to establish and maintain a Court structure fit to meet all the technical demands of the law and ensuring satisfactory justice? Would an external tribunal be desirable to offset contingent political and social pressures? The Privy Council was a useful and admirably cheap option (except for litigants) until resources could be assured. Some countries which would have disavowed that reasoning were also satisfied to bide their time.

One fundamental question was whether independence of itself severed the link. That was argued in *Ibralebbe v The Queen* [1964] AC 900 after the Chief Justice of Ceylon (now Sri Lanka) had held that, in consequence of independence, the Queen had given up prerogative rights including the right to make Orders in Council for Ceylon. The case was a criminal appeal (commonly regarded as falling under the prerogative) and the Ceylon judgment recalled that a Judicial Committee decision was in form a recommendation to the Sovereign for implementation by Order in Council.

The Privy Council was conciliatory but firm. There was nothing in the independence instruments to exclude the prerogative in relation to the Privy Council jurisdiction. Relevant statutory provisions, moreover, were not simply "relics of pre-independence days, which have been left stranded by time on the shores of the statute book" but should be taken to be continued as part of Ceylon law. That did not compromise independence, since the Parliament of Ceylon could restrict or exclude Privy Council appeals at any time.

Privy Council processes, likewise, were not repugnant to independent status. The opinion to the Queen was best regarded as the decision of a Court and the Order in Council was a legal judgment in everything but form. There was no analogy with an Order in Council having legislative or administrative effect. Further, the regime could not be regarded as an intrusion by a foreign power, since the outcome of a Privy Council hearing was a judicial order within the hierarchy of Ceylon Courts. The last proposition appeared especially fateful, depreciating venerable dogma on the unity of Imperial and common law. It fitted admirably with the facts of the New Commonwealth and the recent doctrine of divisibility of the Crown.

Far from taking umbrage at *Ibralebbe*, Ceylon was a prolific customer of the Privy Council throughout the 1960s. In some years, nearly one-third of all appeals were from that jurisdiction and a striking proportion of them made a real contribution to the law. Ceylon left the Privy Council in 1972.

Understandably, new states tended to give up Crown and Privy Council at the same time. Republican status was usually seen as incompatible with reliance on what (despite *Ibralebbe)* had the appearance of an external Court. Partly because flexible procedural arrangements were devised for the republics, abolition was not inescapable. Kenya and Malawi, for example, kept the connection for some years as republics. Since resort to the sovereign was excluded, their appeals went direct to the Privy Council. Malaysia worked out its own variant. Appeals were channelled to (and reported back to) the Head of State of Malaysia just as, formerly, they had been addressed to the Imperial sovereign.

As had happened in the Old Commonwealth, a sticky case could have far-reaching effects on local opinion. In the New Commonwealth, in fact, the impact could be fatal. The classical illustration is the heavily charged political dispute in *Adegbenro v Akintola* [1963] 3 WLR 63, which resulted in Nigerian legislation to redefine, with retroactive effect, the power of a governor to dismiss a Premier. Since that involved direct nullification of the Privy Council decision, it was a bad day for the rule of law. Nigeria hastened to exclude the jurisdiction in the same year.

More often and more subdued, dissatisfaction emerged as to the conceptual basis of decision. Did the Privy Council lack the feel for the constitutional setting of new states with written constitutions buttressed by Bills of Rights or similar individual protection? English law had never operated within that sort of framework. The Law Lords, some critics alleged, were not at home with that kind of law. The cases did provide good evidence that they were too slow off the mark in administrative law. To a limited extent, method appeared to be the culprit. An "austerity of tabulated legalism", it was suggested, was drawing the teeth of protected rights. Especially in countries where that kind of protection was rather desperately needed, civic leaders were more than once perturbed by what was characterised as timid and unimaginative decision-making that deferred excessively to the objectives of the executive. Some of the cases do seem temporising in situations where they might have been bolder, but their Lordships have protested they are not guilty. If assertion is enough, *Attorney-General of Trinidad and Tobago v Whiteman* [1991] 2 WLR 1200 is heartening:

> The language of the law falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are conceived for the protection of constitutional rights.

Justified or not, New Commonwealth reservations related less to legal technique than to the intuition that the framework of reference of the Judges involved a certain disability in respect of shaping decisions appropriate to the cultural aspirations and legal requirements of constituent countries. As the political contraction of Empire drew to a close and United Kingdom business linkage to much of the Commonwealth was attenuated, practical reasons for a common legal institution faded and the implications of divergent values became apparent. And a battered Britain, likely to find its future in the very different association of the Europeans, no longer commanded the international authority which might convince Afro-Asian states that it would be worth an apparent derogation of sovereignty to maintain the legal connection. By 1994 (counting Singapore as out), no substantial independent country of the New Commonwealth was still within the jurisdiction.

In the contemporary retreat from the Privy Council, no jurisdiction

has been lost by conquest. Quite an important one, nevertheless, is being ceded. Under the 1984 Sino-British Joint Declaration for Hong Kong, that colony will revert to being Chinese territory in 1997. The local English law system is to continue, but a Court of Final Appeal is to operate in place of the Privy Council. The legal arrangements for Hong Kong are a unique expedient for a uniquely complex juridical and practical situation. One particular feature of the Court structure that is envisaged is also unique. A bench otherwise made up of resident Hong Kong Judges is to be supplemented by distinguished Judges from other common law jurisdictions. Among all the countries which have abolished Privy Council appeals, Hong Kong alone will not look inward only for the new structure, but will constitute a superior Court retaining an international flavour.

Smaller Commonwealth members, thrown back upon local resources, face some difficulty in maintaining final Courts of credible authority. Some relevant countries, mired in political disaster, scarcely maintain credible legal systems at all. Departed federal states still generate conflicts between the components and the centre and possibly miss the services of a relatively impartial referee. In cultural settings that are so different, the depth of legal culture and refinement of style of the Law Lords will not foreseeably be replaced. But the law of a number of Commonwealth jurisdictions is perceptibly gaining in strength and assurance for the fact that they are now out on their own. For four decades already, the distinction of the Supreme Court of Canada has epitomised the possibilities of a post-colonial common law. Since the 1980s, the hugely successful creativity of the High Court of Australia has realised excitingly the prospects of legal liberation. In the advanced jurisdictions at least, the requiem for the Privy Council is not that it was not helpful, but that they might have done better by themselves. □

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Crime and the media

Popular culture has come a long way since Mrs Johnson urged her husband to withhold his confession [of murder in 1823] from the public because "they cannot relieve your poor soul". Nowadays, when we confess in public it is to fatten our purses, not to relieve our souls. We have created a thriving market for authentic stories, and we put a fat premium on any presentation of a criminal's own voice, whether that voice lies or tells the truth. Perhaps we relish the chance to judge the case for ourselves, or else we may prefer the experience of candor or exposure to anything so final as the truth.

Writers still collaborate with criminals and their executioners. A century and a half after Johnson's death, Truman Capote found himself waiting for two men to die so he could finish *In Cold Blood*. According to his biographer, Capote spent two agonizing years in "suspended animation" as he waited for the State of Kansas to provide the execution that would conclude the best-seller he knew he had written. But Capote's biographer also describes the puzzled and disappointed murderers, who watched as their friend the professional author became the professional author who had befriended their enemies. The executioner, finally, was Capote's most valuable collaborator.

Publishers are still devising ways to profit from representations of crime and death, even though some commentators believe that there are no taboos left to violate. The William Kennedy Smith rape trial was televised nationally, and the plaintiff's name was revealed in the newspapers; one popular "true-crime" television program broadcast a police videotape that showed an officer being murdered (the video camera mounted in the victim's patrol car was programmed to continue taping after the policeman had left the vehicle). Perhaps the last remaining forbidden subject is the filming of an actual execution, but that, too, may soon change: in April 1992 the American Civil Liberties Union arranged to tape the execution of a convicted murderer, Robert Alton Harris, in California. The ACLU wants to show the tape in order to demonstrate how revolting capital punishment is, how it violates the constitutional ban on "cruel and unusual punishment." But if the tape is aired, punishment will once again take place in public – that is, on television – and we will have to consider that medium's extraordinary potential for producing revenue. We will also have to face a much more disturbing question: will television make execution a form of entertainment?

Ann Fabian
The Yale Review
October 1993

Law and Liberty

In Asia they have always had great empires: . . . in Europe the natural division forms many nations of a moderate extent, in which the ruling by laws is not incompatible with the maintenance of the state. It is this which has formed a genius for liberty, that renders every part extremely difficult to be subdued and subjected by a foreign power.

Montesquieu

Economics and the law

By Dr C W Maughan, Senior Lecturer, Department of Agricultural Economics and Business, School of Applied and International Economics, Massey University.

This paper was presented to a Law and Economics discussion organised by the Department of Business Law at Massey University. The paper argues that economic efficiency cannot exist without the law, but that the law may be made more efficient by application of economics to the law. As a consequence the joint study of law and economics is essential. Such study needs to focus on property rights and the role of the state, contracts, legislation directly affecting economic agents, and the efficiency of the law. Such study is in its infancy in New Zealand and needs to learn from the developments in this field in the United States over the last 20-30 years.

The author thanks Professor Charles Rickett and Mr Bernard Robertson of the Department of Business Law at Massey University for their helpful comments.

I Introduction

Before 1960[1] economists in the United States were regarded by lawyers as little more than expert witnesses who could be called to give evidence in matters of economic litigation. Such litigation was defined in a very narrow manner to include principally the anti-trust and labour laws. From memory, and applying my comments only to New Zealand, I would have said that New Zealand lawyers had a similar view of economists while New Zealand economists had an equally narrow view of lawyers: they were people whom economists consulted when some action recommended by the economists – a change in taxation for instance – appeared to have legal implications.

However, beginning in the 1960s, perhaps earlier in Chicago, several universities in the United States began to argue that the formal behavioural model which lies at the heart of economics could be applied rigorously to the law, not only in matters pertaining to economics, but also in relation to legal disputes in general. Simultaneously economists such as Buchanan,[2] who were seeking a comprehensive theory of public expenditure were pushing economics further into what might be described as the "constitutional rules" of society. Hence they too were emphasising that the law and economics were intertwined not only by society's views on competition and the like, but on society's views of such issues as property rights and voluntary trading.

From these interests a series of literatures on the relationship between law and economics began to emerge and to grow rapidly. These literatures are now published in at least four journals dealing solely with law and economics (*International Review of Law and Economics, Journal of Law and Economics, Journal of Legal Studies, and Journal of Law, Economics, and Organization)* and in individual articles in the multitude of "purely" economic and "purely" legal journals with which economists and legal scholars are perhaps more familiar.

At least in the United States the effect of this interaction has been profound. Judges are as likely to attend seminars by economists, or even to be economists,[3] as they are to call economists as expert witnesses. Law schools employ economists: economics departments employ lawyers. Even the Supreme Court nearly acquired Bork, one of the most influential advocates of an economic rather than a legal approach to anti-trust legislation as one of its members. (Bork, R H, 1978: *The Anti-trust Paradox: A Policy at War with Itself,* New York : Basic Books.)

Here in New Zealand, sadly, we appear to be clinging to the notion that we have a uniqueness which entitles us to disregard such intellectual developments. I quote:

> Despite the common ancestry which both the New Zealand and Australian statutes derive from United States anti-trust statutes, caution has to be exhibited before adopting uncritically developments in law and economics from that country. Not only are there different statutory regimes, but there are vast differences in the markets. (*Fisher and Paykel Limited v Commerce Commission* (1990) 3 NZBCL 101,655 at p 101,677.)

Since I disagree with the notion that there are New Zealand markets which can or should differ from markets anywhere else in the world and since I disapprove of what looks suspiciously like xenophobia masquerading as caution, I thought it timely to review for lawyers some of the strands of thought which now go together to make the international discipline of law and economics. Space does not permit more than a very brief introduction to the literatures.

II Economic efficiency

Nelson[4] suggests that economists are advocates of efficiency, and, since I agree, I thought I might start by defining the concept of economic efficiency, and then show how it relates to the law. I shall argue that

efficiency cannot exist without the law, but that the law may be made more efficient by application of economics to the law.

Economic efficiency is a general welfare concept which derives from a behavioural model about resource allocation through voluntary exchange.

The exchange is assumed to start at a point where there is some fixed distribution of resources, and to take place under conditions of what the economist calls perfect competition.

Buyers and sellers are assumed to be motivated by a desire to maximise profit or utility, and, in pursuit of these goals, to bargain with each other until the marginal valuation of the buyer (the *price* the buyer will pay) equals the marginal valuation of the seller (the *marginal cost* of the good), at which point an exchange takes place. Exchange continues to take place until there are no more profitable exchanges to make.

In the long term both price and marginal cost will tend towards minimum average cost because of the competition, and if all markets (both input and output) operate in this fashion, *resources will be so disposed that no other disposition of the resources will benefit any one economic agent without disadvantaging another.* This latter concept is called *Pareto optimality* and may be thought of as a definition of economic efficiency.

Economists regard efficiency as desirable, partly because the outcome of efficiency (lots of different goods and services produced at least cost) appears to be universally desirable, and partly because it is almost impossible to devise any stronger welfare concept without resorting to value judgments.

III The legal base of economic efficiency

The concept of efficiency, which I have defined above, depends on the validity of the assumptions which underlie the economic model. There are five important underlying assumptions.

(a) that property rights are well defined
(b) that trade is voluntary and binding
(c) that prices are undistorted signals
(d) that there is perfect competition
(e) that people are rational and react to incentives.

As I hope to show, all of these assumptions make it inevitable that the law and economics are closely interlinked.

I shall look at each in turn.

A Well defined property rights

There is a basic presumption behind the economic model that producers and consumers have clearly defined rights to resources and final products. They own or can lease the resources and products, they can use them as they see fit, and they can dispose of them as they wish. Such freedom is essential to voluntary exchange, and hence to efficiency.

This presumption is not always valid. Some rights have to be *proscribed* because the ethics of a society so dictate. Some rights have to be *qualified* since their exercise affects non-consenting third parties. Other rights are *not defined* (the rights to air or to the open ocean for instance). Yet other rights are *jointly held* by many people (common property) and are difficult to use in an efficient manner. Yet others are *difficult to defend*, for instance the rights to fugitive property such as pelagic fish, or the rights to what the economist calls public goods (I shall define these shortly). Yet others are the subject of *historical disputes.*

The economist must therefore address the very basic question of how to apply efficiency criteria to the process of creating, distributing and qualifying property rights.

In pursuit of an answer writers such as Buchanan,[5] Bowen,[6] and Wicksell[7] have moved into an examination of the efficiency of the process by which governments are selected and constitutions are made, while writers such as Nozick[8] and Rawls[9] have examined even deeper questions of the welfare concepts on which constitutions and governments might be based. In doing so they have taken economics into the heart of constitutional law, public law, and jurisprudence. Events in Eastern Europe, Russia and elsewhere, where the dominant issue is property rights, suggest that this may be the most important area of joint concern for economics and the law in the next two to three decades.

Hernando de Soto for instance, a Peruvian economist, predicts that "the countries in Latin America and elsewhere" . . . (which will succeed) . . . "will be those that spend their energies ensuring that property rights are widespread and protected by law, rather than those that continue to focus on macro-economic policy." (de Soto, H, 1993: "The Missing Ingredient, in The Future Surveyed." *Supplement to the Economist* Sept 11-17.)

B Voluntary and binding exchange

The second precondition for efficiency is that there be voluntary and binding exchange. Without voluntary exchange there can be no assurance that price and marginal cost are equal, and without a binding exchange there can be no assurance that one party will not renege on the deal.

Binding exchange takes us into the second area of common concern — contracts — while voluntary exchange, as we shall see, returns us to constitutional law and jurisprudence.

B1 Binding exchange

All exchanges involve an implicit or explicit contract of some sort and hence have a legal as well as an economic basis. However, more importantly, the modern theory of the firm as developed by Coase[10] and Williamson [11] emphasises the role of contracts and in-firm coordination as mechanisms for reducing transaction costs and improving governance structures. Hence the idea of economic (and legal) contracts is essential to intra-firm as well as inter-firm analysis. The implications of this approach affect not only contract law but company law and anti-trust law, since growth of the firm within the marketing channel (vertical coordination) is now seen as an efficient response to costly transactions, rather than an attempt to monopolise distribution.

B2 Voluntary exchange

The binding nature of the exchange is however only part of the story. To be efficient the exchanges must be voluntary. Compulsory exchange needs to be avoided.

While it is clear that most people would agree that compulsory exchange through theft needs to be avoided (certainly a matter for law) it is by no means clear that compulsory exchange through government taxation can or should

be avoided – if only because someone has to deal with what the economist calls market failure.

Essentially, market failure relates to two areas in which property rights are difficult to defend. The first of these concerns public goods: the second, externalities. I need to explain both.

Public goods, to an economist, are goods which are jointly consumed in a non-rival manner by many people.

Television, for instance, is a public good in the sense that it is jointly consumed by many viewers – one person can watch *LA Law* or a million people can watch it; and the consumption is non-rival in the sense that no matter how many people watch, the product is not depleted by the act of viewing.

Note two points about this public good. First, the consumption of the product is difficult to monitor, and consequently viewers *can* free ride. Second, the non-depletability of the product allows extra viewers to be added at almost zero cost once transmission takes place. Hence viewers feel *entitled* to free ride.

As a consequence, producers will only provide public goods if they can find a way of dealing with the free-rider problem. Basically they do this by using compulsion (payment through taxation), by using exclusion (user pays: non-user is excluded), or by divorcing the collection of revenue from the provision of the good (eg use of advertising on TV).

Unfortunately compulsion is inefficient in that it negates the important concept of voluntary exchange; user pays is also inefficient in that it excludes some people who could be included at almost zero cost, and to whom there would be some benefit greater than zero; and divorce of revenue and service is also inefficient in that the price of the good is not connected to the marginal valuation the purchaser might place on the good.

Hence the market is said to fail where public goods are involved.

Similarly the market is said to fail when the exercise of one person's property rights affects the rights of a non-consenting third party, or, in the economist's jargon, when external costs (or benefits) are created for the third party. Here goods are either produced too cheaply (external costs created and not paid for) or too expensively (external benefits created and not paid for). Pollution is an obvious example of an external cost.

Historically we have tended to respond to both types of market failure by passing the problem to government, presumably on the rather dubious assumption that since government is the source of all property rights, it is the appropriate agency to deal with all or any issues connected with the failure of property rights.

As a consequence government has become ever more involved not only in defining, allocating, and regulating property rights but in directly providing a huge range of goods and services which are claimed to be "public" – including law and order.

Modern public finance and public choice theory now questions the simplistic assumption that market failure will necessarily be ameliorated by government intervention and much of the present world wide debate on the reduction of government deficits, on the rationalisation of government provided services, on deregulation and on privatisation relates to attempts to improve efficiency by minimising compulsory government exchange. Coase's article on "The Problem of Social Cost", (1960) in *Journal of Law and Economics,* October, Stigler on "The Theory of Economic Regulation", in *Journal of Economics,* Vol 2, and again Buchanan (see fnn 2 and 5) and the constitutional writers are all required reading in this area.

Once again this leads us into the area of public law, constitutional law and jurisprudence. What should governments properly do? How should they be elected or appointed? Should there be a constitutional limit to the size of government? We need to address these issues.

C/D Price signals and competition

The third area of joint concern relates to the underlying assumptions on price signals and competition.

Efficiency requires that prices are not distorted, and that every market is competitive. Essentially this requirement means that all producers have to be price takers. They cannot act, to use the American phrase, "in restraint of trade" by restricting competition and causing artificial shortages.

Here, obviously, is the familiar area of competition laws which has been shared by economists and legal experts for many years.

This is not the place to discuss the numerous issues raised by competition law, but I need to draw your attention to the fact that modern industrial economics focuses not only on the need for pro-competition laws, but on an analysis of the many anti-competitive principles and judgments which have become embedded in allegedly pro-competitive legislation as a result of the capture of the law.

The work of writers such as Bork (see above) exemplifies this approach to competition legislation in the context of the US anti-trust laws. Essentially this approach argues that the laws were set up to defend the existence of numerous small competitors, rather than the principle of competition per se. Hence many early judgments promoted inefficiency by refusing to recognise that competition might lead to a reduced number of competitors but increased economies of scale and scope.

There is now a vast literature in this area on everything from vertical integration and mergers to intellectual property and counterfeiting. It is complemented by an equally vast literature in the related field of regulation of industry for various reasons such as health, safety and equity.

Again, this is a major area of joint concern for economists and lawyers which hardly seems tapped in New Zealand.

E Rational behaviour

The last assumption which underpins the economic model is that human beings are rational agents who can order their priorities coherently and who can make choices in response to incentives.

I am not a psychologist, and I shall not argue the case for rationality. Nevertheless it can be suggested that the model appears to be reasonably validated by experience. For instance, I can use the model to predict with confidence that some of the

outcomes of the Health and Safety in Employment Act 1992 will be:

- an increase in the income of those supplying safety equipment
- a decrease in the number of jobs where the costs of identifying risks exceed the benefits
- an increase in costs for most if not all businesses
- an increase in litigation on safety matters with some flow-on effect to lawyers' incomes
- a considerable increase to litigation if successful litigation leads to gains for the plaintiff.

Note that the benefits, which are touted around with little or no quantification, are far less predictable, and will I suspect be less than the costs.

Similar examples can be drawn from almost any branch of statute law, and consequently have led economists to consider a wide range of issues about the efficiency of the law. Prominent topics in this area are the economics of litigation, Gould;[12] the representativeness of litigation, Priest and Klein;[13] the comparative efficiency of statute and common law, Hayek;[14] rational choice and crime, Becker;[15] and a host of articles about specific laws.

This is the fourth major area for cooperation between the law and economics, and one in which statistical analysis can help elucidate anything from decision criteria to the pay-off matrices which are likely to exist in litigation under different systems of liabilities.

IV Summary and conclusion

In summary, any study of law and economics must focus on four areas.

(1) Property rights and the role of the State
(2) Contracts
(3) Legislation directly affecting economic agents
(4) The efficiency of the law

Of these I personally believe the most important to be property rights and the role of the State.

In New Zealand the focus appears to me, perhaps wrongly, to be almost entirely on (3) and even there public debate is either muted or confined to the personal invective which so often passes here for intellectual discussion. Were it not for the efforts of a few commentators[16] whom politicians tend to address collectively and erroneously as the "new right", there would be little or no informed public debate on such issues as the Producer Boards' legislation, and on mergers.

Discussion on the other three issues is to quote Jimmy Nail, "like sex in Gateshead – still in its infancy". (From the British television programme "Auf Wiedersehen Pet".) There is, to be sure, a public awareness of property rights issues related to the Treaty of Waitangi, and to conservation; and there is the referendum on the electoral process which will have been decided by the time this article is published, but there appears to be no awareness whatsoever that the central issues are not how we elect our governments or redress past grievances, but what we can legitimately and logically expect governments to do in the first place.

Similarly the key role of contracts in the economy is only discussed when a particular contract appears to either of the contracting parties or to a third party to be "unfair" in some way. The idea that there might be a theory of contracts which is related to optimisation in voluntary exchange never surfaces. (For a summary of the economic theory of contracts, see Maughan C W and Wright L, 1993, "An Application of Transaction Costs theory to the New Zealand Meat Industry", paper presented to the New Zealand Branch of the Australasian Agricultural Economics Association. (To be published in Proceedings.))

As for discussion on the efficiency of the law, while I do not know to what extent individual economists and legal experts are aware of the literature in this area, I observe that the application of the economic model to the law does not appear to be part of the syllabus in either law or economics faculties in New Zealand. As a result, if I asked students of either discipline the questions, "How much of law and order is a public good; how much a private good?" and, "How much of the public good part of law might be provided at least cost by government; how much by the private sector? I suspect I would get few if any informed replies.

I find these omissions in our intellectual training and in our public debates deplorable, and I would suggest that both of our professions need to redress our present deficiencies in these areas through changes in, or additions to, our formal training. We have much to learn from the United States experience. □

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Justice and our neighbour: An address to the Auckland District Law Society church service

By Hon Justice Smellie

On 2 February 1994 the annual Auckland District Law Society church service was held and in the course of the service an address was given by Justice Smellie. This address dealt largely with questions of equality as a matter of justice, and specifically with equality for women seen as our neighbours in both the biblical and Donaghue v Stevenson *sense.*

When the Council of the Auckland District Law Society asked me to undertake the responsibility of delivering this address I was filled with all the misgivings of one whose place is in the pew, not the pulpit. I was conscious also of the discerning congregation I would face. But in practice I regarded it as a professional duty to comply with requests from the Society if I could and I have tried since being on the Bench to adhere to that approach. So upon reflection, and despite my continuing reservations, I accepted.

Every lawyer acquainted with scripture will have been pointed to, or stumbled upon, some passage which to him or her at that time seemed particularly pertinent.

My first experience of this was when, freshly qualified, my landlady mildly castigated me at breakfast for working into the early hours of that morning. I confessed that despite the midnight oil burnt I was still, as the late Leonard Leary QC was wont to put it, "in agony of spirit" as to how to conduct the trial that was to start that day. She referred me to the first book of Kings, chapter 3, verse 9:

> Give therefore thy servant an understanding heart to judge thy people, that I may discern between good and bad.

It did not actually help me much on the day as I recall. But it has been my not infrequent petition since becoming a Judge.

Another for which I shall always be grateful, came upon my appointment, from the late John Towle. The prophet Micah, chapter 6, verse 8:

> What then doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God.

And however far short of that precept one constantly falls, it remains a touchstone of grace – a standard to strive for.

What then are the passages which are particularly relevant to the profession today – now – as we stand on the threshold of 1994?

I have chosen two.

The first is the Gospel reading for today which gives us the second great commandment – "Love your neighbour".

You are all, of course, familiar with both the parable Christ told, in response to the lawyer's question, to illustrate true neighbourliness and Lord Atkins' application of it in *Donaghue v Stevenson* [1932] AC 562 at 582.

But have you perceived the close relationship, indeed overlap, between love in the New Testament sense and justice in the 20th century sense. Sir Gerard Brennan (the Hon Sir Gerard Brennan AC, KBE) of the High Court of Australia, put it this way in an address given on 28 January 1992 at the Ecumenical Service in Canberra to mark the commencement of the legal year:

> The radical Christian command to love my neighbour is broken unless I first do what I can to see that justice is done to that neighbour.

And he adds a little later, after giving some examples of the many professional neighbours a practising lawyer inevitably comes into contact with:

> Declarations of solidarity with or sympathy for a neighbour who suffers an injustice are no substitute for, or solvent of, the duty to do whatever lies reasonably within our power to see that justice is done according to law. ("The Christian Lawyer", *Australian Law Journal*, Vol 66, p 259, at 260, May 1992).

The other text is from Paul's letter to the Galatians, chapter 3, verse 28:

> There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus.

Here the Apostle speaks, (like the Prophet Isaiah in the first lesson), of the universality of God's love and justice. Neither ethnic origin, status or gender are relevant. All are equally precious, to be valued, respected, treated justly and loved.

That truth, once grasped, can be seen as the driving force behind such exemplifications of fundamental humanity as the abolition of slavery, the introduction of universal suffrage, and at this very moment, the demise of apartheid in South Africa.

I pause here to acknowledge that not everyone would see Paul as an agent for change – especially in respect of women. Her Honour Judge Cecile Rushton, delivering a paper at

the Commonwealth Law Conference in Cyprus last May, contended broadly that religion has been an impediment to the realisation of women's rights. Of Christianity she said:

> Christianity, based on Judaism overlaid with the teachings of Christ, has been depicted as softening the stricter Jewish teaching relating to women. Christ included women in his retinue and they are mentioned positively in the Gospels. Then came the commentator and interpreter of those teachings: St Paul. Paul's teachings have been used as the basis for much of the anti-female bias within the Christian ... Church. (*The Commonwealth Lawyer*, Vol 5, No 2, October 1993, p 57 at 61)

I think perhaps there is room for a more generous view of Paul. Of course you can find in his letters plenty to challenge, but it has always seemed to me that reading scripture is somewhat like studying a body of case law. You strive to divine, if you can, the true principle that emerges from it.

Here in this passage from Galatians we find a first century man — Pharisee and Roman citizen — advancing notions of equality which were radical in the extreme for the society in which he lived, and are still, as the 20th century draws to a close, ahead of their time in terms of full acceptance and actual implementation.

But why are these two passages particularly relevant for us at this time?

To a greater or lesser extent you are all aware of the matter I am about to raise with you. The evidence has mounted steadily over the last decade or more throughout the Common Law world, until there is now no longer room for argument, that women practitioners are discriminated against in almost every facet of our profession.

If you want a punchy, passionate and informed exposition, read Helena Kennedy, QC's book, *Eve was Framed*, subtitled *Women and British Justice*. But you will find the hard cold data in various papers published by your own Society and the national body (eg *Law Talk*, October 1993 issue), and by the Law Society of NSW, and above all, in the August 1993 "Report on Gender Equality in the Legal Profession", prepared for the Canadian Bar Association over a period of two years by a Task Force chaired by Madam Justice Bertha Wilson, formerly of the Supreme Court of Canada. I quote from the Overview Pamphlet made available at the time the report was released:

> The Report's findings paint a negative, at times bleak picture of a legal profession that regularly discriminates against women in both direct and indirect ways:
>
> - women are hired reluctantly
> - women have restricted professional opportunities
> - women are less likely to be promoted or attain partnership
> - women earn less than their male counterparts
> - the profession seldom accommodates the special needs of women with children
> - lack of accommodation results in a further reduction of career opportunities and loss of income
> - women are sexually harassed
> - women from historically disadvantaged groups (Women of Colour, Aboriginal women, lesbians and women with disabilities) face more severe forms of discrimination.

And a little later, dealing with private practice:

> Too often the dynamics of the traditional law firm are hostile to women, particularly women with child-rearing responsibilities. As a result, women are leaving the profession at a rate up to 50% higher than men. Client development activities, evaluation methods, law firm culture, billing hour targets and inflexible working arrangements all act to exclude women.

Those comments are mirrored in Judith Potter's Editorial in the October 93 *Law Talk* earlier mentioned — expressing great concern for the profession as a whole and imploring readers to think about the issues and recognise them as directly relevant for all of us, the President said:

> Yet recent statistics show that as many women leave the profession each year as enter it, and despite the fact that for several years now over 50% of law graduates have been women, only about 20% of the practising profession are women. And women are under represented as Judges, Partners, on Law Society Councils, and in other positions of influence where critical decisions for the future are being taken. (*Law Talk* 502, p 1, October 1993)

And my researches suggest that the picture is the same in all Commonwealth jurisdictions.

So talking as I am to a predominantly male group. I suggest that here in our midst are neighbours in respect of whom the "radical Christian command" as Sir Gerard put it, has been broken. And it is time for male lawyers (and Judges). especially those who profess themselves Christian, to do what we can to eliminate discrimination.

We are called in this, as in all aspects of life, to be the leaven in the loaf. Thus it behoves us to find the time and energy to read the reports and the literature and to *listen* to women practitioners. Delivering the Frank Guest Memorial Lecture at Otago University last year, my colleague, Justice Cartwright said:

> It is still clear that women are fighting for survival in the legal profession. We can no longer rely on the fact that women are entering the law faculties in large numbers, and generally graduating with greater distinction than their male colleagues, to transform the face of the legal profession over the next decade.

And your President, Peter Salmon, QC, said also last year, that a sea change in the cultural attitude of male members of the profession is required.

Our place as Christian lawyers is in the van of that change.

I want to conclude by placing before you the final paragraphs under the heading "The Challenge" of Madam Justice Wilson's introduction to the Canadian Bar Association Task Force Report. They were written of necessity in a secular context. Nonetheless I see what she had to say as a flowering of justice within a legal system which, to quote Sir Gerard

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Some reflections on the first Women Judges' Conference held in New Zealand

By Judge Anthony Willy

As I peeled the potatoes and dissected the carrots for tonight's dinner party (having not long finished the ironing), my mind ran along the events of the past week encompassing as it did the first meeting of women Judges ever held outside of the United States of America. Present were 62 Judges from 26 countries accompanied by a number of women legal luminaries. By a happy combination of a sympathetic executive Judge and my natural curiosity to learn what it was women Judges would talk about when unburdened by large numbers of male colleagues I was able to attend on two of the four days. Because I have nowhere seen any published report of any detail of the conference, I thought I should record some of my personal, albeit limited reflections.

My day one was rather onerous and required a good deal more self control and sacrifice. The sessions were held at the Wellington Golf Club, and I am sad to report that even as I write the male spouse of a Danish woman Judge is winging his way back to Copenhagen with $5 of my hard earned New Zealand coin, no doubt to display triumphantly in the boardroom of his multi-national accountancy firm. A 30 handicap in Denmark is a vastly inflated affair as said spouse reeled off a succession of pars and one overs. The experience was the more galling because in my last association with Copenhagen Danes one of them (or possibly some invitee to that beautiful city) stole most of the luggage of myself and family. Very persistent stuff that Viking blood, but I have this one's card and look forward to the revenge of the Anglo-Saxons.

My day two (the last day of the conference) was a much more relaxed affair, attended by a smattering of male Judges and lawyers. In the morning we heard a number of papers on violent crime against women. The session began with Helena Kennedy QC. She had given the before dinner speech on Wednesday evening (they did it at the lunch on Friday – I hope it does not catch on, it is very distracting watching the prawns going off while trying to take in the speech). At the conclusion of Ms Kennedy's Friday paper I could only congratulate myself that I am not practising at the Old Bailey. One has listened to a number of fine advocates over the years. I can recall few as compelling in clarity and sincerity as she. The subject of violence against women is something with which Judges in New Zealand are familiar. I imagine we all think we know how utterly objectionable and deeply seated it is.

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Brennan again, has been largely formed by the "civilising values of western Christianity".

> . . . change (she said) comes slowly in the legal profession. The traditional legal mind set was well delineated by Lord Buckmaster in 1917 when he moved the second reading of a Bill in the House of Lords to lift the barriers against women being admitted to the Roll of Solicitors. He said:
>
> > There is no doubt that a legal training does limit and narrow a man's outlook on life; there is no doubt that it leads me to criticize great schemes rather by the consideration of their petty detail than by looking at the general principles which they involve. It does induce a view of life which leads one to regard it rather as a series of fine and intricate traceries on an etcher's plate than as a broad and generous design conceived in sweeping lines on a big canvas.
>
> Lord Buckmaster was very well aware of the snail's pace of change in the legal profession as he made his final eloquent plea:
>
> > I would beg of your Lordships not to delay consent until time will have robbed it of all its graciousness, and what today might be a free and dignified act of justice will become tainted with the meannesss and cowardice of expediency.
>
> That was 1917 and this is 1993. Will the reform the Task Force advocates in this report be implemented as a free and dignified act of justice? Is the profession ready for equality of opportunity for all women – white women, Women of Colour, Aboriginal women, women with disabilities, lesbian women? Or will their male colleagues make them wait another fifty years until time will have robbed their consent of its graciousness and tainted it with the meanness and cowardice of expediency?" (Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *"Touchstones for Change: Equality, Diversity and Accountability"* at pp 4 and 5.)

So what about us?

Are we ready to give succour to the neighbours in our midst or will we, like the Priest and the Levite, pass by on the other side? □

Nothing in my experience prepared me for the deliberately understated, moderately delivered account of the levels of such violence which is Ms Kennedy's daily legal diet.

Merely to hear her recount in bald terms the facts of some randomly selected recent cases brought a very unmanly lump to the throat, but more shocking was to hear described at first hand from an artisan not a theorist, an analysis of some of the well-accepted and widely held community attitudes which not only make such violence possible, but as present trends show, inevitable. Much to think about, and much to be done. Thank you Helena, and please do not rest on your laurels of having brought down the sewerage system at your Inn. Even though Dr Johnson would not be pleased I am sure he would applaud you spitting out for public inspection this social hot potato.

Dr Allison Morris supplemented these personal reflections with an academic analysis which if anything deepened the gloom by pointing to the lack of evidence that the recent New Zealand experiment in tough policing of domestic violence was having any beneficial effect on the problem. Interestingly she raised the possibility that some domestic violence might be avoided if more emphasis were given to habilitating some of the offenders rather than merely punishing them. A view that I know is held by some New Zealand Judges.

The mood lightened somewhat after Judge Coral Shaw's address. She in finest No 8 New Zealand tradition had very soon after her appointment to the bench decided that something had to be done in her community of Waitakere City to stem the tide of male violence. Without funding or official recognition she has established a network of support services for battered women and an imaginative programme of sanctions against and assistance for the abusers. There is every indication that this approach is working, and one is proud to claim her as a colleague.

The next two speakers both spoke about "gender bias". For those who are not familiar with the terminology it used to be called sexism. This is rightly treated as a serious issue and attracted the attention of Dr Norma Wikler an American sociologist of international reputation, and Justice Evatt a very experienced Australian Judge with a particular interest in the question of gender bias in the law. She is also president of the Australian Law Report Commission, and therefore brings a wide perspective to the issue. The basic problem is to examine the extent to which legal institutions and procedures are unacceptably affected by a bias against women. That theme was taken up by Dr Wikler in a more specific way from the background of her work in examining the same problem in areas of public life and the institutions which represent those areas. I have not read any of Dr Wikler's work, but I understand it has been seminal in exposing unspoken and unacknowledged bias against women in many areas such as labour relations, access to financial institutions and in educational opportunity to mention but a few.

I also recognise that both she and Justice Evatt are probably aware of recent changes in the substantive criminal law in New Zealand explicitly designed as it is to improve the lot of women appearing in the Courts as victims, witnesses and accused. Those changes include dispensing with the requirement of corroboration in sexual cases making more difficult examination of complainants about previous sexual activity, video taping of evidence and the like. I further accept that of necessity Dr Wikler is not daily involved in the practice of law in the Courts.

Against that background two matters discussed by these commentators call for comment. The first is that there are still in office male Judges who are disposed to treat women lawyers and witnesses in the public Courts in a sexist way or in the new idiom with gender bias. The suggestion is a familiar one. The signs mentioned include the following:

First, the use of over familiarity which has no place outside of a loving relationship, for example calling counsel or the witness "honey" or any of its variants ("my dear" is probably the New Zealand equivalent to which my generation of male Judge is most likely to be prone). Then, the use of first names for women participants, but not male in a formal Court setting. References to female attire, hairstyle or appearance, or worse to the female form. Clearly none of this is acceptable judicial conduct and all Judges must strive to avoid it.

The difficulty a Judge has in knowing whether this sort of thing is prevalent in New Zealand Courts is that we never see our brothers and sisters at work. That it happens from time to time I am prepared to accept as a real possibility, all I can say is that one is not conscious of a perceptible level of complaint about it. That may mean that the conduct exists and is being suffered by the women lawyers in silence or that it is isolated and without sufficient pattern to be more than a minor and diminishing irritation. One would like to hope it is the latter. No doubt if that is not so we shall soon be hearing more about it. My plea is that we do not allow this issue to become a process of guilt by association with what may or may not take place in other jurisdictions at other times.

The Kraken stirs

Of far more importance to the public credibility of the administration of justice was the second observation made that there is an inbuilt gender bias against the credibility of female witnesses at the hands of male Judges.

This if true strikes at the very heart of the administration of justice involving as it does a cynical denial of the judicial oath to do right by all manner of person – without fear or favour, affection, or ill will. It means presumably that from time immemorial, women have been deprived of rights and outcomes which otherwise would have been theirs solely on the basis that male Judges are inclined not to believe them because of their gender. That is a truly shocking suggestion and a damning indictment of those Judges in particular whose specialist warrants daily require them to assess the evidence of female witnesses on crucial matters such as custody access and property. It also means that male defendants have been avoiding their just deserts at the expense of the rights of deserving females. It was this suggestion, I put it no higher than that, which prompted me to enter the lion's den and voice a protest (as a male colleague remarked later I certainly will not get the QSO but I might be

a candidate for the VC). I am not sorry for having done that.

So serious is the assertion that one would expect there to be some evidence to support it. I have not heard of any, but no doubt if there is then bodies such as that upon which Madam Justice Evatt serves will find it out. I fervently hope she will find none or certainly nothing which would show this to be a vice inherent in the institutions of Justice. If that proves to be so then I think it very important that the idea be struck from the legal feminist lexicon.

We are not here dealing merely with some interesting academic possibility. As anybody knows who is involved in the administration of Justice, conflict resolution produces some pretty sore losers who are prepared to cling to almost any excuse for failing to secure some desired end rather than to acknowledge that their case lacks merit or had less merit than the other side or was legally untenable. If we provide a further arrow to that quiver that in the case of disgruntled female litigants, the Judge was a male and therefore likely to have devalued her evidence because of gender, then the Kraken will have done more than stir it will have become wide awake and hungry.

The tendency for those who think they have been badly treated by the "system" to sue the Judge, unheard of a few years ago is becoming well established. Furthermore it has no doubt received a shot in the arm from the recent and truly alarming judgment of Smellie J in *Derrick v Attorney-General & Ors*. In that climate to open another vista of litigation against the judiciary – and it cannot be against anybody else, on the basis some perceived gender basis is to strike at the heart of the administration of justice. I am sure that no woman Judge or lawyer would wish for such an outcome.

Neither is it any answer to say that the problem (if there is one) will go away if we appoint a preponderance of women Judges – or perhaps all women Judges. Is it to be suggested that women are immune from this virus, that it is something peculiarly male? That is to draw a very long bow; and anyway would it make any difference? Surely male participants would then be entitled to complain, justifiably or not, that their credibility is devalued because of gender. If that happens one must ask with what sort of gender neutral object would we replace the women Judges. But of more immediate concern how do we view the work and attitude of the existing women Judges? Unless they are virus free shall we assume without a shred of evidence that they disbelieve more men than women. I am prepared to assume precisely to the contrary that they make every effort to remain universally true to their oath and treat male and female alike with gender blindness – in short without affection or ill will. I believe they make a conscious effort do all the things Judges are supposed to do, listen to the evidence, assess the credibility, measure those often subjective assessments against any objective evidence and come to an honestly held conclusion.

I urge those feminist lawyers who espouse this particular notion of gender bias to reflect carefully upon the damage this may do if wrong, and how difficult it will be to revive what is so fragile a thing as public confidence in the institutions of the law. I am sure they would want to act like lawyers and at least reserve judgment until the evidence is in.

All that said however I have not the slightest doubt that there are instances of gender bias in both the substantive law and its procedures. The substantive law is outside the ambit of my remarks. It is a matter for the legislators, and the pressure groups which activate them. The practice and procedures of the law are a matter for Judges and lawyers, and administrators. I do not wish to unduly prolong these reflections so I merely offer some examples.

In a discussion I had with a very experienced Judge of the Californian Superior State Court she illustrated the subtle nature of the problem by reference to a rule in her jurisdiction which allows for urgent ex parte applications to be brought between 9.30 am and 11.00 am only. After 11.00 am the applicant must wait until the next day. Not much help to the battered woman who cannot leave the house until the abuser has gone, park the children and then face a two hour bus ride to get to Court. A comparable example in New Zealand is the absence of separate places in some Courts for female complainants and witnesses to wait, or be protected. That is a practical inbuilt gender bias against women which was tragically illustrated by the recent events at the Christchurch District Court. A more trivial but I suspect irritating example is the requirement that women barristers wear peri wigs when appearing in the High Court. (Those adornments were designed as a more practical substitute for the full bottom wig of the Stuart and Jacobean eras for wear by men. They simply do not adapt for a woman unless she adopts a male hair style. Why should she? And if not she should not run the risk of looking a bit different in the eyes of the client who is paying the bill – particularly if the client loses. Male barristers are not expected to affect a bouffant look to compete with the women in the District Court, each is allowed to express their individuality and personal style as best suits them.

Then there is the even more subtle problem related to gender bias that results from linguistic differences. In the course of the conference luncheon I was pleased to share bread with two Dunedin women barristers for whom I have a high regard. Among other things we discussed the different ways in which women and men use language. That lead me to read a paper on the subject by Deborah Tanmen PhD. Both my barrister colleagues and Dr Tanmen make the compelling point that left to themselves most women prefer not to see communication as a contest, rather as a means of exploring a topic as it were by throwing a net over it and analysing the conclusions caught in the net. It is of course much more complex than that, but if that rough summary is accurate then it places women advocates at an immediate disadvantage with male Judges, at least until they learn the male way of communicating (and they may say, why should we?) The busy male Judge will often be heard to say something like – get to the point, or what is your best point, or do you really mean this or that.

We are all familiar with the variations on the theme, and I suspect many male Judges are guilty of the practice. Women lawyers are entitled to ask why should they be made to appear less adequate in the eyes of the client or jury, because

their way of getting to the point is simply different, not less valid. I have an uneasy feeling that there are some women barristers who have discontinued or modified their careers because they are unwilling to learn or practise the men's way of communicating. If so that is a gender bias which we can and should redress. Whether the problem exists between male advocate and female Judge I know not (never having appeared before one) but I suspect it might.

One could multiply examples but space does not allow. The point is that there is a problem. There are obstacles which have real and harmful consequences to the careers of women advocates and Judges, and to female defendants and witnesses. These problems may well be invisible to many male Judges, practitioners and administrators. As we learn to share a profession which has hitherto been a male preserve, and with tolerance and goodwill (and dare I say a little humour) on both sides I am sure these obstacles will be overcome so that at least the women will not have to run 100 m over the hurdles to keep up with the men who run 100 m on the flat.

There is much more one could say about this conference. The wonderful sense of fun enjoyed by and with many of the women Judges. The real sense of camaraderie which comes from the knowledge that we are all in the business of fighting prejudice and dispensing justice, fallibly but humanly, to that enormously interesting thing, the human condition. At a personal level I am left with the overwhelming impression of meeting with a diverse and challenging group of colleagues, and those with an interest in the law. Were they men or were they women? Who cares! There is much more which unites us than can possibly divide. □

Books

Brooker's Accident Compensation in New Zealand

By D A Rennie & J M Miller

Brooker & Friend Ltd, Wellington, 1992 ISBN 0-86472-099-8. NZ price $520.50 net, GST inclusive, (includes book + annual subscription).

Reviewed by Margaret A McGregor Vennell, Associate Professor of Law, Auckland University

The Accident Compensation Act 1972 came into force on 1 April 1974. New Zealand was certainly the first common law country to institute a comprehensive "no-fault" scheme. In 1992 the scheme was radically changed with the coming into force of the Accident Rehabilitation and Compensation Insurance Act 1992. This has meant that much of the body of precedent which had been built up in the 18 years in which the original scheme had been in operation is no longer relevant. *Blair's Accident Compensation* (2nd edition 1983) had long become outdated. Thus a text so soon after the enactment of the legislation is to be welcomed.

The Accident Rehabilitation and Compensation Insurance Act 1992 provides a very different scheme from that originally enacted. (The Accident Compensation Act 1982 changed the detail but the philosophy was still the same as under the 1972 Act.) Under the 1992 Act the right to sue is prohibited only where there is "cover" under the Act. "Accident" is defined and is no longer dependent on "an unlooked for mishap or untoward event which is unexpected or designed" (*Fenton v Thorley* [1903] AC 443). Now there must be "A specific event or series of events which involves an application of a force or resistance external to the human body and that results in personal injury . . ."(s 3). "Personal injury" has a restricted meaning, and, in particular, does not include "mental injury" unless it is the outcome of physical injuries to the injured person, or results from certain specified criminal acts. There is a new definition of "medical misadventure" (s 5).

In general the authors take the view that because the concepts of the Act are so different from the earlier legislation that it would be unwise to offer an opinion as to possible interpretation of the provisions. For this reason the loose-leaf format of the text is admirably suitable, since, as a body of case law develops, the necessary commentary can be readily incorporated into the text. Nevertheless at this stage *Brooker* largely reproduces the statute itself and the regulations made thereunder, whereas *Blair* felt able to draw an analogy or distinction between the legislative provisions and the interpretation of similar provisions of workers' compensation legislation. A discussion of cases decided under earlier legislation and in other jurisdictions would add to the usefulness of *Brooker*. It will be some way down the track before the true value of the book will be known. Although three updates have been received since publication these have mainly consisted of recently promulgated regulations. With each update a useful bulletin summarising the principal changes is included. The bulletins are also useful in that reference is made to other related legislation or bills. For example Update No 1 summarises the principal effects of the Health and Disability Services Bill.

The definition of "medical misadventure" is new, and narrower

than that developed by the Courts under the 1972 and 1982 Acts. The new definition requires proof of either "medical error" or "medical mishap". *Brooker* makes only passing reference to how these will be established. Although reference is made to the yardstick laid down in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 for establishing failure to attain the appropriate standard of care, it is disappointing that there is no reference in either the second update (dated 18 January 1993) or the third update (dated 2 March 1993) to the High Court of Australia decision in *Rogers v Whitaker* (1992) 67 ALJR 47. There a majority of the Court disapproved the *Bolam* test, at least in so far as it applies to non-disclosure of risks, and queried its application in the sphere of diagnosis and treatment. Gaudron J, however, went even further and held that "even in the area of diagnosis and treatment there is no legal basis for limiting liability in terms of the rule known as 'the *Bolam* test' . . .". The relationship of this decision to section 5 would be interesting. Greater discussion of the circumstances in which the right to sue may be available would be useful. Where however the authors are discussing well tested terminology, (for example in the discussion of the meaning of "event of series of events" in paragraph 3.01.05), they do refer to relevant precedents.

The book begins with a useful seven page introductory chapter setting out the social and legislative history leading up to the enactment of the Accident Rehabilitation and Compensation Insurance Act 1992, followed by the bulletin of developments. The substantive part of the book largely comprises an annotated version of the Act, divided into parts following the same divisions as in the Act. Each provision is followed by a short history, a synopsis, cross-references, and a phrase by phrase commentary on each provision. This commentary will presumably be expanded as case law develops. At present there is almost no reference to academic writing, for example the absence of a reference to Mahoney (1992) 40 AmJCL 159 or Tobin [1992] NZLJ 282, is regrettable.

The statute is followed by the various regulations promulgated under the Act. It is the regulations which have comprised the main content of the three updates. A substantial number of regulations have been passed, and some of those which applied under the earlier legislation are still in force. Those prescribing the rates of earners and employers' premiums have already been replaced by new regulations since the 1992 Act came into force. There is very little commentary about the effect of any of the regulations. This is disappointing as many of the regulations (for example, The Accident Compensation (Accident Experience) Regulations 1992, and those fixing the fees of health professionals) will have considerable impact.

Certainly in so far as it gathers the Act and the regulations together *Brooker* is useful. Nevertheless it is expensive. Its true worth will become apparent as additional updates with more extensive commentary become available. □

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fully entitled to make that argument. But Cooke P had the following to say about the argument.

> That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing.

Has *Ashby* been overruled? It has not been specifically overruled. A Court faced today with the facts of the *Ashby* case would probably still decide the same way. The Court in *Ashby* was being asked to construe s 14(1) of the Immigration Act 1964. The Court held that the language of the section was "clear and unequivocal".

> Where the statutory criteria are met the Minister's discretion to grant or refuse a temporary permit is not expressly fettered in any way. ([1981] NZLR 222, at 229, per Richardson J.)

There is a presumption that Parliament does not intend to legislate inconsistently with a nation's international legal obligations. (*Rantzen v Mirror Group Newspapers* [1993] WLR 953, 971.) However, no Court can presume that Parliament, when they passed the 1964 Act, intended to legislate consistently with a 1965 Convention. What we can say is that the basic principle of *Ashby* that Courts cannot require a Minister to exercise his or her discretion in accordance with international legal obligations has been severely eroded.

Perhaps we cannot regard the *Ashby* case as specifically overruled. But what we can say is that international law is coming to New Zealand like thunder, like a Mandalay sunrise. We must get down to it. □