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# Serious Fraud Office: Powers of arrest?

*The following guest editorial is a statement issued by the Public Issues Committee of the Auckland District Law Society convened by Grant Illingworth. The views of the ten members of the Committee do not necessarily, and cannot, represent the views of all Auckland lawyers nor the views of the Council of the Auckland District Law Society.*

In a paper released in June 1991, this committee analysed the statutory powers of the Serious Fraud Office. We expressed concern at the breadth of the powers conferred upon that agency and said:

- The privilege against self-incrimination is so important that it should be retained, unless there is a compelling case made out against it. In our view, that compelling case is yet to be made out. The privilege against self-incrimination should be reinstated.
- The Director should be subject to the same principles of judicial review as for any other public decision-maker. The immunity from judicial review and the restrictions placed upon the High Court as to the granting of interim relief ought to be lifted.
- There should be a specific provision inserted in the Act to clarify beyond any doubt the point that the Director may not disclose secret or confidential information to the Government.
- Express provision should be made to enable independent investigations (similar to the Police Complaints Authority) to take place into the activities of the Serious Fraud Office.
- Express provision should be made to enable members of the Serious Fraud Office to report instances of abuse of power and to disclose information to an external investigator.
- Section 23 should be amended to ensure that the privileges contained in the Evidence Act are available in respect of an investigation under the Serious Fraud Office Act.

- The Act should be clarified to ensure that the fruits of interception exercises carried out under the Misuse of Drugs Act 1975 or under Part XIA of the Crimes Act 1961 are kept confidential to the police.
- The phrase "serious or complex fraud" should be reconsidered to see if a more precise definition can be formulated.

We note with concern a recent proposal to confer even wider powers upon the Serious Fraud Office than it now has. It is suggested that the Serious Fraud Office should have the same powers of arrest as the police.

In our earlier paper we sought to demonstrate that the Serious Fraud Office is, in large measure, unaccountable for its actions. A point of particular importance is that the Police Complaints Authority has no jurisdiction in relation to the Serious Fraud Office and there is no other body capable of exercising a similar role. To confer a power of arrest, without extending the jurisdiction of the Police Complaints Authority to cover the Serious Fraud Office, would be to remove a protection for the public which has come to be recognised as essential in a modern community.

If serious consideration is to be given to extending the powers of the Serious Fraud Office, this should be done in the context of an overall re-evaluation of the Serious Fraud Office Act 1990 by a Select Committee including, in particular, careful scrutiny of the question whether the privilege against self-incrimination should be re-instated.

If, after that exercise, it is decided that the Serious Fraud Office ought to be given powers of arrest, it follows that there should be express provision for complaints to be made to an independent investigator who would need to have adequate powers to deal with such complaints. □

# Case and Comment

## The ROT subsidises (gradually)

It is submitted that the decision of the Court of Appeal in *Whenuapai Joinery (1988) Limited v Trust Bank Central Limited* [1994] 1 NZLR 406 restores some commonsense into the previously vexed area of competing priorities between reservation of title clauses and mortgages though the Court's judgment is not as conceptually clear as one would like.

### Facts and summary of judgment

The facts need be summarised only briefly. Subsequent to the registration of the Trust Bank Central ("TBC") mortgage, Whenuapai supplied and installed joinery to the mortgaged property. The mortgagor ran into financial difficulties as a result of which TBC issued a s 92 notice and the day after the notice expired unremedied, Whenuapai entered and removed the joinery. The supply of the joinery was subject to a reservation of title clause which, amongst other things, authorised Whenuapai to enter onto the land and/or buildings to repossess the goods supplied whether or not they were fixed to any building. Only the main arguments are summarised in this note.

In the Court of Appeal, Whenuapai proffered a number of arguments, most of which were, with respect, clearly indefensible. Only the main arguments are summarised in this note.

The first main argument, based on a line of primarily English cases relating to trade fixtures, was that by allowing the mortgagor to remain in possession, TBC had impliedly acquiesced in the mortgagor permitting the fixtures to be fixed and unfixed on the premises provided that they were unfixed before the mortgagee took possession. Apart from the fact that the fixtures in the present case were not trade fixtures, the Court considered that this general rule should not be extended to mortgages in relation to land on which the mortgagee is aware of

major construction work being undertaken by developers, ie, it could not be automatically asserted in such circumstances that the mortgagee impliedly consented to agreements with suppliers containing rights of re-entry and repossession.

The Court did not comment on whether the "general rule" is valid in relation to Torrens System mortgages; it is submitted that it is not. As counsel for TBC submitted, the cases which established the "trade fixtures" were all decided towards the end of the nineteenth century or the early part of the twentieth century, the intention being to encourage commerce. The question frequently raised was whether an owner of goods retained the right to remove fixtures supplied under a hire purchase agreement prior to the mortgagee moving into possession. By allowing the mortgagor to remain in possession "for his trade", the mortgagee was taken to have impliedly consented to the mortgagor carrying on the trade together with all incidents thereto, including obtaining equipment on hire purchase.

As readers will be aware, a common law mortgage under the deeds system consists of a transfer of the legal estate to the mortgagee subject to a right of redemption. Coupled with this is an attornment by the mortgagor to the mortgagee. So, in theory, as counsel for TBC put it, the mortgagor is leasing the property from the legal owner, the mortgagee. The situation is entirely different under a Torrens System mortgage where there is no question, in a non-default situation, of the mortgagee "allowing" the mortgagor to remain in possession. The Torrens System mortgage constitutes only a charge on the land. See Dukeson, "Commercial Securities", *Essays in Commercial Law*, Borrowdale & Roe (eds) 1991 at 97.)

The Court noted that an implied consent might be discerned from particular circumstances. However in the present case, any implied consent

was negated by clause 14(b) of the mortgage which stated (amongst other things) that the mortgagor would not without the written consent of the mortgagee cause or permit any buildings or improvements on the mortgaged land to be removed, dismantled or structurally altered. Nor, on the facts, could there be any question of an estoppel arising which would prevent TBC from relying on clause 14(b).

The second main argument was that the supplier had an equitable interest by virtue of the reservation of title clause and that this had priority over the rights of TBC. It will be recalled that in the High Court, Robertson J held that the supplier had an equitable interest in the mortgaged property and that this interest would prevail over the "inchoate" rights of TBC unless TBC had extinguished the supplier's interest by taking an action inconsistent with it. On the facts, it was held that the supplier's rights were in effect extinguished when the s 92 notice expired unremedied. The Judge relied particularly on *Kay's Leasing Corporation Pty Limited v CSR Provident Fund Nominees Limited*.

The Court of Appeal noted that the issue of the default notice was not an exercise of inconsistent powers. It was simply an intimation that those powers could be exercised after the stipulated date.

While such rights as Whenuapai had were not determined by the default notice, the Court considered there was a "more fundamental reason" for concluding that Whenuapai could not exercise its right of removal in the face of TBC's mortgage. (It is at this point that the judgment becomes difficult to follow.)

There was authority for the existence of an equitable right of removal by the owner of goods supplied under a hire purchase agreement. In the High Court, Robertson J had applied that

principle to the reservation of title clause, holding that the clause created an equitable interest in Whenuapai. While noting that there was no appeal from the finding, the Court stated that it should not necessarily be taken as agreeing with these propositions.

The Court then noted that, while in possession, a mortgagor under the Land Transfer Act is able to deal with the land as owner subject to the mortgage and can commit waste, unless it imperils a security by rendering it inadequate, in which case the mortgagor may be restrained by the mortgagee. In the present case, TBC had the additional protection of clause 14(b) of the mortgage.

The Court also noted that a mortgagee has the powers of entering into possession and of sale conferred by the mortgagor or by statute which powers are exercisable only if the mortgagor defaults (and then subject to compliance by the mortgagee with s 92 of the Property Law Act). The Court recognised that these rights are protected by the indefeasibility provisions of the Land Transfer Act, the consequence of s 62 of that Act being that TBC held its estate as mortgagee free from all estates or interest save those noted on the register.

The principle of indefeasibility also protected clause 14(b). Accordingly, TBC was entitled to take action during the currency of the advance against both the mortgagor and Whenuapai to restrain the removal of the joinery without regard to the reservation of title clause in the same way as it would have been entitled to prevent waste imperilling the security.

In *Kay's Leasing Corporation Pty Limited* (supra), Adam J was considering the right of a mortgagee under the Victorian Transfer of Land Act 1958 to sever and sell separately plant which had been supplied pursuant to a hire purchase agreement. Adam J held that the supplier of the plant had an equitable interest which endured subject to the priority rights of the mortgagee but was not extinguished by those rights pending their exercise by the mortgagee's going into possession or selling. Adam J was concerned with the circumstances in which those rights could be regarded as being extinguished and not with their exercise contrary to any rights

conferred on the mortgagee.

Having held that TBC had priority, the final matter to be considered related to the fact that Whenuapai had removed the joinery. Relying on *Dalton v Whitem & Fox* (1842) 32 QB 777, it was held that Whenuapai was precluded from maintaining against TBC that the joinery after removal ceased to be a fixture and became a chattel. This was on the basis that Whenuapai, as a wrong-doer, would be prevented from taking advantage of its wrong doing. Accordingly, Whenuapai could not deny that the joinery was subject to TBC's charge. In these circumstances, TBC was entitled to invoke the assistance of the Court in its equitable jurisdiction to obtain an order for its return.

Indeed, the Court held that TBC was in a stronger position by virtue of the default notice having expired. At that time, TBC was entitled to take possession of the property. On this basis, the Court held that TBC had the right to immediate possession of chattels and was therefore entitled to bring an action for conversion or detinue.

#### *Analysis of judgment*

With respect, the judgment of the Court is not as clear as one would like, particularly in two respects.

First, the Court dealt with a number of concepts in quick succession and the relationship between these concepts is not entirely clear. It is possible to analyse the Court's reasoning as follows:

- (a) TBC's rights to take possession of and sell the property had the benefit of the principle of indefeasibility, ie these rights had priority over any interests other than those noted on the Land Transfer register prior to the registration of TBC's mortgage.
- (b) Under normal circumstances, the mortgagor would be entitled to commit waste provided that this did not imperil the mortgagee's security.
- (c) Whether or not Whenuapai's actions would have constituted waste of the imperilling kind by the mortgagor, clause 14(b) precluded the mortgagor from removing or permitting to be removed improvements on the

mortgaged land. Clause 14(b) had the benefit of the principle of indefeasibility.

If this is the correct analysis of the Court's reasoning (it being presumed that the "more fundamental point" was that clause 14(b) had the benefit of the principle of immediate indefeasibility), the question arises as to what the Court's judgment would have been had clause 14(b) not been included. The answer presumably depends on whether or not the action of Whenuapai constituted waste of the imperilling kind by the mortgagor. (To have restrained Whenuapai would have rendered the mortgage security deficient.) If not, TBC may have been unable to restrain the removal of the joinery or to sue for its conversion.

This analysis may not be what the Court would have intended. It is possible that the Court accepted the submission by counsel for TBC that, once the joinery became a fixture, it was charged by the mortgage in favour of TBC and by virtue of s 62 of the Land Transfer Act, TBC had priority over any equitable interest what Whenuapai may have had. This may have been the "more fundamental point" to which the Court referred.

However, this seems unlikely. Had the Court accepted the submission by counsel for TBC, there would have been no need for the Court to refer to the doctrine of waste or to place reliance on the indefeasibility of clause 14(b). Indeed, it would appear that counsel for TBC did not mention the doctrine of waste and only mentioned clause 14(b) in the context of negating any possibility of an implied consent by TBC to the removal of the joinery.

It is submitted respectfully that the submission by counsel for TBC was correct and that the issue which then required resolution was the status of the joinery once it had been removed; this leads on to the second aspect of the Court's judgment which is not as clear as one would like.

Having stated that Whenuapai was prevented from asserting that the joinery had ceased to be a fixture and had become chattels, the Court then referred to the joinery as chattels in respect of which TBC,

having immediate right to possession, was entitled to bring an action for conversion or detinue. Whenuapai was unable to assert that the joinery was no longer subject to the mortgage. No authorities were cited by the Court.

The writer understands that, initially, the Court found it difficult to accept that TBC had any right to the joinery once the joinery had been removed from the property. Counsel were invited to make further submissions. In essence, counsel for TBC made two submissions. First, the joinery remained a fixture despite its wrongful removal; "once a fixture, always a fixture". (*Bain v Brand* (1876) App Cas 762; *Re Thomas ex parte Baroness Willoughby D'Erespy* (1881) 44 LT 781, *Farrant v Thompson* (1882) 106 ER 1392 and *Mather v Fraser* (1856) 2 K & J 536.) There is no indication in the judgment as to whether this submission was accepted or rejected. Secondly, Whenuapai was prevented from relying on its wrongful action and denying TBC's right to the joinery. (*Dalton v Whitem & Fox* (1842) 3 QB 777.) In the latter respect, TBC had an election whether to treat the joinery as a fixture or a chattel and if it elected to treat the joinery as a chattel, to sue for its conversion. (See *Clerk & Lindsell on Torts*, 16th ed, para 22-41 citing, inter alia, *Farrant v Thompson* (supra).) It seems clear that this submission was accepted by the Court.

On the conversion point, see the recent judgment of Holland J in *Trustbank Canterbury Limited v Lockwood Buildings Limited* (High Court, Christchurch, CP 389/89, 28 October 1993). In that case, pursuant to a debenture, Lockwood removed a showhome (deemed to be a fixture) from the mortgagor's property notwithstanding that the property was subject to a mortgage in favour of Trustbank Canterbury Limited. Trustbank Canterbury Limited sued for trespass to land and in conversion and detinue. Holland J referred to the discussion of the doctrine of "trespass by relation" in *The Law of Tort in New Zealand* (The Law Book Co Ltd 1991) at pp 359-360 where the learned authors state that a mortgagee who is suing for trespass to land will be deemed at the time of the trespass to have been entitled to immediate

possession of that land if, prior to suing, the mortgagee has served a default notice which has expired unremedied. It may be implicit from their earlier discussion of the doctrine that the learned authors consider that the mortgagee would also need to have obtained possession prior to suing. Certainly, that is the way that Holland J put it in his judgment. Holland J then commented that, just as in trespass to land the plaintiff must demonstrate entitlement to immediate possession of the land, so in conversion the plaintiff must demonstrate entitlement to immediate possession of the chattel. (Query whether, in the circumstances, this would have meant that Trustbank would need to have obtained possession of the showhome prior to suing or whether it would have been sufficient that Trustbank had obtained possession of the land from which the showhome was removed.)

It should be noted that the issues raised by Whenuapai Joinery are not confined to competing priorities between suppliers under reservation of title clauses and mortgagees. Financiers under hire purchase agreements need to take note. As with the supplier under the reservation of title clause, a financier under a hire purchase agreement who takes an assignment of the vendor's rights, including the vendor's interest in the goods financed, purports to retain title to the goods until full payment is received. Where there is a registered mortgage over the land and buildings, the financier must suffer the same fate as the supplier under a reservation of title clause unless the goods have been financed under a customary hire purchase agreement, in which case s 57(7) of the Chattels Transfer Act 1924 provides that chattels will be deemed to remain chattels notwithstanding that they may become fixtures.

Financiers who lend on the security of instruments by way of security will find that they are in the same position as financiers under hire purchase agreements.

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## **Bribery and constructive trusts — The demise of *Lister v Stubbs* (1890) 45 Ch D 1**

*The Attorney-General for Hong Kong v Reid & Ors* [1994] 1 NZLR 1.

In November 1993 the Privy Council handed down its decision on an appeal by the Attorney-General for Hong Kong against Reid, a solicitor and New Zealand national and formerly Acting Director of Public Prosecution in Hong Kong. The case is of importance and interest. It provides a clear statement to the New Zealand Court of Appeal as to the approach it should take when considering English decisions. The law relating to bribery and constructive trusts is considered with the decision of *Lister v Stubbs* (1890) 45 Ch D 1 being overruled by the Judicial Committee of the Privy Council.

In 1990 Reid was convicted of taking bribes and ordered to pay the Crown the sum of HK\$12.4 million (approximately NZ\$2.5 million). He had accepted these bribes in the course of his employment as Acting Director of Public Prosecutions. Among Mr Reid's assets were three properties in New Zealand which had arguably been purchased with bribe money. These properties had increased in value to the point where the total value of assets in New Zealand exceeded the sum of NZ\$2.4 million. No part of the bribe money had been recouped and the Attorney-General for Hong Kong sought to renew three registered caveats against the titles of these properties. He did so to prevent any dealing with the property pending the hearing of proceedings which were initiated for the purpose of claiming the properties on a constructive trust. The renewal of the caveats was opposed by the respondents on the grounds that the Crown had no equitable interest in the three New Zealand properties. In the Court of Appeal [1992] 2 NZLR 305 it had been found that the Hong Kong Government had no proprietary interest in the properties and that *Lister & Co v Stubbs* (1890) 45 Ch D 1 applied. The Privy Council allowed the caveats to be renewed and chose not to follow *Lister v Stubbs*.

In *Lister v Stubbs* the English Court of Appeal had held:

- (1) That where a fiduciary corruptly received a secret commission his immediate obligation to account

to his principal is that of debtor/creditor not trustee/beneficiary.

- (2) That a bribe cannot be said to be money of the plaintiffs before they have a judgment for recovery in their favour.

The Court of Appeal held that *Lister & Co v Stubbs* stated the law in England and that whilst subject to criticism its authority had not been eroded for New Zealand by any New Zealand decisions. The Court refused to consider the merits of *Lister v Stubbs* and concluded that if the case was not to be applied then that was a decision for the Judicial Committee, not one to be made by the New Zealand Court of Appeal. The Privy Council held that 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.

Their Lordships considered that what the Court of Appeal was saying was that in the absence of differentiating local circumstances it should follow a decision representing contemporary English law and that the correctness of the English decision should be left to be determined by the Privy Council. Their Lordships disagreed. They stated that 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 be considered wrong. Templeman LJ said

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 greatest assistance to the Board (p 11).

The Court was impressed by the approach taken in *Sumitomo Bank Limited v Kartika Ratna Thahir* [1993] 1 SLR 735. In that case Lai Kew Chai J had "robustly" held that *Lister v Stubbs* was wrong and that its "undesirable and unjust consequences should not be imposed and perpetuated as part of the law of Singapore". Thus *Attorney-General for Hong Kong v Reid* provides a clear injunction to the New Zealand

Court of Appeal to take initiative in the future.

The case is also of interest as the judgment considers the law pertaining to bribes and constructive trusts. It will be recalled that in *Lister v Stubbs* an employee took bribes in the course of his employment and invested the proceeds. The employer failed to obtain an interlocutory injunction stopping the employee from disposing of these assets pending trial of the action in which the firm sought £5,541 and damages. The bribe money could not be said to be money of the plaintiffs. Lindley LJ had stated that ownership should not be confused with obligation. Whilst the decision has always been presumed to be the leading case on the subject of bribes the Privy Council chose not to follow it. This has implications going beyond the specific area of bribes; it pertains to the wider subject of constructive trusts and equity in general.

What is interesting is the fact that their Lordships took the fact situation which concerned bribes and applied general equitable principles. A person who accepts bribes in the course of his or her employment is simply a person who is in a fiduciary position and one who has breached his or her duty. On this analysis cases such as *Keech v Sandford* (1726) Sel Cas T King 61 and *Boardman v Phipps* [1967] 2 AC 46 become relevant. These cases have always been difficult to reconcile with *Lister v Stubbs*. The first of these two cases held that property which a trustee obtains by use of knowledge acquired as trustee becomes trust property. The Privy Council held that this rule must apply to a bribe accepted by a trustee for a guilty criminal purpose which injures the cestui que trust. The trustee is only one example of a fiduciary and the same rule applies to all other fiduciaries who accept bribes.

The Privy Council held that when a bribe is accepted by a fiduciary in breach of his or her duty then the bribe money is held in trust for the person to whom the duty was owed. If the property increases in value the fiduciary is not entitled to any surplus because he or she is not allowed by any means to make a profit out of a breach of duty. This had been emphasised in *Boardman v Phipps* [1967] 2 AC 46. Equity considers as done that which ought to have been done, and as soon as a bribe is received it is held on a constructive

trust for the person injured. In the present case the Hong Kong Government had no proprietary interest in the bribe money yet the Court found a constructive trust. This suggests that a proprietary basis is not a necessary prerequisite to finding a constructive trust. The case thus endorses a remedial approach to the subject of constructive trusts.

Until the Privy Council handed down this decision *Attorney-General v Reid* could be seen as out of step with recent New Zealand Court of Appeal decisions in this area. For example in *Elders v BNZ* [1989] 2 NZLR 180 Somers J concluded that the constructive trust is a device

for imposing a liability to account on persons who cannot in good-conscience retain a benefit in breach of their legal or equitable obligations. Its extension or evolution may not have come to an end.

Had this dictum been applied by the Court of Appeal in Reid's case there is little doubt that the Hong Kong Government would have succeeded. Reid had obtained a benefit in breach of his equitable obligations to the Hong Kong government. The Court of Appeal, in Reid's case, by not following *Elders v BNZ*, had produced two seemingly irreconcilable decisions. On the one hand the Court in *Reid* had emphasised the lack of proprietary interest yet in *Elders* the approach had been remedial in the sense that a remedy was being provided in a situation that required equitable relief. The need for a pre-existing proprietary interest was not emphasised as necessary. The development of constructive trust law in the context of de facto property cases could also be seen as following in the direction indicated by Somers J in *Elders*. Thus the Court of Appeal decision in *Reid* could be seen as out of harmony with current New Zealand law. The Privy Council decision has rectified this.

It must be concluded that the Privy Council decision in *Attorney-General for Hong Kong v Reid* is a welcome one. On the facts it achieves a just and sensible result. All would surely agree with Lord Templeman that a caveat was needed to stop Reid from selling the

properties and having the proceeds "whisked away to some Shangri La which hides bribes and other corrupt moneys in numbered bank accounts" (p 12). The decision is also to be welcomed because it clarifies the law on constructive trusts by taking the view that a proprietary interest is not absolutely necessary before finding that a constructive trust exists. The decision is in harmony with cases such as *Elders*, where the constructive trust is seen as a remedial devise. *Lister v Stubbs*, a much criticised case, is no longer law for New Zealand and this must also be seen as a good thing. Finally the Privy Council invite the New Zealand Court of Appeal to take an initiative and refrain from following cases such as *Lister v Stubbs*, and again this must be seen as appropriate.

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### Exemplary damages for work injuries

*Iversen & Anor v Zendel Industries (NZ) Ltd and Anor* [1993] BCL 1495

Under s 14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992, subject to certain exceptions:

No proceedings for damages arising directly or indirectly out of personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

It is clear from case law under the 1972 and 1982 Acts that exemplary damages — that is, damages designed to punish or deter the defendant rather than to compensate the plaintiff — do not arise "directly or indirectly" out of the personal injury.

Liability for such damages arises from the quality of the defendant's conduct, rather than the particular type of harm. Thus an action for exemplary damages will remain available in appropriate circumstances. (*Donselaar v Donselaar* [1982] 1 NZLR 97). However, the conventional criterion for the award of such damages — high-handed disregard of a person's rights — might have been thought difficult to establish in the context of health and safety in employment, the principal exception being physical sexual harassment which clearly involves a battery.

Nevertheless, a recent decision indicates that the fluid boundaries of tort may yet lead to more cases of this type than might originally have been predicted. In *Iversen & Anor v Zendel Industries (NZ) Ltd and Anor* [1993] BCL 1495, the first plaintiff was the manager of the defendant's plant, which manufactured and distributed chemicals including isocyanates. He alleged that the defendants knew that employees like himself would be exposed to the adverse effect of the isocyanates, that they were aware that their plant was unsafe and that — notwithstanding requests for reassurance from employees — the defendants did not reveal the true position and actively misled the employees as to the risk in allowing work to continue. Whilst any adverse effects of the process might well have been covered by the concept of occupational disease under the accident compensation scheme, the first plaintiff argued that what had occurred amounted to a battery and also to assault. The decision concerned an application to review the earlier decision of Master Gambrill not to strike out aspects of the statement of claim.

In refusing to strike out the claim for battery, Williams J referred to a passage from Salmond and Heuston, *The Law of Torts* (now 19th ed, London, 1987, 134-135), to the effect that "It is probably also a battery to project heat, light, noise, or vapours onto another person in such a manner as to cause physical injury or personal discomfort". The Judge added:

There is no authority cited for that proposition but of course it is notorious that in the field of tort, development and modifications of established concepts relating to particular torts occur from time to

time. It may well be that a modern formulation by the Court at trial of ancient principles on battery will demonstrate that the assertions of the authors of that textbook are a correct statement of law.

Williams J also refused to strike out the pleading of battery on the basis that the requirement for direct rather than indirect injury was unclear (citing reservations by the authors of Salmond on the point, together with the first plaintiff's allegation that at a certain point he became fearful and apprehensive of the effects of the isocyanates). Commentators are divided on the question of the requirement for directness, which has traditionally been thought to divide battery from negligence (see FA Trindade, "International Torts: Some thoughts on Assault and Battery" (1982) 2 *Oxford Jo of Legal Studies*, 211, 217; S M D Todd and Ors, *The Law of Torts in New Zealand*, Sydney 191, 90-91; cp A M Linden, *Canadian Tort Law*, 4th ed, 1988, 41).

Regrettably the precise way in which the first plaintiff in *Iversen* was exposed to the chemical whilst at work is left unclear in the judgment. In some circumstances, of course, it is at least arguable that subjecting a worker to chemical spray will satisfy the requirement that an action for battery requires direct application of force. To take the simplest example, a worker who is injured by virtue of being within range of a chemical spray hand-operated by the employer is clearly directly injured for the purposes of the tort. To subject a person to the projection of chemicals at work in this way, whether in the form of liquid, spray or dust, is arguably indistinguishable conceptually from the old cases which have held spitting in another person's face to be a battery (*R v Cotesworth* (1704) 6 Mod 172; 87 ER 928), although the rationale for protection obviously differs. Nor need the employer personally be responsible for the battery. Employers will be vicariously liable for intentional torts committed by their employees, and the resulting exemplary damages, so long as the action is "within the course of employment" (*Monroe v Attorney-General* [1985] NZ Recent Law 342).

Presumably, by the same token, an employer who substituted an

unsafe chemical for a safe chemical in a work process without the knowledge of a worker would also be guilty of battery, where the requirement for direct injury is made out (by analogy with *Nash v Sheen*, Queen's Bench, *The Times*, March 13 1953). An intention to injure is not essential for the purposes of the tort (*Wilson v Pringle* [1986] 3 WLR 1, 8).

Assuming a continuing requirement for direct application of force, greater difficulty would be encountered with the tort of battery or assault in the more common situation where a worker is directed to use unsafe machinery, or an unsafe work process, although Williams J pointed to the absence of any formulation of the tort in this respect in modern times and to the continuum between direct and indirect means. That continuum might include, for example, both the hand-held chemical spray and the mechanical sprayer operated from a switchboard by the employer or a fellow-worker acting in the course of his or her employment. But, on a traditional view, it might not cover the worker who is simply ordered to work in an unsafe environment or with unsafe machinery.

It might be that the generic tort of intentional infliction of harm under *Wilkinson v Downton* [1897] 2 QB 57 might serve to fill the conceptual vacuum at this point. "Intention" in this context includes recklessness (*Bunyan v Jordan* (1936) 36 SR (NSW) 350). The facts might be subsumed under the tort of negligence. Whilst the availability of exemplary damages where the employer is shown to have behaved recklessly is less well-established, such damages have been awarded in recent Australian cases (*Midalco Pty Ltd v Rabenalt* (1988) Aust Torts Rep 80-208: employer's deliberate failure to act on knowledge of the risks posed by asbestos in the workplace: see also *Lamb v Cotonno* (1987) 164 CLR 1).

A further cause of action in *Iversen* was assault. Since, amongst other things, the first plaintiff alleged that "at a certain point he became fearful and apprehensive of the effects of the isocyanates on him" the defendants failed in their application to strike out the claim. Had injury not been pleaded, a claim based on assault alone would obviously have escaped the bar in

s 14(1) of the Accident Rehabilitation and Compensation Insurance Act.

The extended discussion by the House of Lords of recovery for psychiatric illness resulting from shock, in *Alcock & Ors v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 has yet to be considered in detail in the New Zealand Courts. In that decision, the House of Lords was considering the claims of relatives and friends who witnessed the Hillsborough football stadium disaster, either directly or by means of simultaneous television transmission. It was emphasised that:

- 1 the injury must be reasonably foreseeable; and
- 2 the relationship between the plaintiff and the defendant must be sufficiently proximate; and
- 3 the plaintiff must show propinquity in time and space to the accident or to its immediate aftermath; and
- 4 the required degree of shock involved a sudden event which "violently agitates the mind" as opposed to being the result of accumulated assaults on the nervous system.

The need for a close relationship between the accident victim and the plaintiff was stressed as an aspect of reasonable foreseeability. However, this was not presented as an inflexible rule and, as examples which would be relevant to the workplace, the position of close friends and of bystanders witnessing particularly horrific accidents was left open to be decided on a case by case basis.

Whilst the *Alcock* decision has not received a detailed treatment in any New Zealand decision, in *Iversen's* case Williams J relied on the analysis of the House of Lords in striking out a claim for damages by the partner of the first plaintiff since her reaction to the first plaintiff's injury (asthmatic attacks) lacked the necessary element of suddenness. Williams J added, however:

... this is done without prejudice to the formulation of a claim by the second plaintiff within the principles laid down in *Alcock*. Speaking purely hypothetically, if

for example the second plaintiff could establish that on a specific day (eg the day when the first plaintiff brought home a medical report which diagnosed the asthmatic condition caused by the isocyanates) that she there and then suffered an instant shock which "violently agitated her mind and caused a psychiatric illness" then it would be permissible to plead such a claim.

With the much greater restriction on the scope of accident compensation after the enactment of the 1992 Act, it can be predicted with relative confidence that more cases of this type will come to occupy the attention of the Courts. Few would argue, however, that the manipulation of common law principles derived from 19th century cases is a satisfactory alternative to what was once a comprehensive no-fault scheme.

John Hughes  
University of Canterbury

## Australian Institute of Judicial Administration

The Thirteenth Annual Conference of the Australian Institute of Judicial Administration (AIJA) is to be held in Fremantle on Saturday 13 and Sunday 14 August 1994.

In conjunction with the Annual Conference the Court Administrators' Conference and the Biannual Librarians' Conference will be held on Friday 12 August, 1994.

Information about the Conference can be obtained from Mrs Margaret McHutchison at the AIJA Secretariat, 103-105 Barry Street, Carlton South, 3053 Victoria, Australia. Telephone (03) 347 6600, Fax (03) 347 2980.





# In the Name of the Father

By Alastair Logan

*The film In the Name of the Father has recently been released and was one of those nominated for an Oscar. This article expresses concern at the substantial dramatisation and falsification of what was undoubtedly a miscarriage of justice. The author, Alastair Logan, has been involved in the case from the beginning, representing all of the Guildford Four between 1977 and 1988, and is now representing Carole Richardson and Patrick Armstrong. He has represented all of the Maguire Seven since 1977, including Giuseppe Conlon until his death in 1980.*

*The article is reprinted with permission from the New Law Journal of 25 February 1994.*

The essential story of this film is to show how Gerard Conlon, brilliantly played by Daniel Day-Lewis, along with the other three of the Guildford Four, was wrongfully convicted and imprisoned. The film seeks to show how this terrible miscarriage of justice happened by making four principal assertions.

First, that on the night that the bombings occurred, Gerard Conlon and his friend Paul Hill were sleeping rough on a park bench which a tramp, Charlie Burke, regarded as his property.

Secondly, that the evidence against Conlon was manufactured by the police and inserted by them into a blank piece of paper which he had signed after they had used violence, threats and intimidation towards him. Thus it was that his aunt, Annie Maguire, was brought into the picture, having been named by Hill and written into Conlon's statement by the police despite his sarcastic rejection of her alleged involvement as a bombmaker when questioned by the police – "My Aunt Annie made them and Mother Theresa planted them."

Thirdly, that his father Giuseppe, hauntingly portrayed by Peter Postlethwaite, was imprisoned with the remainder of the Maguire Seven for assisting in the preparation of the bombs for Guildford and other similar activities after a single trial which had involved all eleven of them.

Fourthly, that Conlon and Hill were unable to find the tramp to prove their alibi and thus their innocence. That the fact that Charlie Burke could give evidence in support of the alibi was known to the police who interviewed him about Conlon's alibi (on a date which according to the film preceded Conlon's arrest by nearly a month) and who concealed this alibi from Conlon and Hill. But for the

clever outwitting of the police by Conlon's solicitor, who had obtained a court order to force them to allow her access to their records, and is then depicted removing the original police file from the police archives in her bag, this would never have come to light. It is her gruelling search that reveals the carved initials of Charlie Burke on the park bench and her fearless advocacy, armed with the purloined documents, despite the combined efforts of a lone judge in the appeal court and the prosecution, which ultimately exposes the police deceit and concealment of that alibi and thus secures the acquittal of the Guildford Four and the Maguire Seven.

The other story is the relationship between Gerard and Giuseppe Conlon. They are depicted as sharing a cell from the time of their remand in custody. Initially Gerard rejects his father's pacifism and opts for violent confrontation. He ultimately comes to share his father's views when the attractions of the violence personified in the IRA man MacAndrew leads to the death of a prison officer.

In the absence of a disclaimer, the makers of the film must have realised that its audience would regard the content as fact and leave the cinema believing what they have seen actually took place. The reality, however, is that most of the content of this film is fiction. Not only is it fiction, but some of it is wholly unnecessary distortion of fact.

None of the four assertions in the film are true. Hill and Conlon were not together on the night of the Guildford bombings. Hill was in Southampton and Conlon in a Catholic Young Men's Hostel in London. Charlie Burke was a respectable young man who worked as a manager of a greengrocer's shop and who also lived in the hostel. He

made a statement to the Surrey Police in January 1975, six weeks after the arrest of the Guildford Four, which provided Conlon alone with an alibi. The statement was not served on the defence as it should have been but it was served by the DPP as part of the appeal papers in May 1989 without any Order compelling them to do so. The statement made by Burke in 1975 had been found by the Avon and Somerset Police in 1988 when they were carrying out an inquiry into the case ordered by the Home Secretary. Thus, all that was discovered by Gerard Conlon's solicitor was the note which had originally accompanied the statement saying that it should not be revealed to the defence, a fact that was already obvious because it had not been.

Gerard Conlon made two statements both lengthy and both written by himself, and did not sign any blank statement. Paul Hill mentioned a woman he named as "Anne" in an interview that took place on the morning of December 3, 1974. He did not identify that woman. Gerard Conlon told the police that the "Anne" was his aunt Annie Maguire in an interview which took place in the afternoon of the same day. Police were despatched to the Maguire household and took up observation at 7pm. The Maguire Seven were arrested at 8.45pm and were charged with a separate charge from the Guildford Four charges, there being no allegation of connection that the Crown could prove, and they were tried separately. In addition to the eleven, a large number of other people were arrested but only four made self-incriminating confessions. Those four were the people whose characters and lifestyles were such that they were unable to withstand the violence, the threats and the intimidation which



characterised the interviews.

Some of the events depicted in the film are completely unnecessary deviations from the truth. The producers attempt to justify the portrayal of Charlie Burke as an elderly tramp when in fact he was a respectable young man by saying that they had become fed up with doing interior shots and wanted to do an exterior one. So much for integrity! Even details not essential to the story are hopelessly wrong. The Conlons, as Category A prisoners, never shared a cell with anyone, let alone each other. They were rarely in the same prison.

The Court of Appeal scenes depicted in the film reduce it to the level of an American TV courtroom drama with remarks like "Can I approach the bench, Your Honour?" and the judge's announcement of "Case Dismissed" when the Four are acquitted. No doubt it will sit easily with an American audience. But the film casts an unwarranted slur upon our legal system in that it fails to recognise that, despite the wrongs done to these people, in the end, albeit a lamentable 15 years later, the system proved capable of putting right these miscarriages. Miscarriages are serious matters not only for those who are the victims of them but for the victim(s) of the original crime and for society as a whole. These miscarriages have caused a crisis of confidence in the criminal justice system as a whole and in the police and the judiciary in particular. Restoring that confidence is a priority and it cannot be helped by a film which substitutes fiction for fact and fails to address the issues the cases raise. Because the film does not help viewers to understand the facts, they cannot make a judgment.

Despite the undoubted appeal of Emma Thompson, no solicitor ever had a right of audience before the Court of Appeal. The Conlon alibi did not even figure in the appeal hearing at which the convictions of the Four were quashed. The evidence which convinced the Court was presented by the prosecution after it was discovered by the Avon and Somerset Police in the files of the Surrey Police. That evidence demonstrated to the satisfaction of the Court of Appeal that the Surrey Police must have lied about the interviews of Patrick Armstrong and Paul Hill and had concocted false custody records to support what they

alleged about the interviews of all of the Four. Since the Four had always stated that they were forced to make false self-incriminating statements because of the violence, threats and intimidation of the police, the credibility of the police in denying that any violence was used was essential to maintain the convictions. Once that credibility had been so convincingly destroyed, there being no other evidence against the Four, the convictions had to be quashed.

The evidence of police perjury and fabrication which secured the quashing of the convictions of the Guildford Four would have been substantially added to if the defence had been able to present their cases on behalf of the Four.

The evidence which secured the quashing of the convictions of the Maguire Seven was discovered during and after Sir John May's Inquiry and demonstrated that the scientific evidence upon which they were convicted was unreliable and could not exclude innocent contamination.

In fact, the unique pattern of test results in their case was due to the ether used in the laboratory to test the swabs taken from their hands being contaminated with nitroglycerine, as was shown by experiments conducted by scientists instructed by the Maguire and Conlon families.

It was not just lawyers, let alone a single lawyer (who first came into the case in 1988 and never met Giuseppe Conlon), who were responsible for uncovering these miscarriages. The film ignores the large number of people from all walks of life who over many years campaigned and fought tenaciously to achieve justice in these cases: people like the families of those imprisoned, Robert Kee, Yorkshire Television, Ros Franey, Grant McKee, Cardinal Basil Hume and his Deputation. To these must be added Sir John May and his Inquiry team and those in the police service and the media who were prepared to look for the truth beyond the lies and the prejudice. None of these is mentioned in the film. Nor, sadly, are the victims of the bombings.

The film fails to explain that the whole of the prosecution in the Guildford Four case was a giant fraud in which there was, apart from the matters uncovered and laid before the Court of Appeal in 1989 and the new evidence that had been uncovered since, extensive concealment of the evidence which demonstrated that the

Balcombe Street Active Service Unit of the IRA had carried out the bombings. The role of the forensic scientists, the Metropolitan Police and the prosecuting authorities in this, the actions and attitude of the judiciary when it was laid before them in 1977, and the deliberate failure to prosecute those against whom there was solid forensic evidence, as well as detailed, freely made confessions, are not even mentioned in the film.

The co-producers of the film reject criticisms of its factual inaccuracies by suggesting that these will give succour and comfort to those who seek still to say that the Guildford Four and the Maguire Seven were guilty of the offences they were charged with in 1974. The truth of the matter is that a factually inaccurate film which does not "come clean" about its inaccuracies and poses as a dramatic documentary will be used by those in the police service, on the bench, in the Temple and in Parliament who still whisper that the Guildford Four and the Maguire Seven are guilty, as evidence that lies are being peddled as fact to justify the assertion that these were miscarriages of justice.

Not unnaturally, those who participated in the events which the film purports to depict are likely to view the film in a different way, if it strays from the truth, than someone only aware that the Guildford Four and the Maguire Seven were the victims of massive miscarriages of justice. The Guildford Four and the Maguire Seven were accused of foul crimes and they and their families suffered horribly. The Maguire family has been criticised by the film's actors and producers as well as by Gerard Conlon for commenting upon the factual inaccuracies. The family has always insisted that the truth be told about them because, like Giuseppe Conlon in his lifetime, they regard the truth as a shield against those who would seek to malign them. To castigate this as "sour grapes" because the film was not about them is to demonstrate utter incomprehension of the importance of truth and principles to those who had little else to cling to in the long dark years of unjust imprisonment.

Far from exorcism, the film engages in fantasy and exculpation — for the other allegation which could be levelled at it is that it is cleaning

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# Requiem for *Rylands v Fletcher*: *Cambridge Water v Eastern Counties Leather*

By Bruce Pardy, Lecturer, Faculty of Law, Victoria University of Wellington

*The rule in Rylands v Fletcher usually gets a chapter to itself in the standard textbooks on Tort. After the decision of the House of Lords in the Cambridge Water case [1994] 1 All ER 53 the author of this article argues that it will no longer be a distinctive rule but should merely be regarded as indistinguishable from nuisance. For an earlier comment on the case see [1994] NZLJ 87.*

The rule in *Rylands v Fletcher* (1866) LR 1 Ex 265; (1868) LR 3 HL 330 has been retired. It still exists as an independent cause of action, but after the House of Lords decision in *Cambridge Water Co v Eastern Counties Leather* it serves no useful purpose.

In *Cambridge Water*, the House found that recovery under *Rylands v Fletcher* requires foreseeability. In so doing, it removed the only remaining difference of any significance between *Rylands v Fletcher* and nuisance. Where *Rylands v Fletcher* provides a remedy, nuisance should as well.

## *Cambridge Water Co v Eastern Counties Leather*

The plaintiff Cambridge Water Co was a statutory company with the job of providing a public water supply. In 1976 it purchased a pumping station for obtaining water from underground. The station was located in the same village as the defendant Eastern Counties Leather, a leather tannery which for many years had used an organochlorine known as perchloroethene for degreasing pelts.

When Cambridge Water Co first tested the water prior to the purchase, regulatory authorities had not identified perchloroethene as a concern and its presence was not tested for. In the early 1980s new standards for the presence of organochlorines were issued and the water was tested again. It was found to have concentrations of perchloroethene many times higher than the standards specified, and pumping at the site ceased in 1983.

From about 1973 to 1976, perchloroethene had been delivered in drums to the Eastern Counties Leather site. When required, fork-lifts carried the drums from storage to the degreasing machines, where they were opened and tilted into the reservoir feeding the machine. When the drums were tilted, some perchloroethene spilled. In spite of the fact that perchloroethene is highly volatile and could be expected to evaporate, some perchloroethene seeped into the ground and eventually contaminated the Cambridge Water Co water supply.

Because of the volatile properties of perchloroethene, its seepage into the ground and the contamination of the ground water were found to be unforeseeable. On this basis, the trial Judge dismissed the action in nuisance and negligence. The action based on *Rylands v Fletcher* was dismissed because the use of the solvent was found to constitute a natural use.

The Court of Appeal allowed the appeal in nuisance on the ground that where a nuisance interferes with a natural right incident to ownership, liability is strict and does not require foreseeability. This conclusion was based on *Ballard v Tomlinson* (1885) 29 Ch D 115, but the Court of Appeal failed to take into account the Privy Council's declaration in *The Wagon Mound No 2 (Overseas Tankship (UK) Ltd v Miller Steamship Co Pty [1967] 1 AC 617)* that all nuisance cases require foreseeability. The House of Lords overturned the decision on this basis. The Court of Appeal did not consider liability under *Rylands v Fletcher*.

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up some images and that some of those really responsible for these miscarriages are conveniently omitted. Why did the film need to misrepresent the facts? Why was it necessary to tell lies to "justify" a truth? The real facts are compelling and powerful.

The way the film treats the facts of the cases poses three questions. First, if you chose to depict real people who took part in real events, are you obligated to depict those events with factual accuracy? Is artistic licence

permissible when you purport to deal with events that actually happened, and if so, how far are you entitled to depart from the truth? Secondly, if "faction" is permissible in a case where real events are being depicted, should the film's audience be told what is the fictional content of the film? Thirdly, what explanation, if any, do you owe your audience, in the event that you depart from the truth?

In my view, the film is a missed opportunity to explain and dignify the struggle of eleven ordinary people who found themselves in a Kafkaesque nightmare where truth

was turned on its head and all semblance of reality was replaced by ghastly lies and distortions. They were faced by blind prejudice and the massed forces of the state and as a result justice was perverted, families were torn apart and in some cases destroyed, and children orphaned and imprisoned. If the film had depicted the stories of the two mothers, Sarah Conlon and Anne Maguire, it would have been able to tell truthfully and simultaneously the story of both the Maguire Seven and the Guildford Four — a story of human love and endurance beyond our experience. □

### The House of Lords decision

As far as *Rylands v Fletcher* was concerned, the House of Lords considered two issues. First, was foreseeability of damage an element of *Rylands v Fletcher*? (Yes.) Secondly, did the use of perchloroethene by Eastern Counties Leather constitute a "non-natural" use? (Yes.)

### Discussion

It has seemed odd to more than one commentator that the original facts of *Rylands v Fletcher* were not dealt with simply as a case of nuisance. Activity on the defendant's land (the building of a water reservoir) caused material damage to the property of the plaintiff (whose mine shafts were flooded when the reservoir burst). Neither the judgment of Blackburn J in the Court of Exchequer Chamber nor that of Lord Cairns in the House of Lords mentions the word "nuisance", but nor do they give the impression that they are branching out into new territory. Indeed, Lord Cairns says "the principles on which the case must be determined appear to me to be extremely simple." (*Rylands*, supra (HL) at 338.) Lord Cairns' discussion of natural and non-natural use clearly was a reference to the distinction between the natural accumulation of water on the defendant's land and the collection of water on the land by the defendant. (ibid, at 338-39.) This is consistent with nuisance; where circumstances which caused damage were "non-natural" in the sense that they were created by the defendant rather than arising naturally, liability was strict. One of the chief architects of this argument was Professor Newark, who in 1949 wrote an article on "The Boundaries of Nuisance" (1949) 65 LQR 480. In it, he suggested that *Rylands* was a simple case of nuisance misconstrued.<sup>1</sup>

The main argument defending the independent status of *Rylands* is that nuisance would not have been available on the facts. The bursting of the reservoir was an isolated event, not a continuing situation, and at the time nuisance did not apply to single incident losses. This distinction, if it ever was the case, disappeared many years ago. One illustration of this fact is *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, a House of Lords case decided half a century ago in which the plaintiff's property was flooded

by water from the defendant's adjacent land. The flood was caused by a blockage in the defendant's drainpipe. The blockage had accumulated over time, but the flooding, like the escape of the water from *Rylands*' reservoir into *Fletcher*'s mine, was a one-time event. The defendant was found liable in nuisance.

Until *Cambridge Water*, the proposition that *Rylands* was a "simple case of nuisance misconstrued" was ignored by the Courts, and the rule in *Rylands v Fletcher* was treated as a wholly independent cause of action. In *Cambridge Water*, the House of Lords finally acknowledged its nuisance origins, and made special note of Professor Newark's analysis. Lord Goff, writing for the Court, accepted the point that even though *Rylands* took on an independent status, it was "essentially concerned with an extension of the law of nuisance to cases of isolated escape". (*Cambridge Water* supra, at 79.) Therefore, according to Lord Goff, since foreseeability is now an element of nuisance, foreseeability must also be an element of the rule in *Rylands v Fletcher*.

The problem is that the *Rylands* decision was based upon nuisance as it existed in 1866. Until *Cambridge Water*, the rule in *Rylands v Fletcher* may have remained closer to those roots than did nuisance itself. There is tremendous irony in the House of Lords' decision, for the effect of accepting the nuisance origins of *Rylands v Fletcher* has been to remove it further from them. In order to show the full effect of the decision, it is necessary to describe broad developments in the law of nuisance.

### Nuisance invaded by the fault doctrine

Although they are both referred to as "nuisance", the origins of private nuisance and public nuisance have little in common. Private nuisance was always about rights in and uses of land; public nuisance was a common law crime, derived from an assortment of obstruction and disturbance type offences. Before negligence actions were available, public nuisance was applied to obstruction cases in which there had been personal injury or property loss. In such circumstances, private actions in public nuisance were allowed

because the plaintiff had suffered "special damage" — damage distinct and different in kind from that suffered by the rest of the public.

In these cases, some evaluation of conduct was often necessary. For instance, if someone had left a carriage in the roadway and someone else had collided with it, it had to be considered whether the carriage had been left for an unreasonable time in unreasonable circumstances. This was not referred to as negligent conduct, but the inquiry was similar.

Public nuisance was not suited to this task. Indeed, the existence of the private action in public nuisance is an anomaly. Negligence occupies this field and is equipped with appropriate tests. When the private action in public nuisance emerged, it was really an action in negligence before its time. Nevertheless, the cause of action survived even after negligence became established. In fact, where public nuisance could be argued successfully, it had at least two advantages for plaintiffs over negligence: public nuisance did not require negligent conduct, and it did not require foreseeability.

Meanwhile, there was a distinction in private nuisance between creation and continuance cases. Where the defendant had created the conditions which caused the damage to the plaintiff's land, liability was strict as always. But where the conditions producing the nuisance arose naturally on the defendant's land without his participation or consent and he did not remedy the situation, it was appropriate to evaluate his failure to act and the accompanying circumstances. Did he know of the potential for damage to the plaintiff's land? How much effort would it have required to fix? Like the private action in public nuisance, liability in continuance cases was not strict. Adding to the confusion was another distinction drawn in private nuisance, that between nuisance which causes damage to land and nuisance which causes mere interference with use and enjoyment of land. (See for example *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683.) The latter requires consideration of the context: was the defendant's use of land reasonable? Was the interference unreasonable? Negligent conduct again was not required, but neither was liability strict.

These different kinds of nuisance situations were easy to confuse.<sup>2</sup> The

variations obscured the fact that in pure cases of private nuisance — those where the defendant was carrying on an activity on his own land which caused material damage to the plaintiff's land — liability was strict. There was no evaluation of conduct, no consideration whether the defendant's use was reasonable, and no element of fault, whether called careless conduct or foreseeability.

Then came *The Wagon Mound*. Oil from *The Wagon Mound*, a ship moored in Sydney Harbour, spread onto the harbour waters and caught fire, causing damage to docks and two other ships. Two actions were brought in negligence and public nuisance, one by the owner of the dock (*The Wagon Mound No 1*) (*Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388) and the other by the ship owners (*Wagon Mound No 2*) (*Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617). The findings in the cases are confused, but the bottom line was that in *Wagon Mound No 2* negligence was in danger of being usurped by the public nuisance action. The Privy Council decided that foreseeability must be an element of nuisance also.

This would have been a sensible conclusion if it had been limited to private actions in public nuisance for private injury or property loss, for these are essentially negligence actions anyway. But the Court did not recognise the peculiarities of the private action in public nuisance and concluded that foreseeability must be an element in all nuisance actions.

As a result, even private nuisance actions in which the defendant's use of land causes material damage to the plaintiff's land require foreseeability of damage. This is not consistent with the way private nuisance has operated for hundreds of years, and certainly does not amount to strict liability. It

is still one step removed from requiring negligent conduct on the part of the defendant, but liability in private nuisance since the *Wagon Mound No 2* is based on fault, and now is closer to negligence than it is to strict liability.

#### Requiem for *Rylands v Fletcher*

Until *Cambridge Water*, *Rylands v Fletcher* had largely escaped this invasion of fault theory. Because *Rylands* had been misconstrued so long ago as something different from nuisance, a cause of action more or less based on strict liability had been preserved. Indeed, in some ways the modern rule of *Rylands v Fletcher* more closely resembled nuisance as it existed in 1866 than did the modern version of nuisance itself. To require foreseeability in *Rylands* makes no more sense than it does in private nuisance. If foreseeability had been required by the Court which decided *Rylands*, the plaintiff would have lost; the defendant did not know and reasonably could not have known the shafts were there.

The *Cambridge Water* decision is ironic in another sense as well. After acknowledging the nuisance origins of *Rylands*, Lord Goff applied a wider meaning of "non-natural" use. He found that the use and storage of chemicals in substantial quantities was a classic instance. (*Cambridge Water*, supra, at 83.) Prior to *Cambridge Water*, non-natural meant unusual or extraordinary in the context of the place and time, akin to the neighbourhood test applied in private nuisance cases of unreasonable interference with use and enjoyment. A plaintiff will no longer have to prove that the defendant's activity is extraordinary or ultra-hazardous, or to refute the economic or community benefits of the activity offered to justify it.

But this begs the question: Why should a plaintiff now resort to *Rylands v Fletcher* at all? Before *Cambridge Water*, if the defendant's

activity was sufficiently hazardous to be "non-natural", *Rylands* would apply even though the escape and the actual damage which occurred was unforeseeable. After *The Wagon Mound No 2*, such was not the case in nuisance. Now, however, private nuisance applies to more situations and its elements are easier to prove: *Rylands* applies only to property damage, whereas nuisance applies also to interference with use and enjoyment; unlike *Rylands*, nuisance has not been definitively restricted to activity on the defendant's land;<sup>3</sup> and despite the broadening of "non-natural" in *Cambridge Water*, some evaluation of context will still be required. In nuisance, all that need be shown is that the defendant carried on the activity.

#### Conclusion

*Rylands v Fletcher* indeed may have been a cause of nuisance misconstrued. But before *Cambridge Water*, it had not been misconstrued as badly as nuisance itself since *Rylands* was decided. To make the rule in *Rylands v Fletcher* conform to the present state of private nuisance takes it not closer to its origins, but further away. □

1 Also see Stephen Todd's excellent treatment of the subject, "The Rule in *Rylands v Fletcher*" in S Todd, ed, *The Law of Torts in New Zealand* (1991).

2 See for instance *Clearlite v Auckland City Corp* [1976] 2 NZLR 729, a case of physical damage to property. The decision refers to nuisance as a tort of strict liability, but also says that liability is a question whether the defendant's conduct is unreasonable having regard to the interests of the plaintiff (at 740-41).

3 In *Cambridge Water*, supra, Lord Goff notes (at 79) that because of *Read v J Lyons Co Ltd* [1947] AC 156, no liability arises under *Rylands v Fletcher* except where damage has been caused by an escape from land under the control of the defendant. It is possible for a defendant to commit a private nuisance while not on his land: *Clearlite v Auckland City Corp* [1976] 2 NZLR 729; *Southport Corporation v Esso Petroleum Co Ltd* [1953] 2 All ER 1204.

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# Excusing breaches of rights

By Don Mathias, Barrister of Auckland

*A breach of the New Zealand Bill of Rights Act 1990 may not render evidence inadmissible. Some breaches of the Act may be excused by the Courts. This article is concerned with identifying the kinds of situations in which a breach of the rights to legal advice contained in s 23(1)(b) might be excused. In the United States there is a long history of exceptions to the corresponding rights, and it is necessary to determine whether any of those are applicable here.*

*It is suggested that in excusing breaches of the Bill of Rights and admitting unlawfully obtained evidence Courts are in danger of countenancing abuse of process arising from failure of the rule of law.*

In this article the basic procedural and evidential rules will be outlined first, followed by a summary of the various excuses for breach of *Miranda v Arizona* 384 US 436 (1966). Each type of excuse will then be examined in relation to New Zealand law. It will be seen that the choice between constitutionalism and legalism may determine the ultimate level of confidence the public have in the legal system. These ugly ism-words require some justification. Constitutionalism is used because it has an American flavour which here will evoke the danger of rights disappearing. Legalism is a word with a slightly pejorative connotation, and it is used here as a reminder of the dangers inherent in balancing exercises. Both these terms will be defined below in relation to the burden and standard of proof.

## The issues

Three issues involving rights are (1) whether the claimed right *exists* in the circumstances of the case; (2) if it does, whether it has been *breached*; (3) if it has, whether the breach should be *excused*.

In this article these issues will be numbered in that way. The second issue is merely a matter of fact and is only discussed in relation to the rules concerning burden and standard of proof.

The theory of this article is that for issues of rights-existence (1), legalism is the appropriate analysis, whereas for issues of excused breach (3), it is constitutionalism.

## Burden and standard of proof

Issue (2) is whether there has been a breach of the Bill of Rights, and it is

for the defence to point to an evidential foundation for the suggestion that there has been a breach. Once there is such a foundation, the onus of proving that there was no breach falls on the prosecution. The standard of proof has been variously expressed, but it seems to be little different from proof beyond reasonable doubt although that formula has not been used. In *R v Dobler* [1993] 1 NZLR 431, 439 (1992) 8 CRNZ 604, 613, Smellie J expressed it as follows:

Accordingly, although accepting that on the balance of probabilities is the right standard, none the less the gravity of the subject-matter means that I will not be satisfied lightly and *effectively will give the benefit of any real doubt to the accused.* [emphasis added]

In *R v Te Kira* (1993) 9 CRNZ 649, 655 Cooke P said that the test used by Smellie J should be adopted. Again, in *Police v Kohler* (1993) 10 CRNZ 118, 123, Cooke P referred to this, saying that it was doubtful that this would lead to results different from those in Canada and the US, where the standards are described as "a heavy burden", "a high standard of proof", "a very high standard."

It is undesirable to create a plethora of standards of proof where exactitude is impossible. In *R v McCuin* [1982] 1 NZLR 13 McMullin J referred to the uncertainty inherent in adopting an intermediate standard of proof between balance of probabilities and beyond reasonable doubt (pp 21-22), and Somers J observed that the standard of beyond reasonable doubt would be unlikely

to give rise to any change in present practice whereby the existence of any real doubt as to voluntariness of a confession would not satisfy the onus cast on the prosecution (pp 23-24). It is therefore unlikely that there should be a distinction between Smellie J's "real doubt", the benefit of which would be given to the accused, and the traditional criminal "reasonable doubt". Clearly it is intended that the standard be rather higher than the balance of probabilities, and anchoring the concept to that phrase may not be helpful. Although there is little authority on the point, perhaps because it is always taken for granted, it has been held that the prosecution must establish the admissibility of its evidence beyond reasonable doubt: *R v Yacoob* (1981) 72 Cr App R 313 CA.

Issue (3) arises if the prosecution fails to meet its standard of proof on the first issue. It is, are there grounds for departing from the prima facie rule of exclusion of the evidence? The onus of proof of the existence of such grounds rests on the prosecution, and the standard of proof is the same as in relation to the first issue: *Police v Kohler*, supra, at p 123. This article is concerned with the main grounds that have been recognised for departing from the prima facie exclusion rule.

## Legalism and constitutionalism defined

In this article, legalism requires the Court to ask whether it is satisfied to the necessary high standard that the claimed right does not exist in the circumstances of the case, taking into account the competing interests and balance objective factors in general terms.

Constitutionalism requires the Court to ask whether it is satisfied to the necessary high standard that the breach of the right should be excused in the circumstances of the case, taking into account D's subjective position measured against the need to prevent abuse of process by discouraging official disregard for the law.

#### Relevance of United States law

In *Miranda v Arizona*, supra, the Supreme Court considered what procedural safeguards were necessary to protect a suspect's rights under the fifth amendment ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .") when he was subject to custodial interrogation. The Courts would not allow the prosecution to use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant, unless it demonstrated the use of procedural safeguards to inform him of his right to silence, to ensure a continuous opportunity to exercise it, and to advise him that he had the right to consult with an attorney, either retained or appointed, at any stage. A statement obtained in breach of these safeguards would be inadmissible. Exclusion as a matter of law was held preferable to a case-by-case approach because of the inherent difficulties in determining the facts. A useful discussion of the erosion of the *Miranda* safeguards is to be found in Charles J Ogletree's article "Are Confessions Really Good for the Soul? A Proposal to Mirandize *Miranda*", [1987] 100 *Harvard Law Review* 1826. Dr Ogletree describes inroads that have developed to restrict the effectiveness of the *Miranda* requirements to a point where he concludes that the exclusionary rule has not achieved its objectives. The various inroads may be grouped as follows for present purposes: (1) narrowing the definition of custody, (2) restricting police obligations to informing of rights and not including assisting in facilitating the exercise of those rights, (3) construing waiver of rights widely, (4) excusing breach of rights in situations broadly described as emergency, and (5) too readily allowing derivative evidence to be given (the "fruit of the poisoned tree" cases).

The *Miranda* rights are obviously similar to rights pursuant to the Judges' Rules and s 23(1)(b) and (4)

of the New Zealand Bill of Rights Act 1990. Our Courts have already recognised, in a tentative way, that these rights may be subject to restrictions of the kinds imposed in the United States. It will be seen that of the five types of restrictions set out in the last paragraph, the first two are relevant to what in New Zealand is the first issue. They tend to narrow the circumstances in which rights will be recognised. The other three types of restrictions are relevant to the third issue, whether there are grounds for departing from the prima facie rule of exclusion. They tend to widen the circumstances in which evidence obtained in breach of rights will be admissible. The subject of this article is the latter three types of restrictions, but cases on the first two may be noted in passing.

#### Limiting existence of rights: the first issue

Section 23(1) applies to "Everyone who is arrested or detained under any enactment". *R v Goodwin* [1993] 2 NZLR 153, (1992) 9 CRNZ 1 CA gives a narrow interpretation of the words "arrested" and "detained under any enactment", so that "arrested" is construed objectively in terms of the officer's conduct and intention (in contrast to the earlier approach illustrated by *Marson v Police* (1992) 9 CRNZ 97 HC), and "detained under any enactment" means validly so detained. The problem in *Goodwin* was, broadly, whether the facts raised a first or a third issue question. It was held that they raised a first issue question (whether D had the claimed rights in the circumstances), and the answer to this question was reached by a process of legalism (to conclude that he didn't have the rights he claimed). It may seem inconsistent to say that *Goodwin* illustrates legalism when Richardson J, for example, prefers what he calls a "rights centred" approach. However the following dicta make it clear that he is employing legalism (p 194, 46):

In my judgment the Bill of Rights itself mandates a rights centred approach to the assessment of the public interest. That does not mean that other aspects of the public interest are to be ignored. It requires that the weighing process respect the concern of the legislation for the vindication of human rights and that it should consciously seek to assess all the

circumstances of the case against that standard.

Even a detention within s 22 seems to require that the defendant be told that he should remain in police custody: *R v Goodwin (No 2)* [1993] 2 NZLR 390, (1993) 90 CRNZ 394 CA. See also *R v Latta* (1992) 8 CRNZ 520 CA (no evidence D reasonably believed he was not free to leave the police station if he had asked to do so), *R v Clarke* (1992) 8 CRNZ 528 HC (unconscious driver at hospital not detained when blood sample taken from him because he was incapable of exercising any rights that might have been available to him; but even if detained, taking the sample was a justified limitation within s 5).

The obligation to inform of rights does not necessarily include an obligation to inform how those rights might be exercised in the existing circumstances: *R v Mallinson* [1993] 1 NZLR 528, (1992) 8 CRNZ 707 CA, and *Takarangi v Police* (1992) 9 CRNZ 234 HC (failure by D to seek further information — the after-hours telephone numbers of lawyers — meant there had been no breach, it not being necessary to assist D by taking the initiative in giving her that information). It is for D to trigger the ancillary obligation on the police to inform him that legal advice may be available free: this occurred in *R v Barber* (High Court, Christchurch, T13/93, 10.6.93, Fraser J), where D declined a lawyer "on grounds of financial difficulties". The *Mallinson* judgment does not disclose any form of reasoning behind its conclusions. It is fair to assume that it is the product of the appropriate reasoning, and the view suggested in this article is that legalism is the correct approach. Legalism would involve the Court weighing up the burden that would be placed on the police by a duty to inform a suspect about facilitation, and the wider public interests that would be prejudiced (whatever those might be), against the benefits of avoiding subsequent rights disputes and ensuring suspects understand their position. It seems clear that the safest course for the police, in the interests of avoiding later argument, would be to take the initiative in telling D how his rights may be exercised (cp Tipping J's observation in *R v Steere* (High Court, Christchurch, T56/93, 21.10.93) that arguments about detention would be avoided if D was



told at the outset of the interview that he was free to leave at any stage). With respect, *Mallinson* seems to reach the wrong conclusion on the initiative point.

Other limitations on the existence of rights will arise from the operation of s 5 of the Bill of Rights. It is a question of interpretation whether s 5 also includes second issue disputes. There are some dicta which suggest that whether or not an existing right has been breached can depend on the s 5 criterion of "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." On the third issue, when the appropriate analysis is constitutionalism, it is difficult to see how such broad issues can be applicable to excuse breaches once the right has been found to exist.

### Departing from prima facie exclusion: the third issue

Three kinds of reasons for allowing evidence obtained in breach of rights to be admitted will now be considered individually. For each, an outline of the approach in the United States will be followed by comparison with New Zealand cases, and an evaluation of its rationale will be offered.

#### (a) Waiver

Conceptually there is a distinction between waiver of a right, on the one hand, and waiver of a breach of a right on the other. The relevance of the distinction is that it defines the matters in dispute. A *rights waiver* dispute would be, D: "I wasn't given the right to consult a lawyer," Prosecution: "Yes you were, and you declined to do so." A *breach waiver* dispute would be, D: "I wasn't given the right to consult a lawyer," Prosecution: "Of course you weren't. You were too insistent on telling us you were guilty and you said your rights didn't matter." Strictly, the concern of this article is exceptions to the exclusion rule, so only waiver of breaches should be considered. However both kinds of waiver can be reviewed here because they share the essential requirement of informed and conscious (voluntary) choice, and the cases on rights waiver are relevant to illustrate that requirement.

In the United States, *rights waiver* requirements are that unless D invokes *Miranda* rights clearly he has waived them: *Frazier v Cupp* (1969) 394 US 731, 22 LEd 2d 684; but

subsequent prevarication cannot be used to cast doubt on the clarity of his initial request for a lawyer: *Smith v Illinois* (1984) 469 US 91, 83 LEd 2d 488. *Breach waiver* issues arise, for example, if D has requested a lawyer and while waiting for legal advice he resumes communication with the police. Once D has requested a lawyer *Miranda* requires a cessation of custodial interrogation, so further questioning is a breach. Yet although that part of the interview cannot, in the absence of waiver, be given in evidence as part of the prosecution case in chief, it can be given to impeach D's testimony: *Oregon v Hass* (1975) 420 US 714, 32 LEd 2d 570, where there was no suggestion that D's continued answers to questions in a patrol car on the way to the station where he would be able to obtain legal advice had not been voluntary.

New Zealand cases on the *rights waiver* illustrate the requirement of informed and conscious choice in the matter of waiver. In *R v Duran* (1992) 8 CRNZ CA D's comment, "If I had a lawyer here he would be having apoplexy that I told you anything at all," showed that he had been aware of his right and had chosen not to exercise it. There was no clear rights waiver in *R v Mallinson* (1992) 8 CRNZ 409 HC where D simply said he had a lawyer who would get him off. Clear rights waiver occurred in *R v Doctor* (1992) 9 CRNZ 142 HC, where advice of rights was repeated several times and D simply gave the name of his lawyer without actually requesting contact with him; there was clear and valid waiver, with full knowledge of his rights. In *R v Ali* (1992) 8 CRNZ 405 HC rights waiver was inferred from the facts that (1) D had not consulted a lawyer when given the opportunity the previous evening, (2) he declined to have a lawyer present at an identification parade some 20 minutes before the interview in question, and (3) he readily admitted his involvement in the earliest stage of the interview showing that he was anxious to make a full confession immediately after the identification parade.

For there to be a valid waiver, D must exercise an informed and conscious choice: *Police v Kohler* (1993) 10 CRNZ 118 CA, where a right to private consultation with a lawyer could not be proved to have been waived in the absence of proof that D knew of the right to privacy.

In that case the Court noted what it called another ground that might be advanced for departing from the prima facie exclusion rule: inconsequentiality (see also *Duran*, supra). That would require the Court to be satisfied that if D had been told of his right to private consultation with a lawyer, he would not have exercised it. One may, with respect, wonder whether inconsequentiality is really a separate ground for admitting evidence obtained in breach of rights. It is potentially a dangerous ground, because it seems to invite a wide application so that it would allow rights to be ignored if, for example, no lawyer was available to advise D. At present the term "inconsequentiality" is used "in the sense that the Court can be satisfied that the admission would have been made without a breach" (per Cooke P in *Goodwin*, supra, p 171, 21). It is also useful in the context of derivative evidence (see below).

Informed waiver requires that D know the reason the police intend to question him. In *R v Tawhiti* (High Court, Rotorua, T5/93, 6.5.93, Thomas J) D believed he was to be questioned in relation to possession of an offensive weapon. He had not been told that the victim had died and it was a murder inquiry. He had declined a lawyer, saying, "No, not yet." Evidence of his interview was held inadmissible.

*Breach waiver* was held to have occurred in *R v Grant* (1992) 8 CRNZ 483 CA where it was not until the conclusion of the interview that D had been informed of his right to legal advice. It was held that it could properly be inferred that it would have made no difference to D if he had been told his rights at the proper time, because (1) he did not immediately seek advice after being told he could have it, and (2) the next day he continued his cooperation by travelling with the officer and pointing out scenes of his crimes. By contrast, it was held to be wrong to infer that D would have made the admissions if she had been told of her rights at the beginning of the interview where she was told of them at the end and she tried unsuccessfully to contact two lawyers and then when offered a list she said, "No, don't worry about it. I'll see about it tomorrow": *R v Himiona* (High Court, Rotorua, T69/91, 10.2.92, Doogue J). As for the position when D is awaiting



legal advice, it is not enough for the police to refrain from actively eliciting incriminating evidence: they must not act in any manner which will negate the right: *R v Taylor* [1993] 1 NZLR 647, (1992) 9 CRNZ 481 CA. However in that case it was held that the officer had not negated D's right when, in response to D's request, he put away his notebook and participated in a conversation in which D incriminated himself.

Obviously the Courts regard the right to legal advice before (or at any time during) custodial interrogation as important. The rationale for waiver is that an intelligent and voluntary choice can be made by D. Unless the suspect understands his rights they are worthless. The former legal language of the caution and statement of rights often requires careful explanation, but the Courts have not required rights to be explained ab initio in simple terms, including how exercising the rights might be facilitated (*R v Mallinson* [1993] 1 NZLR 528, (1992) 8 CRNZ 707 CA). It is surprising how often the absurd exchange, "Do you understand?" "Yes," is thought to prove something. At present, judicial interpretation of the obligations on the police arising from the right to legal advice falls far short of promoting the purpose of that right.

#### (b) Emergency

In the United States an exception to the requirement to inform a suspect of his *Miranda* rights is where there are circumstances of urgency involving the public safety. In *New York v Quarles*, 467 US 649 (1984) D was handcuffed and questioned about the location of a gun thought to be in the vicinity of a supermarket at 12.30 am. The Supreme Court balanced the need to protect public safety against the importance of the absence of *Miranda* warnings, and held that D's statements were admissible in the prosecution's case in chief. Legalism prevailed over constitutionalism. Other cases in this area concern questioning to ascertain the location of victims, weapons, and other suspects. There is a narrower "rescue doctrine" according to which the public safety exception does not apply to locating other suspects when D is at the

police station and no one is at the crime scene which is under police control.

In New Zealand considerations of any emergency exception have so far been obiter. In *R v Butcher* [1992] 2 NZLR 257, 274, (1991) 7 CRNZ 407, 426 CA Holland J referred to the possibility of urgent legal advice being unavailable and the police having to release a suspect who might then tamper with evidence. Those concerns were voiced with reference to the possible introduction of a police power of detention for questioning, and were not intended to be the basis for police ignoring D's right to be informed of his rights. In *R v Etheridge* (1992) 9 CRNZ 268 CA, 271 passing reference was made to the absence of any "emergency or circumstance of urgency confronting the police". Further, in *R v Goodwin* [1993] 2 NZLR 153, (1992) 9 CRNZ 1 CA, Cooke P referred to reasonably apprehended physical danger to persons and other reasons for urgency such as the risk of destruction of evidence (p 171, 21), Richardson J referred to the Canadian recognition that circumstances of urgency or necessity may be relevant (p 194, 46), Hardie Boys J mentioned the Irish cases in which accident and preservation of life were relevant (p 202, 55), and Gault J said the urgency of the situation may be relevant (p 207, 60).

It may be wondered why D's answers to questions asked in an effort to defuse an emergency should be used as evidence against him when there has been compliance with his rights regarding legal advice. There may well be excellent reasons for not complying with the Bill of Rights, but when D responds to an emergency by giving helpful information to the police it would seem harsh to ignore the breach and use his answers against him. Rights are at their most fragile when officials are dealing with an emergency. Even if D knew his rights, he had waived them but only by force of circumstance. Not voluntarily. This is not to say that derivative evidence could not be used (see below).

It must be recognised that there is a reasonable argument that D should not be allowed to benefit from an emergency of his own creation. This is apposite where the emergency involves preventing D destroying evidence, and it is particularly strong where public safety concerns also arise. For these reasons, legalism can

be said to have more of a role than constitutionalism in decisions involving emergency of that nature. The appropriateness of legalism would seem to vary with the extent to which D is responsible for the emergency. Resort to legalism in the context of breach issues should be regarded as exceptional.

#### (c) Derivative evidence

The expression derivative evidence here refers to evidence which derives from a breach of rights. The evidence must in some sense be a product of the illegality. In *New York v Harris* (1990) 495 US 14, 109 LEd 2d 13 this link was absent: following an illegal entry into the suspect's home he was arrested and taken to the station where he signed a statement admitting murder. The Supreme Court held that the statement was not a product of the illegal entry as D could have been arrested elsewhere since the police had probable cause to arrest him.

It is usual to apply the term derivative evidence to evidence which is a little more remote from the breach than an uncautioned statement. In *Harris*, supra the confession at the station was the second of two statements, the first (at the house) was excluded.

Where there is a link between the breach and the evidence, the issue is whether that link is sufficiently attenuated to purge the evidence of the taint of illegality. Attenuating circumstances may be lapse of time, intervening events, the purpose and flagrancy of the illegality, whether the evidence was yielded voluntarily, whether the evidence would have been discovered inevitably, and whether it could have been obtained lawfully.

The approach in New Zealand at common law is summarised by Eichelbaum CJ in *R v Dally* [1990] 2 NZLR 184 HC, 192-193, where it was observed that "there is no necessity for an inflexible rule about the admission into evidence of facts discovered in consequence of improper activity." The seriousness of the illegality was mentioned as a matter which could be relevant to the exercise of the discretion to exclude the derivative evidence. In the context of breach of the Bill of Rights, an inevitable discovery test was applied in *R v Butcher* [1992] 2 NZLR 257, 267, (1991) 7 CRNZ 407 CA, 418-419 per Cooke P:

... the police would have made in any event a thorough search of the house and garden where Burgess was living and would have discovered the air pistol and the various parts of the shotgun ... the clothing and the mask in roadside locations are much less likely to have been found without guidance from Burgess. Their discovery should be ruled out as evidence derived from an inadmissible confession.

In terms of the discovery of the evidence, if the breach of rights is inconsequential then it will not affect admissibility.

The rules concerning the admissibility of derivative evidence should be the same for common law illegality as for breaches of the Bill of Rights. Arguably, ([1993] NZLJ 10), the procedural and evidential rules concerning wrongly obtained evidence are really the same at common law as under the Bill of Rights. They are simply expressed differently. In relation to derivative evidence the underlying rationale for exclusion should be promotion of official respect for the provisions of the Bill of Rights. The "inevitable discovery" test is geared to the particular circumstances of the case and is consistent with constitutionalism. It does not require the balancing of wider interests that legalism involves. It may be that the circumstances of inevitable discovery are not all admissible if there has been a breach of rights leading to information relevant to the discovery, since at common law the prosecution may not adduce evidence which amounts to a repetition of an incriminating but inadmissible admission through disclosure of the circumstances in which derivative evidence was found: *Lam Chi-ming v R* [1991] 3 All ER 172 PC.

Not all of the factors identified in the United States as being relevant to excuse breaches should be applied. It is difficult to see how lapse of time, for example, can of itself be relevant. Similarly, the fact that D yielded the evidence voluntarily can hardly be material, since his rights had not been observed. Even the purpose and flagrancy of the illegality should have little if any relevance in the context of breach of the Bill of Rights as all breaches are by definition serious: *R v Tawhiti*, supra, where Thomas J said that the Bill of Rights is "not

primarily concerned with the seriousness or otherwise of the breach. It is directed towards vindicating the fundamental rights of the accused." Intervening events will necessarily be relevant if they give rise to inevitable discovery. What can be said is that it is consistent with principle that the relevant considerations should be, subject to what is said below concerning *Bennett's* case, whether the evidence would have been discovered inevitably, and whether it could have been obtained lawfully.

What about evidence which is discovered as a result of a breach of the Bill of Rights which occurred in circumstances of emergency? It was suggested above that a response from D helpful to the police in a moment of emergency is a concession by him; the relevant considerations in relation to derivative evidence here should still be the same: inevitable discovery and alternative lawful course. It is unlikely, however, that there will be much scope for these criteria if the derivative evidence is discovered through D's cooperation during an emergency. That the situation can be called an emergency suggests there was no opportunity either to discover the evidence "inevitably", or to employ lawful means.

### Constitutionalism triumphs over legalism

Constitutionalism is rights centred: it requires the protection of the citizen against the illegal exercise of coercive powers of the State (see, for example, the remarks of Thomas J in *Tawhiti*, quoted supra). Legalism views the rights of the citizen as matters to be balanced with other circumstances in the interests of justice (see, for example, *Goodwin*, supra, per Gault J at p 207, 60, where it was said that the right of the community to have serious crime vigorously investigated is a competing right which overrules the particular circumstances). There are occasions on first issue questions when it is appropriate for a Court to step from legalism to constitutionalism, when executive lawlessness cannot be overlooked even where there was a lawful way for officials to obtain the same evidence.

Ironically, in the United States the proliferation of excuses has occurred because a breach of the *Miranda*

rights is less likely to evoke "constitutionalism" than might have been expected. A breach of *Miranda* is not necessarily a breach of the Constitution so the cases tend to be seen in first issue terms. By contrast, in New Zealand, breaches of the Bill of Rights requirements are necessarily breaches of rights *per se*.

Constitutionalism has recently received impetus in England. In *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 HL the broad discretion to prevent an abuse of process, in the sense invoked by Woodhouse J in *R v Hartley* [1978] 2 NZLR 199, 216-217, and by the same Judge in *Moevao v Dept of Labour* [1980] 1 NZLR 464, 475-476, was used to stay a prosecution of a New Zealander who had been brought illegally within the English jurisdiction from South Africa instead of being extradited. Lord Griffiths said (pp 150-151):

If the Court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

... The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

Lord Bridge, finding that it was unacceptable and insular to suggest that a Court should turn a blind eye to lawlessness beyond the frontiers of its own jurisdiction, said (p 155):

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself.

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# Voice identification

By Stephen O'Driscoll, Barrister and Solicitor of Dunedin

*Identification is often a crucial issue in a criminal trial. In this article the author considers an issue that has not been well developed, that is the question of identification by voice. The article considers particularly two Court of Appeal decisions on this point.*

## Introduction

There has been a considerable amount of jurisprudence written in recent times concerning the issue of identification in criminal trials. This take the form of judgments,<sup>1</sup> legislation,<sup>2</sup> and commentaries on the topic.<sup>3</sup> Cases on identification have usually concerned the proper directions to give to a jury when identification is in issue and the circumstances in which, where identification is in issue, the quality of the evidence is so poor that the case should be taken away from a jury.

One aspect of identification which has received little attention in New Zealand until recently is the issue of voice identification. One commentator has written that "There has been some discussion in Australia of the particular problems involved in voice identification but the issue has not yet received attention by New Zealand Courts". (D L Mathieson,

*Cross on Evidence* (4th ed, Butterworths NZ) p 70. Reference was made to the Australian cases *R v Smith* [1984] 1 NSWLR 462; *R v McHardie* [1983] 2 NSWLR 733; *R v MacKay* [1985] VR 623.)

There are two areas where the issue of voice identification has been raised in New Zealand. The first involves cases where a crime is committed such as an aggravated robbery where the offender is masked but is subsequently identified by voice. The second involves the more common situation of identification by voice where the Police have intercepted communications after the installation of a listening device or audio device under the provisions of the Misuse of Drugs Amendment Act 1975.

The Court of Appeal has recently, on two occasions considered voice identification and these cases have been subsequently considered in the High Court.

*Wickramasinghe* [1992] 8 CRNZ 478 (CA)

In *Wickramasinghe* a tape recording of a telephone conversation allegedly between one of the appellants and his brother-in-law were admitted at trial. During the conversation an admission was made concerning involvement in an abduction and beating. The conversation was in Sinhalese but was translated to English by an independent witness at the request of the Police. The witness expressed the opinion that one of the appellants was one of the speakers. A voir dire was held but the opinion evidence admitted at trial. The appellants then pleaded guilty. The matter was reserved under s 380 of the Crimes Act 1961 for the Court of Appeal.

The Court of Appeal held that the accuracy of the transcript was a jury question and that the difficulty the witness had in discerning what was

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As one English High Court Judge, writing as Stephen Sedley in *London Review of Books*, 23 September 1993, p 3, 6, has observed, the issue of improperly obtained or presented evidence is a constitutional issue going beyond guilt or innocence, and "The esteem in which the law comes to be held in the next generation may well depend on whether such constitutionalism, rather than ... legalism, is allowed to develop as the dominant logic of the law." That is said in response to the Report of the Royal Commission on Criminal Justice (the Runciman Report). The House of Lords majority in *Bennett* was more conscious than the majority of the Commissioners of the shortcomings of legalism compared with constitutionalism as a weapon against the kinds of startling

miscarriages of justice which have recently destroyed public confidence in the legal system in England (cp Cooke P in *Goodwin* at p 170, 20).

*Bennett* illustrates how vigorously the common law can protect rights without their having to be contained in a Bill of Rights.

## Conclusion

If there is a lesson to be learnt from the United States experience it seems to be this: it would be wrong to set about creating a jurisprudence of exceptions to the exclusionary rule. In the article by Ogletree cited above it is suggested that the remedy for existing shortcomings would be to make a statement inadmissible unless it is made after legal advice is received, whether that advice is sought or not. Caution should be exercised lest we reach a position where such an extreme answer seems to be the only remedy. Exceptions to

the exclusionary rule should be few, simple, realistic, coherent in principle, and not dependent on difficult factual determinations.

Whether an exception to the exclusionary rule can be recognised should depend on whether official breach of the law should be overlooked. Usually, when D has knowingly and freely waived the breach it is likely that the breach can be ignored. Similarly when the breach occurred during an emergency created by D, although it would be undesirable to allow the use of an emergency as an excuse for deliberate breach of rights. An inconsequential breach of rights may not of itself affect the admissibility of derivative evidence except where that evidence amounts to a repetition of an excluded statement. It should be recognised that these occasions for overlooking breaches of rights will only rarely arise. □

said on the tape went to weight rather than admissibility.<sup>4</sup> The Court also held that the accuracy of the translation was also a jury question.<sup>5</sup> The Court held that whether the trial Judge should have allowed the witness to express an opinion as to the identity of the voices on the tape, did raise a question of admissibility in law. It was argued by the appellants that the evidence of the witness who gave opinion evidence as to identity of the voices, should have been excluded in the exercise of the Judge's discretion to ensure fairness as the prejudicial effect of that evidence far outweighed its probative value.<sup>6</sup> It was also argued that the prejudicial effect involved an independent person of standing in the community and that the opinion was likely to be totally destructive of the defence of fabrication which made that a possibility and secondly, although the evidence concerning the tapes was available against only one appellant, the Judge would have had to direct the jury that once they were satisfied of one appellant's guilt, conviction of the other appellant would be inevitable.

The Court held that the probative value of one piece of evidence is not to be assessed in isolation. It was held that identity can be established by accumulation of pieces of evidence, none perhaps significant in itself but persuasive in their totality. In this case there were other pieces of totally independent evidence. It was held that where it is sought to prove identity by the evidence of several witnesses in combination, it will rarely be appropriate to exclude that of one of them. The Court held further though that if in totality they carry insufficient weight for a guilty verdict to be safely based on them, the Judge should withdraw the case from the jury. (See *R v Tamihere* [1991] 1 NZLR 195 (CA).)

An important point in this judgment is that while the witnesses' evidence identifying the voices on the tape was admissible in law, particular care was needed on the part of the trial Judge in his direction to the jury. The Court of Appeal held that the Judge would have been obliged to warn the jury in terms of s 344D of the Crimes Act 1961 had the appellant not pleaded guilty. Although the section is directed to visual identification, it was held that its rationale applies "with perhaps even greater force" to the identification of

voices.

### ***Waipouri* [1993] 2 NZLR 410 (CA)**

In *Waipouri* the Court of Appeal was divided over the admissibility of identification evidence by voice. It was alleged that the appellant was one of several persons who had taken part in a robbery. The attackers were wearing balaclavas at the time of the attack but one of the attackers shouted threats to the complainant. The appellant was found near the area of the attack and agreed to accompany the police to the police station for questioning. At the police station the appellant was interviewed on two occasions. On the first occasion he denied any knowledge of or participation in the robbery. On the second occasion, the interview was deliberately arranged to give the complainant the opportunity of identifying the appellant's voice although the complainant was not told this. The complainant had been asked to go to the police station to identify property and give further information. He had not been specifically told that the police had a suspect. At the police station, he was told that the police had a suspect in mind and had spoken to him. The complainant was asked to wait in a room with a constable. He was able to hear a conversation in the next room. He was not told to listen to the conversation but it was obvious to him that it would have been of interest to do so. The complainant heard two voices conducting a conversation in the next door room. He put his ear to the wall and listened to the voice and was then absolutely sure that the person being interviewed was the person who had assaulted him and who had done the talking in the robbery. He listened for five to ten minutes.

The trial Judge held a voir dire relating to the admissibility of this voice identification evidence and concluded it should be admitted. It was held that there was no element present which would amount to unfair conduct on the part of the police and the quality of the evidence in the sense that that expression was used in *R v Tamihere*<sup>7</sup> was considerable. The trial Judge gave a direction in terms of s 344D of the Crimes Act 1961. The appellant was convicted and appealed against that conviction.

The three Judges in the Court of

Appeal agreed that evidence of voice identification was admissible but recognised that as with evidence of identification by other means, care must be taken to obviate the danger of mistaken identification. It was recognised that it was not just a matter of appropriately warning a jury in terms of s 344D of the Crimes Act 1961 but the trial Judge must consider carefully the quality of the evidence for if it was considered that together with such other evidence of identification as there was, it was insufficient to satisfy a reasonable jury then it was the Judge's duty to withdraw the case from the jury.

The majority (Hardie Boys and Holland JJ) held that notwithstanding the lack of distinctive characteristics and previous knowledge of the voice both of which factors were taken into account by the Judge, the identification evidence considered with other evidence was not of such doubtful probative quality as to require it to be excluded provided that the jury was adequately directed on the topic. The majority did however come to the view that they were not satisfied that the trial Judge gave a sufficient direction as to the need for caution and the appeal was therefore allowed.

Eichelbaum CJ reached a different conclusion on the issue of the admissibility of the identification evidence. His Honour held that factors relating to the voice identification by the complainant did not constitute a safe identification. His Honour isolated eleven factors including the complainant's lack of familiarity with the voice of the offender, the offender was speaking angrily at the time of the robbery, the voice had no distinctive characteristic, the voice was heard only for a brief period and the complainant was quickly convinced at the police station that he recognised the voice. His Honour came to the conclusion that in the absence of supporting evidence sufficient to make the jury sure that the appellant was the offender, the case should not have been left to a jury.

### ***Thompson:***

In *Thompson* (unreported, High Court, Dunedin. T 10/93 8 September 1993, per Williamson J Oral Judgment No 2) it was argued

at the end of the prosecution case that an accused should be discharged on the basis of the identification evidence by voice that was relied upon by the prosecution. An interception warrant had been authorised allowing the Police to instal a device which was capable of monitoring telephone calls and audio conversations at a house in Waimate. During one of the telephone conversations, the accused, who was in Dunedin, indicated that he intended to be at that address at Waimate the following Saturday. The police, on that day, listened to recorded conversations which were played to the jury as part of the prosecution evidence. A police officer gave evidence that after receiving training in the analysis and transcribing of audio and telephone tapes, he was appointed as the police officer with responsibility for transcribing all of the tapes involved in the police operation. His evidence was that during the course of listening, he had become familiar with the voices of various parties who were involved in the conversations. While he said that he had never met the accused and that he was not familiar with his voice prior to listening to those intercepted conversations, the officer identified the accused's voice from his repeated listening to both the recorded telephone conversations and the audio conversations. His evidence was that after listening to the relevant parts, he formed the opinion that he had heard the accused offer to supply drugs to another person. It was argued by the accused that he should be discharged because the voice identification by the police officer was unsafe and because of the particular dangers in relation to the identification in this case.

In *Thompson's* case Williamson J was of the view that the identifying witness in that case was in a different category from the witnesses in the two Court of Appeal decisions referred to earlier. His Honour said that the witness in the *Thompson* case had special training who had had the opportunity on a number of occasions to hear the recorded voices. His Honour said that in this case the tapes were relatively clear and while the possibility of distortion must always be considered, there was nothing in these tapes to indicate any particular distortion which would affect the voice and there was no reason why the voices would have

been altered or why a person would be under any pressure to mimic another's voice. The witness was able to study a conversation which had taken place two days before between the accused and another person and that conversation was acknowledged to have been between the accused's address in Dunedin and the other person's address in Waimate. His Honour therefore did not consider that the evidence was so unsafe that he should withdraw the case from the jury and that it was a question of fact for them to determine.

In most cases after the termination of a police operation involving the use of listening or audio devices under the provisions of the Misuse of Drugs Amendment Act 1975, the police will question a suspect. The suspect will be asked to listen to recordings made by the police to confirm that what they are hearing is, in fact, their voice. This is an important matter for the police because once a suspect has acknowledged their voice on the tapes or acknowledged that they are part of the conversations, it will be difficult to raise the issue of identification. This is a practical point for counsel who are present with a suspect when they are interviewed. In the *Thompson* case Thompson declined the police offer to listen to the tapes and conversations and therefore did not acknowledge that one of the voices on the tapes was his voice.

#### Analysis:

- 1 Evidence of voice identification in law is admissible.
- 2 Where the case turns partially or wholly on the issue of voice identification, an appropriate warning must be given in terms of s 344D of the Crimes Act 1961.
- 3 It can be argued following what was said in *Wickramasinghe* that the warning in s 344D of the Crimes Act applies with perhaps even "greater force" to voice identification.
- 4 The trial Judge must consider carefully the quality of the evidence. The quality will depend very much on the opportunity the witness had at the time of the offence to hear the voice with clarity. It will also depend on the extent of the familiarity with that voice and particularly if that is not

great on any distinctive features the voice may have.

- 5 The quality of the evidence will also depend on the circumstances at the time of the offence. This will depend on the time over which the voice is heard, the stressfulness of the occasion and again on any distinctive features. It is not merely the opportunity to hear the voice that is important but also the opportunity to register a clear impression of it on the mind.
  - 6 The quality will also depend on the circumstances of the later hearing of the voice and whether that voice was able to be heard with clarity and whether the conditions affecting the speaker were comparable.
  - 7 After considering the quality of the evidence if a trial Judge considers that together with other such evidence of identity as there is, it is insufficient to satisfy a reasonable jury then it is the duty of the trial Judge to withdraw the case from the jury.
  - 8 Where opinion evidence of voice identification is given by a person who has listened to tapes on numerous occasions, notwithstanding any inaccuracies or inconsistencies, a Court is likely to allow that evidence to go to a jury on the basis that it is a matter of fact for a jury to determine and assess. (See Mathias *Misuse of Drugs* (Butterworths, 1988) p 156.) □
- 1 See eg *R v Turnbull* [1977] QB 224; *R v Tamihere* [1991] 1 NZLR 195 (CA), *R v (Junior) Reid* [1989] 3 WLR 771 (PC), *R v Roberts* [1989] 4 CRNZ 490 relating to secondary evidence of identification, *R v Harris* [1991] 7 CRNZ 611 relating to the use of photographs, *R v Hristov* [1985] 8 CRNZ 158 relating to identification parades.
  - 2 See Summary Proceedings Act 1957, s 67A; Crimes Act 1961; Evidence Act 1908, s 22A, s 344B, 344C, 344D.
  - 3 See New Zealand Criminal Law Reform Committee 1978 Report on Identification, Williams G *Evidence of Identification: The Devlin Report* [1976] Crim LR 407, Greyson, E *Identifying Turnbull* [1977] Crim LR 509.
  - 4 This is consistent with the Court of Appeal's earlier decision in *R v Taylor* [1992] 9 CRNZ 481 (CA).
  - 5 Ibid. See also *R v Menzies* [1982] 1 NZLR 40 (CA); *R v Barry* [1986] 2 CRNZ 437.
  - 6 See *R v Menzies* (ibid) and *R v Barry* (ibid).
  - 7 [1991] 1 NZLR 195 (CA). See also the High Court decision reported at (1990) 7 CRNZ 221 (HC).

# Books

## *Would a Good Man Die?*

By Dick Scott

(Hodder & Stoughton, 1993)

Reviewed by Stuart Ennor, Barrister, Auckland

This book discusses the murder in 1953 of New Zealand's Resident Commissioner to Niue Island, Hector Larsen.

At around midnight on Saturday 14th August 1953, three escaped prisoners entered Mr Larsen's bedroom. They lined up beside his bed, counted to three and began chopping his sleeping body with bushknives.

At that time Niue had a population of around 4,500. As Resident Commissioner Mr Larsen had effective administrative control of the Island.

His assailants were duly arrested and brought to trial.

Whilst Mr Scott's book presents an interesting account of the history of New Zealand's administration of Niue Island, of particular interest to lawyers are the chapters which deal with the Larsen murder. The trial in Niue was presided over by Mr L G H Sinclair, the Auckland magistrate. He sat with six assessors. Mr E T Pleasants appeared for the accused and Mr H R C Wild for the prosecution.

The defence faced a formidable task, having regard to the evidence of the accused's actions and their admissions.

Mr Scott is critical of Mr Pleasants' conduct of the defence. He contends that Mr Pleasants "failed to cite essential defence arguments" and confined himself "almost solely to routine and implausible technicalities". Mr Pleasants had challenged the admissibility of the accused's statements. The Judge in Chambers ruled there was no evidence of any threat, promise or other inducement to render their admissions inadmissible.

The author further contends that Mr Pleasants in open Court advanced "even more flimsy arguments" when he criticised the failure to conduct a postmortem, challenged the identification of the assailants by the dying Resident Commissioner and

contended that their statements were not necessarily true but foolish confessions made out of bravado. This is described by Mr Scott as being "no more than a display of courtroom shadow boxing".

He contends that the defence did not explore "the outer reaches of the law on provocation as practised in other outer reaches of Empire".

The Judge (of whom there is also some critical comment) was known to those who practised before him as a very able and fair judicial officer.

In the Judge's confidential report to the Minister he stated:

The evidence was reviewed with the assessors and they were satisfied that no provocation existed which would justify a verdict of manslaughter and that the evidence established an intention on the part of each one of the accused either to kill Mr Larsen or to do grievous bodily harm to him.

The three defendants were convicted of murder and sentenced to death.

An appeal to the Supreme Court in Auckland was heard over three days in October 1953 and reported in *Latoatama, Folitolu and Tamaeli v Williams* (1954) NZLR 594. Mr Pleasants appeared for the two first-named appellants and this reviewer appeared for the younger appellant, Tamaeli. Again, Mr Wild appeared for the respondent.

All possible arguments on behalf of the appellants were advanced to the Full Court. (Stanton, FB Adams and Turner JJ). As was customary at the time, the arguments of counsel are summarised in the *Law Reports*.

The Full Court in dismissing the appeals upheld the admissions, rejected the submission that the Judge should have summed up in open Court and ruled there was no provocation.

Mr Scott refers to the prisoners' grievances as relevant on the matter of provocation. One of the prisoners'

grievances was that the food allowance for them was the same as for the fowls.

One loaf of bread for a prisoner and one for a fowl? How could a man be fed like that and expected to do hard work?

There are allegations of: assault, kicking and slapping on the head, long hours of work (including work at the Resident Commissioner's own home), being growled at regarding the fixing of golf holes, and being made to work like animals.

The Full Court set out the evidence of the plan made the previous day to murder Mr Larsen. The escape occurred about 6.00 pm and the actual attack about midnight. Counsel had cited to the Court *Kwaku Mensah v The King* [1946] AC 83, 93, which held in that Western case that the test for provocation was to be applied to the "ordinary West African villager". We had called a retired missionary who gave evidence that provocative conduct in respect to the "simple requirements of a Niuean might pre-occupy his mind longer and more effectively than that of his European brother".

The Court held:

Taking all of these factors into account, however, we cannot bring ourselves to reconcile with any accepted definition of provocation the facts that we have above set out. These appear to us to demonstrate in every way not only that there had been ample time to "cool" even "for a reasonable Niuean" but the murder was accomplished with deliberate intention.

There was an unsuccessful appeal to the Privy Council. Their Lordships, without calling on the Crown and without comment, advised Her Majesty that leave to appeal should be refused. It seemed that the prisoners would have to face the gallows. However, after considerable controversy and pressure, the prisoners were finally granted a reprieve.

Mr Scott's book gives a valuable analysis of New Zealand's administration of Niue from the visit of Seddon in 1900 to the self-government in 1974 and gives the author's perspective of a unique chapter in New Zealand's legal history. □



# Developing duties of disclosure in insurance contracts

By Steven Zindel, Nelson practitioner

*The movement for the use of plain English in legal documents could be usefully used in relation to those forms of contract that are in fact unilateral even if expressed to be between two parties at arm's length. Ticket cases are one example and contracts of insurance are another. In this article Steven Zindel considers the issue of disclosure on the part of an insured. He suggests that, pending adequate statutory reform, insurance companies should develop a list of questions about relevant material facts about which disclosure is required. These questions should be in plain English. Obviously too there should not be a final omnibus question like asking if there is anything else that might be relevant.*

## A Introduction

Insurance contracts, like other contracts, are increasingly being interpreted in a more consumer-oriented way. Yet, in the field of disclosure of material facts relating to these contracts the Courts have traditionally expected high standards to be observed by the insured. The Courts have not, so far, been quite so rigorous in the imposition of reciprocal duties on the insurer. There has been a lack of coherence in the development of the duties of disclosure and how they are to be applied to the facts of a given case. The uncertainty is only heightened by piecemeal statutory initiatives.

The situation cries out for comprehensive reform, after consultation with the insurance industry and with consumers' groups as to what should be regarded as material. Questions in proposals should then be worded accordingly, with plain language and with reasonable specificity. Answers grounded in the subjective awareness of the insured as to what a reasonable insured would regard as material ought to be sufficient. Finally, reference to what is said verbally or outside the policy document should generally be circumscribed to avoid the factual difficulties which have been encountered on numerous occasions in the past.

## B Common law duties on insurer

An insurance contract is a contract of the utmost good faith and so there are duties (under the Marine Insurance Act 1908 in the case of marine

insurance) cast on insured and insurer alike not to misrepresent and, in fact, to make complete disclosure of all material facts. Even innocent non-disclosure can avoid an insurance contract. For the insurer, this usually means relying on the tried and tested policy document which nevertheless may be so archaic and wordy as to make no impact on the typical insured. The Courts have, however, developed a number of protections for the insured.

### (1) Ambiguity

If a question or provision is ambiguous then the Courts will construe it contra proferentem. For example, in *Revell v London & General Insurance Co Ltd* (1934) 50 LI L Rep 114 the negative answer of the insured to the question "have you or any of your drivers ever been convicted of any offence in connection with the driving of any motor vehicle?" was held not to be a misrepresentation where the driver had been convicted only of driving a motor vehicle without a rear vision mirror and also of not having insurance. Both offences could have been committed without driving and so the benefit of the doubt as to the meaning of the question was given to the insured. In *Cleland v London Insurance Company Ltd* (1935) 51 LI L Rep 156, there was similarly held to be no misrepresentation where the insured answered, "no" to the question, "Have you or your driver ever been convicted or had a motor licence endorsed?" The insured had dishonesty-type convictions but the question was construed as referring to

motor convictions as all the preceding questions dealt with motor inquiries. However, the insured was ultimately held to be without cover because he had not disclosed his general dishonesty convictions in the context of a warranty to that effect which was expressed to be the "basis of the contract" (no longer applicable in New Zealand as a result of ss 4-6 of the Insurance Law Reform Act 1977).

### (2) Waiver

The scope of questions asked by the insurer may indicate a waiver from knowing more. In *Chick v National and General Insurance Co Ltd* (1983) 2 ANZ Insurance Cases 60-520 the New South Wales Supreme Court noted that it could be doubted that the description of the deceased's profession was accurate and complete ("clerical manager" was provided for a director of a process serving and private investigation company). But there was no misrepresentation, on the facts, because the plaintiff (the deceased's wife) had answered the questions to the best of her knowledge, in accordance with the warranty at the foot of the proposal. On construction, this warranty was subjective, not only as to the first part which was obviously so, but also as to the second part. It could be inferred that the subjectivity of the first part was to be implied in the second part. In short, the Court accepted the proposition that the duty of disclosure may be cut down by the terms of the insured's declaration.

In *McLeod v SIMU Mutual Assurance* (1984) 4 ANZ Insurance Cases 60-784 a specific and limited



question as to previous motor vehicle convictions, allied with a narrow explanation from the insurer's employee as to the extent of the question and the failure of the insurer to inquire further, meant that the insurer was held to have indicated that it had no interest at the time in any further information and therefore it had effectively waived the requirement of such information. The insured's conviction for theft of petrol from a boat four years before the insurance was taken out was held not to be material in the context of the theft claim.

There next follows four State Insurance cases on the subject of waiver. The first in time is *McFarlane T/as Grove Contractors v The State Insurance General Manager* (1989) 5 ANZ Insurance Cases 60-887 where Eichelbaum J (as he then was) held that the wording of the warranty was indistinguishable from that of *Chick*. Yet, Eichelbaum J seems to have indicated that there would have been material non-disclosure even if the insured had himself not regarded the existence of his previous convictions as a fact likely to affect the acceptance of the proposal (he had maintained incorrectly that he had made the insurer aware of his previous convictions and he had previously made disclosure to other insurers). The violence and disobedience-type convictions over the preceding nine years were held to be objectively material. His Honour's views on the objective overlay to be applied to a subjectively worded proposal were not accepted in the remaining three cases.

In *The State Insurance General Manager v Hanham* (1990) 6 ANZ Insurance Cases 60-990 Holland J appears to have regarded Eichelbaum J's comments as obiter and not determinative, in following *Chick*. Influential to the Court were the subjective belief seemingly required of the insured from the warranty clause in the proposal and the wording of a question suggesting that convictions for other offences not involving motor vehicles in the last 10 years were not material. The insured had a number of dishonesty and drug convictions (the last of which occurred three years before the proposal) but none of these were related to the use of

a motor vehicle.

Similar reasoning was applied by Chilwell J in *State Insurance General Manager v Peake* [1991] 2 NZLR 287. His Honour noted that, as the policy was to be completed in a matter of minutes across a counter at the insurer's offices, the circumstances were not such as to suggest to the applicant that the insurer was interested in an extensive detailing of a variety of factors beyond the questions on the form. Dishonesty convictions (including four shoplifting charges current at the time of entering into the proposal) were held not to be considered material in the context of the theft claim, although it is to be noted that there was a first instance finding as to the insured's general credibility.

This pro-insured approach was followed by Henry J in *State Insurance Ltd v Fry* (High Court, Auckland M 1961/91, 19 September 1991) where, again, the insured's credibility was accepted despite her previous criminal convictions.

In *McFarlane* Eichelbaum J expressed some sympathy for the argument that an insurer does seek to have it both ways. It knew that general criminal convictions were capable of being considered material, but that few insureds disclose such convictions unless the information were requested in a particular way. By failing to draw attention to these matters by means of specific questions or by other means to direct attention to the consequences of non-disclosure, the insurer might be said to trap the insured. However, Eichelbaum J saw the legal issue as clear, while having little doubt that insurers deliberately refrained from asking about criminal records, for marketing reasons.

There may also be held to be a waiver through a failure on the part of the insurer to pursue specific information provided by the insured which would put a reasonable insurer on notice that further inquiry may be necessary. For example, in *Edwards & Anor v AA Mutual Insurance Co* (1985) 3 ANZ Insurance Cases 60-668, while the construction of the house was regarded as material, the insurer's agent's incorrect completion of the form (as signed by the insured) was overridden by the insured's oral qualification as to the lack of

certainty which he had as to its construction. This oral qualification was deemed to be within the knowledge of the insurer pursuant to s 10(2) of the Insurance Law Reform Act 1977. There was also a specific question in the proposal which was limited to the lining of the main rooms in the house and so the insured was not under a duty to disclose the fact that some of the rooms other than the main room were scrim-lined.

Against that, in *Kyles Transport Pty Ltd v Zurich Australia Insurance Ltd & Another* (1984) 3 ANZ Insurance Cases 60-600, while the questions in the proposal were limited to claims in the preceding 12 months, there was found to be a specific verbal inquiry from the insurer regarding claims in the preceding three years which imposed an obligation on the insured to disclose fully and accurately its claims history for that period.

If an insurer places restrictions on the questions in a proposal form or accepts incomplete answers then a waiver will apply if a person reading the questions might reasonably conclude that the insurer was not interested in additional information. In *Napier Discount Meats Ltd v Commercial Union General Insurance Co Ltd* (Heron J, High Court, Napier CP 106/90, 10 December 1992) the insurer had been shown to have waived its requirement for prior completion of the usual disclosure forms. The insured was asked to complete an application for private car insurance only, not an application for client registration. On that application, the insured would have been asked to disclose previous criminal convictions (he had one for receiving). The insurer's failure to place the right proposal before the insured meant that it could not rely on the insured's failure to disclose his previous conviction.

Collection of a premium by the insurer after the loss does not amount to waiver: *Countrywide Finance Ltd v State Insurance Ltd* [1993] BCL 799.

### (3) Estoppel

The insurer may be estopped from relying on the terms of its contract by its negotiations or later conduct.

In *Car Owners Mutual Insurance Co Ltd v Buckley* (1986) 4 ANZ Insurance Cases 60-693 a cover note referred to a specific limitation on the availability of cover. It also made cover subject to the terms of the policy. The cover note made no reference to the fact that the policy excluded liability for loss suffered while a vehicle was being driven by a person who had held his licence for less than three years. Kelly J in the Supreme Court of the Australian Capital Territory held the insurer was not entitled to rely on the relevant term in the contract. The insurer's failure to advise the insured of the limitation was treated as a representation by silence that the insurer was prepared to extend final cover to a person with the insured's limited driving experience. The insured had acted to his detriment by not going elsewhere to obtain effective cover. Consequently the insurer was estopped from relying on the term in the policy. Also, it was not material how long the insured had held a licence and so there was held not to be non-disclosure of material facts.

#### (4) Negligence

An insured may sue an insurer for negligent misstatement. This was recognised by the English Court of Appeal in *General Accident Fire and Life Assurance Ltd & Others v Tanter & Others* ("The Zephyr") (1985) 3 ANZ Insurance Cases 60-682. A cause of action in tort for careless performance of a contractual duty may exist, even where the complaint is that the insurer omitted to do something which the contract required it to do. A duty of care may also result from the assumption of a voluntary responsibility either in the context of a general relationship (see *Medical Assurance Society of NZ Ltd v Lovie* [1993] BCL 831) or specifically in relation to a particular transaction. Silence may lead to a negligent misstatement being found but again there must be a voluntary assumption of responsibility by the insurer and reliance by the insured. It may be much more difficult to infer misstatement in the case of mere silence than in the case of active misrepresentation: *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952 (CA) and [1990] 2 All ER 947 (HL) ("*Banque Keyser*").

#### (5) Other relief

Alternatively, an insured may be able to establish a collateral contract: that a misstatement by the insurer forms the basis of a collateral contract and on that basis the misstatement is a term of the contract. The insured also may be entitled to damages and equitable rectification.

### C Statutory modification

#### (1) Contractual Remedies Act 1979

The Contractual Remedies Act applies to misrepresentation; under s 6 there is a right to damages for misrepresentation whether innocent or fraudulent. The right to damages for an action in deceit is abolished. Cancellation under s 5 is allowed and the parties are free to contract out of the legislation by making express provision for a remedy for misrepresentation. However, this regime does not apply to non-disclosure, it seems, because non-disclosure is analytically not a representation that there is nothing to disclose: *Banque Keyser*. The effect of this is that the insurer could theoretically make the Contractual Remedies Act inapplicable by stipulating that an insured's misrepresentation is actually a non-disclosure. It seems, however, that the Courts would adopt a more robust approach and bring non-disclosure within the framework of the Contractual Remedies Act.

#### (2) Contractual Mistakes Act 1977

Rectification under the Contractual Mistakes Act is available if a written contract fails to record accurately the parties' joint intentions. In *Wijeyaratne & Another v Medical Assurance Society (NZ) Ltd* (1990) 6 ANZ Insurance Cases 60-993 the insured and the insurer entered into a contract of insurance over a motor vehicle in a mistaken belief that the insured had an insurable interest in it. Justice Hillyer rectified the contract to cover the interest of the person who did have an insurable interest in the vehicle. Section 7(2) of the Insurance Law Reform Act 1977 was also applied.

#### (3) Insurance Law Reform Acts

Section 4 of the Insurance Law Reform Act 1977 does not apply in relation to oral misrepresentation or non-disclosure: *Preece v State Insurance General Manager* (1982) 2

ANZ Insurance Cases 60-493. (See the commentary by Alan Cameron "The ambit of the misstatement provisions in the Insurance Law Reform Act 1977" [1992] NZLJ 144.)

Section 16 of the Insurance Law Reform Act 1985 requires the insurer to clearly inform the insured before the contract is entered into of the existence and effect of a clause imposing pro rata average. However, this does not apply for dwelling houses, contents insurance or marine insurance.

#### (4) Fair Trading Act 1986

The Fair Trading Act may apply to non-disclosure as well as to misrepresentation. Damages on a tortious basis would usually be applicable: *Gates v City Mutual Life Assurance Society Ltd* [1982] 43 ALR 313. As a result of this decision, it appears that an insured is only able to recover for loss if he can establish that, but for the insurer's misstatement or failure to provide information, he would have obtained effective cover elsewhere. Section 9 of the Act

... is to be seen as adding a concrete dimension, by protecting the consumer, to the duty of utmost good faith owed by an insurer in holding itself out as ready to do business: *King v NZ Insurance* [1993] DCR 31 per Judge Inglis QC.

### D What is material?

#### (1) The tests

As to whether a fact is material, the test in s 6 of the Insurance Law Reform Act 1977 is that a statement is material only if that statement would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether it would have taken or continued the risk upon substantially the same terms. This reflects the weight of common law authority, for example, *Mayne Nickless Ltd v Pegler* [1974] 1 NSWLR 228, 239, *Lambert v Co-Operative Insurance Society Ltd* [1975] 2 Ll L Rep 485, and *Avon House Ltd v Cornhill Insurance Co Ltd* (1980) 1 ANZ Insurance Cases 60-429. The fact must actually be capable of altering the insurer's decision and the Courts will approach that exercise critically. The

reasonableness or otherwise of what was claimed by the insurer to be material would be a relevant consideration as to whether the fact was truly material: *State Insurance General Manager v McHale* [1992] 2 NZLR 399. In the context of misrepresentation, the Courts have been quite strict as to what can constitute a material fact. For example, in *Action Scaffolding Ltd v AMP Fire and General Insurance Co (NZ) Ltd* (CA 61/91, 8 April 1992) misrepresentation as to alcohol consumption avoided an insurance contract even though the driver had claimed consuming only one can of beer.

The question whether a fact is capable of being material is one of law; the question whether it is indeed material in the case in hand is one of fact: *Guthrie House Ltd v Cornhill Insurance Co Ltd* (1982) 2 ANZ Insurance Cases 60-466.

### (2) Materiality of criminal convictions

The Courts have in the past imposed a very wide duty of disclosure in relation to criminal convictions. For example, in *Schoolman v Hall* (1951) 1 Ll L Rep 139 it was conceded by the insured that if there had been no proposal form there would have been a duty upon the proposer to disclose his previous criminal record although it belonged to a dim and remote past (dishonesty convictions of between 14 and 21 years prior to the proposal). On the facts, while the questions in the proposal concerned the trade character of the insured there was no necessary implication that the insurer would not have been interested in the insured's criminal record.

It is hard to reconcile all the cases on criminal convictions but it is clear that what is material depends on a host of factors. The factual relevance of the previous convictions is important. If the insurance concerns a motor vehicle then previous driving convictions are very relevant. Convictions generally may relate to the "moral hazard" posed by an insured. For example, in *Antolovich v Sun Alliance Insurance Ltd* (1989) 5 ANZ Insurance Cases 60-915 the insurer was held to be entitled to know that the house which it was insuring was being constructed for a person with a criminal background. This person was known to the insured and it was obvious from the evidence that they were quite good friends. While the

man's convictions related to dishonesty rather than violence, the convictions were held to be material. In the Supreme Court of Victoria, Beach J considered it a notorious fact that criminals were of diminished morals, responsibility and integrity, and were likely to settle their quarrels without recourse to the legal system and by violence to property of persons. On the facts, it was just as probable that the damage to the windows of the owner's house and the fire which followed were caused by members of the criminal element of the community with whom the person had a falling out, as it was that the damage was caused by vandals.

In *McFarlane*, as noted, the plaintiff's convictions over all of the preceding nine years to the taking out of the insurance included charges of resisting, obstructing and assaulting law enforcement officers, escaping from custody, charges relating to firearms, a number of assaults and threatening behaviour. Eichelbaum J stated that none of these convictions involved dishonesty but they were indicative of a persistent and continuing course of conduct. They were held to be material.

The convictions not only of the insured but also those of his or her associates such as his or her spouse, child or employee may be relevant depending upon the circumstances. the undertaking and findings of a Royal Commission of inquiry into the affairs of an associate (a former business partner) in *Trimboli & Others v Royal Insurance Australia Ltd* (1983) 2 ANZ Insurance Cases 60-500 was held to be material.

It can be said that the greater the time that has gone by since the convictions, the less relevant they will be. In *Edwards* convictions for three minor thefts eight and a half years previously were held not to be material. But there are (generally older) precedents of contrary authority, such as *Schoolman v Hall*.

If an insured has been charged but is innocent it could yet be material: *March Cabaret Club & Casino Ltd v The London Assurance* [1975] 1 Ll L Rep 169. However, this view was rejected by Forbes J in *Reynolds & Anderson v Phoenix Assurance Co Ltd* [1978] 2 Ll L Rep 440. Arguably, rumours and opinions about the insured

ought also to be disclosed. (See Clarke (1984) LMCLQ 100.)

### (3) Reliance by insurer?

It may be that an insurer who wishes to rely on the non-disclosure or misrepresentation of the insured should be required to establish that, but for the non-disclosure or misrepresentation, it (as apart from the prudent insurer) would not have entered into the insurance contract, either at all or on the same terms. The inducement of the particular insurer was thought to be crucial by Kerr J in *Berger v Pollock* [1973] 2 Ll L Rep 442 but this requirement was rejected by Somers J in *Avon House v Cornhill*. Arguably, an attempt by an insurer to rely upon a non-disclosure or misinterpretation which had no effect in inducing it to enter the contract could be seen as a breach of its duty of good faith generally.

### E Insured's awareness of material facts? Material to whom?

Richmond J in *Blackley v National Mutual Life Association of Australasia Ltd* [1970] NZLR 919, 951 accepted that the duty to disclose material facts extends only to facts which are either known or ought in the ordinary course of affairs to be known to an insured.

By contrast, in *Banque Keyser* at p 989 Slade LJ stated that:

The law requires a party to an insurance contract to state not only all those material circumstances within his knowledge which he believes to be material, but those which are in fact so.

The New Zealand Court of Appeal in *McHale* recognised the weight of the English authority to be that what an insured knows or ought to know as to materiality does not matter. The insured is absolutely bound to disclose facts which would be material to a prudent insurer provided that they are actually known to the insured or (probably) that a reasonable insured in his or her position ought to know them.

In *Lambert*, for example, the plaintiff's husband's second conviction was held to be material

through application of the prudent insurer test, even though it was specifically found at first instance that a reasonable person in the plaintiff's position would not have considered it to be so.

Cooke P in *McHale* drew upon Richmond J's remarks in *Blackley* (which were not questioned by the Court of Appeal in later consideration of the case) and held the proper test could be that the duty was to disclose such facts as a reasonable insured would believe to be material. In His Honour's view it was rather incongruous that, following English authority, an insured was bound to disclose facts even though he ought not to know that they were material.

The Court of Appeal ultimately left it for later consideration, perhaps by a full Court, as to whether the appropriate test could be reconsidered. All the members of the Court commended legislative reform through possibly the adoption of a test of the reasonable insured, as in s 21 of the (Australian) Insurance Contracts Act 1984.

In *Ronald Engel v South British Insurance Co Ltd* (1983) 2 ANZ Insurance Cases 60-516 Davison CJ noted that a claim will be defeated if the insured knows a statement is false or is reckless as to its accuracy, provided the statement is not so insubstantial that the *de minimis* maxim will apply. Although the question and the proposals limited losses from the previous three years, the declaration signed by the insured was not so limited. It was held that a misrepresentation on the part of the insured had occurred as he knew the statement, "the property had been on sale for several months" was false (it in fact had been for sale for nearly four years). It may have been made to conceal an element of motive to start the fire on the insured property.

As to the manner of disclosure, communication of material facts to the insurer's representative verbally for other matters is not sufficient. Whilst there is an imputation to the insurer of the knowledge of its agent at common law and for the purposes of s 10(2) of the Insurance Law Reform Act 1977, the relevant knowledge is that of the representative concerned in the negotiation of the contract, not such knowledge as some other

representative of the insurer may have for other transactions. The knowledge must relate specifically to the transaction affected: *Green and Another v State Insurance General Manager* (Gallen J, High Court, Wellington CP 537/86, 2 September 1992).

## F Insurer's duties

The insurer also has duties. *McLeod* speaks of the insurer's duty to ask the right questions. The insurer is also under a duty not to misrepresent; this is based on both the law of contract and the duty of utmost good faith. Further, the insurer must disclose all material facts. The sole basis for this is the doctrine of utmost good faith.

In *Banque Keyser* the English Court of Appeal posed a test of materiality in relation to misrepresentation and non-disclosure by the insurer as depending solely on the likely effect of the relevant fact on the prudent (or reasonable) insured. This is open to some criticism: see eg Kelly and Ball, *Principles of Insurance Law in Australia and New Zealand* p 150, para 4.6. The Court of Appeal restricted the duties of the insurer in applying the broad concepts of honesty and fair dealing. It is arguable that the Court may have distorted the concept of materiality in the process.

The Court of Appeal recognised two general categories of general fact: those relevant to the risk to be recovered, and those relevant to the recoverability of the claim under the contract. In practice, material facts are more likely to be the latter. Material facts could involve the terms of the contract, with conduct of the parties relevant to recoverability.

In certain cases, a duty to act in utmost good faith can imply an inability to rely on a breach of a term of the contract or the insured's non-disclosure unless the consequences of that breach were explained to the insured beforehand: *Australian Associated Motor Insurers Ltd v Ellis & Anor* (1990) 6 ANZ Insurance Cases 60-957. In the Supreme Court of South Australia Cox J held in that case that the duty may extend to the insurer being obliged to give written notice in advance of any unusual term. The insurer's obligation also includes in certain circumstances, an obligation to bring to the insured's

notice a consequence of any breach by the insured of a condition of the policy that operates subsequently to the making of the contract (although Lord Jauncey in *Banque Keyser* indicated that there was in general, no obligation to disclose supervening facts which come to the knowledge of either party after the conclusion of the contract).

It may come to be that the insurer's duties will stretch to ensuring that the insured has read or is given a copy of the insurance contract before signing, or that the insurance contract is really understandable by the particular insured. It might be thought, for example, a clear breach of duty of utmost good faith for an insurer to require the insured has read or is given a copy of the insurance contract before signing, or that the insurance contract is readily understandable by the particular insured. It might be thought, for example, a clear breach of duty of utmost good faith for an insurer to require the insured to enter into a contract that recites, contrary to the facts, that the insured has read the terms of its policy. However, marketing information such as information concerning lower premiums available from other insurers does not have to be disclosed: *Banque Keyser*.

## G Conclusion

The law relating to disclosure of material facts and misrepresentation generally in insurance contracts is long overdue for statutory reform. However, the Contracts and Commercial Law Reform Committee in their 1975 and 1983 Reports postponed consideration of non-disclosure, and the Law Commission has yet to find the time to investigate the area. Reform is necessary so that both insurer and insured are under no misapprehensions as to the validity and enforceability of the contracts into which they enter. It ought to be a relatively simple task meanwhile for all insurance companies to refine a list of material facts about which disclosure is required and for this to be asked of proponents in the policy document. Questions such as: "Do you have any criminal or traffic convictions or infringements against your name over the course of the last

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# American decision of *Moore* (I)

By Susan Pahl, Department of Commercial Law, University of Auckland

*Biotechnology continues to be a source of moral and therefore legal problems. It is only because there are recognisable moral issues that legal issues arise at all. In this article Susan Pahl considered the Californian case of Moore covering the use of tissue from a diseased spleen. The patient had consented to the operation; but without his knowledge or consent portions of the spleen, and later other tissues, were used for research that had no relation to Moore's medical treatment. The Supreme Court of California while reversing the State Court of Appeal decision on an allegation of conversion, held that Moore was entitled to bring an action on breach of fiduciary duty and lack of informed consent. This article, and a succeeding one discuss the issues of informed consent and of conversion.*

As part of nature's laboratory, organs, tissue and products derived from human beings still excel anything man has been able to manufacture. New Zealanders share a world fascination with biotechnology issues, probably because many relate to such central questions as the nature of life, and what separates human beings from other species.

Recently the New Zealand Medical Council published a report on biotechnology. A Law Society submission of 13 March 1993 on the report called for consideration being given to prohibiting the sale of human body parts and tissue. It was stated [in s 3(b)], "the Society was not confident that legislation should apply to human parts that can regenerate." Thus it has been tentatively suggested that it may be possible for New Zealanders to claim ownership over and therefore sell the "products" their bodies produce.

New Zealanders already have a type of dominion over their bodies since they can, through various means request that parts of their bodies can be used for therapeutic, educational or research purposes after their death. (Human Tissue Act 1964, s 3(1).) Such a request can, however, be countermanded by a spouse or relative! If the Law Society submission is accepted in its current form it would be possible for people to sell regenerative parts while still

living. However it would not be possible to sell, for example, a diseased kidney which had been removed for therapeutic purposes. This is despite the fact that recent biotechnical developments have centred around development of cell lines from diseased organs; cell lines which may have almost incomprehensible value. The Californian case *Moore v Regents of the University of California* demonstrated this in the Californian Court of Appeal (*Moore v Regents of the University of California* 202 Cal App 3d 1230, 249 Cal Rptr 494(1988) and Supreme Court, (51 Cal 3d 120, 793P 2d, 479, 271 Cal Rptr 146 (1990)).

## 1 Facts

The facts in *Moore* are important in understanding the outcome, particularly in the Californian Court of Appeal. John Moore, the plaintiff, first visited UCLA Medical Centre on October 5, 1976 to receive treatment for hairy-cell leukemia, which he had recently been diagnosed with.<sup>2</sup> Hairy-cell leukemia is a rare and potentially fatal form of cancer. Moore was treated by Dr Golde, the head of the Hematology-Oncology Department, who confirmed the diagnosis.

On October 8, 1976 Dr Golde recommended the removal of Moore's

spleen, standard treatment for the disease. Golde told Moore that he had reason to fear for his life and that therefore the splenectomy was necessary. Based on Golde's representations, Moore signed a consent form.

Dr Golde and Shirley Quan, a researcher employed by the Hospital, had decided to take portions of Moore's spleen to a research unit after the surgery. These research activities were not intended to have any relation to Moore's medical care. Moore was not told of the intention to use his spleen for research. His spleen was duly removed on October 20, 1976. Between 1976 and 1983, Moore travelled from Seattle to Los Angeles to make approximately twelve follow-up visits. (Lavoie, below, fn2.) He did this because Dr Golde told him that the visits were necessary for his health and well-being and the procedures performed had to be carried out at the Centre under Dr Golde's supervision. During the visits, Golde took samples of serum, skin, sperm, bone marrow and blood. In fact, the visits played no role in Moore's medical care, but were for the purpose solely of furthering Dr Golde's research. Golde and Quan planned to "benefit financially and competitively by exploiting the cells and their exclusive access to the cells by virtue of Golde's ongoing physician-patient relationship". By August 1979 Golde

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five years?" could be listed. A prominent statement in the proposal would need to be incorporated that: "IF THESE QUESTIONS ARE

ANSWERED WRONGLY OR WITH HALF-TRUTHS OR IF YOU WITHHOLD ANY RELEVANT INFORMATION THEN YOU MAY BE DENIED COVER". Most importantly, insurance contracts must be in plain English so that there are

fewer misunderstandings. Such self-reform by the industry would probably result in more contracts being upheld by the Courts which to date have tended to release insureds from the consequences of contracts which they did not understand. □

had established a cell-line from Moore's white blood cells.

A cell-line is derived from primary cultures of cells and is capable of continuous and indefinite growth. "It is unclear whether these changes are a consequence of tumour cells or simply the result of adaptation to an artificial environment: in any case, the culturing process produces a cell-line that is dramatically different from the original tissue sample." (Lavoie, below, fn 2, at 1368.) Moore's cells were of importance because they overproduced the proteins that regulate the immune system.<sup>3</sup> By replicating Moore's cells in a cell-line, it became possible to harvest the proteins in large quantities where they could otherwise only be obtained in small amounts in very costly procedures. The proteins are useful in the treatment of diseases such as cancer and AIDS. The Mo cell-line, as it is known, has a potential market value of \$US3.01 billion. (Lavoie, below, fn 2.)

On January 30 1981, the Hospital applied for a patent of the cell-line, listing Golde and Quan as the inventors. Once the patent was granted, commercialisation of the line was begun with considerable benefits accruing to Golde. During Moore's last two visits to the Hospital, Golde<sup>4</sup> asked Moore to sign consent forms waiving all Moore's rights to any cell-line or commercial products derived from his tissue. "After receiving evasive answers to his questions regarding the purpose of the research and its commercial potential, Moore signed the first consent form presented but refused to sign the second." (Lavoie, below, fn 2, at 1366.)

## 2 The causes of action

Moore sued Golde, the research workers, the hospital and the commercial company in thirteen causes of action. It is proposed to discuss here two of these: conversion and lack of informed consent. The trial Court sustained the defendants' demurrers to the cause of action for conversion and held that the remaining causes of action were deficient because they incorporated the first claim. The Court of Appeal disagreed, holding that an individual has a tangible property right in his or her tissue and that

therefore conversion had taken place. The majority of the Supreme Court of California, that State's highest Court, reversed the decision of the Court of Appeal, stating that the conversion action must fail. The Court held, however, that Moore was entitled to a trial on the causes of action of breach of fiduciary duty and lack of informed consent. This article deals with the discussions of the Courts on informed consent and the innovative discussion on conversion in the Court of Appeal.

### A: Informed consent

In the judgment for the majority, Panelli J allowed that there was a cause of action for lack of informed consent, stating that for a patient's consent to treatment to be effective, he or she must give informed consent. (Scowen, "The Human Body — Whose Body and Whose Profit" (1990) 1 *Dispatches — Centre of Medical Law and Ethics* 1.) Thus, if proven, Golde's failure to disclose the extent of his research and economic interests in Moore's cells would render him liable. Significantly, though, the obligation was narrowed so that if the doctor had no pre-existing research interests at the time the cells were removed, the patient's medical interests have not been impaired and therefore the doctor is not liable for a failure to obtain informed consent. However, such a holding fails to protect adequately a patient's dignitary interests when the doctor's professional judgment is not compromised.<sup>5</sup> "Through these distinctions the Court implicitly sanctioned nondisclosure under certain circumstances and thereby frustrated the doctrine's [informed consent] broader goal of ensuring patient autonomy." Panelli J considered that there was no obligation to obtain a patient's informed consent when research interests were an insignificant factor in recommending treating. It is extremely rarely that tissue specimens lead to the successful development of a cell line, meaning that, in practice, research interests will often be an insignificant factor. Thus, under the majority test in *Moore*, it is only rarely that a doctor will be liable for failure to obtain informed consent.

As pointed out in the minority judgment and by United States

commentators, this is a somewhat impoverished view of the doctrine of informed consent. The motivating factor behind the creation of the doctrine was to give patients autonomy over their own bodies. Thus, what was important in *Moore* was not the motivating factors behind Golde's request to remove Moore's tissue, but whether Moore, had he been aware of the proposed research use of the cells, would have consented to their removal for that purpose. The research motivation may have been insignificant in Golde's request that the cells be removed (although on the facts that seems unlikely); what is important, though, is how material the research disposition was to Moore as the patient. The purpose behind the informed consent doctrine is not, it is suggested, solely to protect patients against poor medical treatment; it has developed as part of the movement towards increased patient autonomy over their bodies and their medical care. (Justice Mosk said that the approach taken by the majority gave patients a right merely to veto their own exploitation.)

There is also a practical problem with the use of the informed consent doctrine in a case such as *Moore*. The action for lack of informed consent is usually framed as a negligence claim. With negligence, the plaintiff can recover only for actual damages incurred. Therefore, if Moore proved lack of informed consent, he would not be able to claim any share in the potential billions of dollars of profits from the cell line. Presumably, the extent of his damages would be the same as if the tissue had been wrongfully removed and no cell line successfully created. It therefore permits Golde to profit from his wrongdoing. Thus damages would be restricted to those caused by emotional distress and psychological damages. Lavoie summarises the position in America thus:

Although patients who donate tissue to research rarely suffer injury to either their person or property, they may suffer emotional and psychological damage. Emotional damages are more speculative and difficult to prove but they would be appropriate when an individual's tissue is used without consent in



violation of the individual's moral and religious beliefs. Individuals who strongly oppose the use of their tissue in research or its continued existence after they die would suffer greater emotional distress than individuals who are morally indifferent to the use of their tissue. Thus, compensatory damages not only will reimburse patients, but will do so commensurate to each individual's strength and depth of moral convictions regarding the disposition of her body and tissue. (Lavoie, below, fn 2, at 1371.)

It is suggested that of equal importance is the issue of the patient's feelings about the unnecessary removal of tissue. Moore may have no very strong moral or religious beliefs regarding the use of his tissue, but may feel highly aggrieved over the fact that it was removed at all. He may argue that he suffered emotional damage through making unnecessary journeys from Detroit to Los Angeles and, in particular, through spending a number of years going through unnecessary procedures, believing he was still at risk of cancer. In short, although Moore may have extreme emotional damage resulting from the removal of the tissue from his body, under Lavoie's analysis, if he has no strong feelings on its eventual disposition, he is not entitled to damages.

It is the cause of action for conversion which is of chief interest for our purposes since, had it succeeded it would have given clear judicial recognition to the concept of property in human body parts. The Superior Court in California found that there was not a cause of action for conversion. The Court of Appeal reversed this finding, with one Judge dissenting. The Supreme Court, with two Judges dissenting, reversed the Court of Appeal. The diversity of opinion of the Judges on the law in the area is understandable, given the complete lack of judicial precedent in the area. Some Judges took this as authority for the proposition that there can be no ownership in body parts; others as evidence that there is no ownership in body parts.

The judgments also highlighted

conceptual differences between the Judges over the role of the Court, with the Judges opposed to ownership frequently raising public policy arguments (eg, Panelli J's judgment in *Moore*, 494 and Arabian J, 497) and those in favour saying questions of policy should be determined by the legislature (eg Broussard J in *Moore*, 505, Mosk J in *Moore*, 507). In the writer's opinion, the approach taken by the majority in the Court of Appeal, which allowed a cause of action for conversion is superior.

#### *B: Conversion in the Court of Appeal*

Within the Court of Appeal, Rothman J, delivering the majority judgment, initially spoke of the importance of the case in our age, where mere cells can potentially be the foundation of an industry worth billions of dollars. He said that, until recently, the human body had little value apart from as a source of labour, (not strictly true given the activities of resurrectionists in the eighteenth century). He then defined property and cited two recent cases relating to dominion over the body, one of which was *Venner v State* (1976) 30 Md App 599, 354, A 2d at 483. In that case the question was whether the police illegally seized narcotic-filled balloons found with the defendant's faeces in a bedpan. The Court, discussing whether the balloons were abandoned, stated that:

[i]t could not be said that a person has no property right in wastes or other materials which were once a part of or contained within his body, but which normally are discarded after their separation from the body. It is not unknown for a person to assert a continuing right of ownership, dominion or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, fingernails, toenails, blood and organs or other parts of the body, whether their separation from the body is intentional, accidental, or merely the result of normal bodily functions. (*Venner v State*, supra, at 498, (fn omitted).)

Discussing this case in his minority judgment, George J said that he

considered the dictum from that case to be a weak authority on which to construct a property right in surgically-removed body tissue. (*Moore*, 315)

The majority judgment then went on to discuss whether the law relating to dead bodies was analogous to this case. The Judge concluded that, even though there were no property rights in dead bodies, cases such as *Cohen (Cohen v Groman Mortuary Inc)* (1964) 231 Cal App 2d 1, 41 Cal Rptr 481 made it clear that under American law, there existed quasi-property rights for the purpose of determining who had custody for burial. Rothman J also discussed cases relating to cornea transplants which recognised the heirs' right to dispose of them. For example; *Tillman v Detroit Receiving Hospital* (1984) 138 Mich App 683, 360 NW 2d 275, 277.) He concluded that (*Moore*, 310)

[d]efendants' position that plaintiff cannot own his tissue but they can, is fraught with irony. Apparently, defendants see nothing abnormal in their exclusive control of plaintiff's excised spleen, nor in their patenting of a living organism derived therefrom. We cannot reconcile defendants' assertion of what appears to be their property interest in removed tissue and the resulting cell-line with their contention that the source of the material has no rights therein.

Rothman J continued by discussing the defendants' arguments.

To the contention that plaintiff had no property right in what was made in the course of the study of his cells, Rothman J said that "without those small indispensable pieces of plaintiff, there could have been no three billion dollar cell-line". He said that the question of the value of the work done to "improve" the cells was a damages question and did not relate to the issue of conversion. Such a view seems entirely reasonable. The issue is not how much the hospital added to the value of the cells but whether they were converted in the first place.

The next argument put forward by the defendants was that, since the plaintiff's spleen was diseased, it had no value. However, as Rothman



J pointed out, the efforts taken by the defendants show that this was clearly not the case in their eyes. In addition, just because the owner of a chattel, either erroneously or correctly, believes it is of no value does not mean that someone who steals it is not guilty of conversion.

An interesting argument put forward by the defendants was that the plaintiff's DNA was not a part of him over which he had the right of disposition. Rothman J discussed the case of *Motschenbacher v R J Reynolds Tobacco Company* 498 F 2d 821, (9th Cir 1974) where the Court said that it would "afford legal protection to an individual's proprietary interest in his own identity". (*Motschenbacher*, 825) The Judge discussed other cases on point 6, and then went on to say.

If the Courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or fact? A patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress.

Discussing the Court of Appeal judgment, in an article which argued that the same result could have been achieved using the informed consent doctrine without going to what she considered the extreme of finding property in tissue, Lavoie (below, fn 2, at 1363) argued that the mutations in cancerous cells means that the body no longer recognises them as "self".

While much of the genetic information present in cancerous tumour cells is identical to that contained in the genetic make-up of an individual's normal cells, the rare and commercially valuable characteristics of tumour cells may not inhere in the genetic information of the individual but the disease. (Lavoie, at 1374.)

Such an argument seems dubious at best, since most cancers are not caused by external factors such as viruses but, as far as we know, by

internal factors within the body itself. To say that the disease is not created by the body is a nonsense.

Lavoie continues by citing the case of *Chakrabarty (Diamond v Chakrabarty* 447 US 303 (1980) in Lavoie, fn 2, below), where a live, man-made organism was patentable because it had markedly different characteristics to any bacterium found in nature. Lavoie says that it follows that the Mo-Line would not have been patentable unless it differed markedly from the original genetic material in *Moore*. However, it is indisputable that *Moore* provided the raw material without which it would not have been possible to create the Mo-cell line. As pointed out by Rothman J above, that issue probably relates more to the quantum of damages.

Another argument raised by the defendants, which was discussed by Rothman J, is the public policy argument that "unencumbered access to human tissue for research is essential to progress and public health". (*Moore*, 311) Rothman J said that there was no statutory or case law cited which justified such an invasion of human rights.

It is with the public policy issues raised in *Moore* that the commentators on the Court of Appeal decision have the most difficulty. Perhaps ignoring what would be "justice" in the particular case, Lavoie states categorically that "*Moore* is bad public policy" (fn 2, below, at 1381.) Lavoie says that if the Court of Appeal ruling in *Moore* became the law, the following could result:

1 Difficulty in determining the extent of each person's contribution. This is undoubtedly true, but it does not seem right to deny individuals justice because it is difficult to work out what damages they are entitled to. Common law cases, such as *Chaplin v Hicks* [1911] 2 KB 786, make it clear that difficulty of assessment is no bar to an award of damages.

2 Increase in research costs because of increased transaction costs. Lavoie argues that in only a small percentage of cases do tissue or substances removed from individuals result in commercially viable biotechnical products. (Fn 2, below, at 1369.) To impose a tracing and payment requirement in all

cases would make the whole industry economically unprofitable, ultimately setting medical science back. Cases such as *Moore*, though, where the doctor is always aware of the value of the tissue and deliberately misleads the patient on why it is being removed, differ markedly from those where tissue is removed primarily for therapeutic reasons. In the second set of circumstances, presumably by far the most common, the doctor, before treatment, could explain that the tissue may be used for medical research and ask the patient to sign a standard consent form agreeing to this and assigning all property rights in the tissue. If the patient made an informed decision, for whatever reason, not to consent to this, the hospital would be obliged to comply with the patient's wishes. In cases where, before removal, the hospital is aware that the tissue may have value, then the patient should be informed of this and agreement made on the sharing of the proceeds of any profits ultimately made from the tissue, or products derived from it. Property rights through conversion can only arise where there is wrongful taking of the tissue. If these procedures were complied with, and the patient's informed consent obtained, then the issue would not arise.

3 The potentially detrimental effect on the doctor-patient relationship. Lavoie argues that the creation of property rights would destroy the relationship of trust between doctor and patient.

The physician . . . may have a conflict between appropriately treating the patient and recommending treatment that will advance the physician's research. (Lavoie, fn 2, below, 1382.)

It seems clear, though, that this conflict is in evidence without the existence of property rights, and what those rights would, in fact, do is empower the patient so that he or she is appropriately informed by the physician. Lavoie says that if there was a property regime then no longer could the patient rely on the doctor to make impartial treatment recommendations. Once again, though, it would not be a property regime which caused doctors not to

make these recommendations but wrongful behaviour on the part of the doctor. The Hippocratic oath makes it clear where a doctor's duty lies: "the health of my patient will be my first consideration". In any event, quite apart from any property regime, few would argue that Dr Golde acted in the best interests of his patient here.

#### 4 Patient's internal conflicts.

The typical patient's goal in seeking medical treatment is to do everything possible to return to a healthy or fulfilling lifestyle. Introducing competing financial interests arguably will compromise pursuit of that goal. A patient gains economically only after parting with the valuable organ or tissue, and that parting could be directly in conflict with the patient's health and welfare. (Lavoie, fn 2, below, 1382-1383.)

Lavoie also points out that patients with potentially valuable tissue may waste time bargaining with different institutions, rather than having urgently-needed treatment. This is a strong point, although one wonders how long, in reality, people would delay treatment for life-threatening disorders on those grounds. In any event, that problem would only apply to the small number of cases, like *Moore*, where doctors are aware before tissue is removed that it has biomedical value. Even in those circumstances, it seems preferable that the patient be put in the position of making informed decisions about the terms of his or her treatment, rather than being subject, as *Moore* was, to unnecessary removal of tissue on the pretext that it is for the patient's benefit.

The final issue discussed was that of abandonment. Rotham J said that *Moore* had not intended to abandon his tissue, since he was not indifferent to its disposal. He said that the concept of abandonment was not appropriate in DNA technology since it incited "intense moral, religious and ethical concerns" (*Moore*, 311) and there were "many patients whose religious beliefs would be deeply violated by use of their cells in recombinant DNA experiments without their consent, and who, on being

informed, would hardly be disinterested in the fate of their removed tissue". (*Moore*, 313)

In the minority judgment, George J said that

a patient who consents to surgical removal of his bodily substances has no reasonable expectation as to their subsequent use, other than an understanding that the licensed medical personnel involved in the removal and use of these substances will comply with applicable medical standards and legal constraints. (*Moore*, 315).

Lavoie (fn 2, below, at 1378), discussing the issue of abandonment, raised another dictum from the *Venner* case (supra) which said

[w]hen one places, or permits others to place waste material from his body into the stream of ultimate disposal as waste, he has abandoned whatever legal right he theretofore had to protect it from prying eyes or acquisitive hands.

However Heyer<sup>7</sup> points out that

abandonment may be inferred where an individual clearly demonstrates an intent to abandon property notwithstanding "express declarations to the contrary". When an individual consents to an operation he or she does so with the expectation that any bodily tissue or organ removed during surgery will be lawfully disposed of by the hospital. In *Browning v Norton-Children's Hospital*, the Kentucky Court of Appeals held that a hospital patient who consents to an operation accepts all the rules, regulations and "modus operandi" of that hospital. In *Browning*, following an emergency amputation, the plaintiff's leg was examined and then cremated. The plaintiff brought suit for mental anguish suffered as a result of the cremation. The Court dismissed the action against the hospital stating that while the individual consented to the operation, he made no special request as to the disposition of the leg.

Notwithstanding the points made by Lavoie and Heyer, in my view the facts of the cases cited are not analogous. It is impossible to ignore the fact that consent in the form of informed consent was not obtained from *Moore* and that, therefore, no intention to abandon can be inferred.

A decision in favour of *Moore* was desirable, both because it was justice in the individual case and because the arguments in favour of conversion were more compelling than those against. However almost without exception the decision of the majority of the Court of Appeal was vilified. Commentators generally considered accepting conversion here was the first step down a slippery slope to a retail market in human body parts. Such a consequence was not desirable but nor was it inevitable. As in countless other areas of the law, it is possible with legislation to draw a line or create an exception. The arguments set out in the case will however form a useful basis for future debate. □

- 1 Human Tissue Act 1964, s 3(2)(b) For a further discussion of the common law and statutory position relating to ownership over dead bodies see Pahl [1992] NZLJ 427 and Pahl "Removal of Body Parts: The Legal Position" [1993] NZLJ 144.
- 2 See Lavoie, "Ownership of Human Tissue: Life After *Moore v Regents of the University of California*" (1989) 75 Virginia Law Review 1363.
- 3 Note, "Tort Law - Informed Consent - California Supreme Court Recognises Patient's Cause of Action For Physician's Non-disclosure of Excised Tissues' Commercial Value" (1991) 104 Harvard Law Review 808.
- 4 Golde received salary benefits, shares in the company developing the cell-line and other fringe benefits.
- 5 Supra, fn 3, "Tort Law ..." (1991) 104 Harvard Law Review, 24.
- 6 For example, *Midler v Ford Motor Company* (9th Cir 1988) 849 F 2d 460, *Lugosi v Universal Pictures* (1979) 25 Cal 3d 813, 160 Cal Rptr 323, 603 P. 2d 425.
- 7 Heyer, "Moore v Regents of the University of California: The Right of Property in Human Tissue and its Effect on Medical Research" (1990) *Rutgers Computer & Technology Law Journal* 629.



# Product innovation — employees and intellectual property

By Owen Morgan, Lecturer, Department of Commercial Law, University of Auckland

*This article considers the protection and encouragement available for innovation in a technological society in terms of intellectual property law. The relevance of the employer-employee relationship, it is argued, is very important in this respect. It is argued that the present legal situation deals with the issue adequately by allowing for the settling of respective rights by clear and unequivocal agreement.*

*... the natural course of an economy appears to lead it into permanent and intractable depression. Something perpetually renews the economy and counteracts the inexorable decay in activity that is the endemic problem of capitalism. Product innovation is a major, and possibly the only, source of this renewal. (J M Legge *The Competitive Edge*, Allen & Unwin, Sydney 1992, p 27.)*

Innovation and change are necessarily on-going facts of a technologically advanced economy. Employees have to face the fact of innovation on a daily basis, meeting the challenge of new ways of doing things in the workplace and the need to be creative in order to maintain the organisation's competitiveness. Yet, despite the source of new ideas, the rights of employees in New Zealand to those very ideas are severely limited.

Innovation is not limited to product innovation, however the value of an innovative product is generally greater than that of an innovative service, principally because of the ease with which the latter can be copied or improved upon by competitors, without infringing the rights of the owners. Investment in innovation is a risk. New ideas and new products, while providing the potential for competitive advantage, expose the innovator to the risk and again there is the potential for loss of investment. The law cannot and should not provide for the first element of risk, but it can, should and does provide for the protection of new ideas, that is the essence of intellectual property rights.

The traditional method of protection is through the patent

system. Despite the high transaction costs and time delays associated with obtaining patents, they are still recognised as important in New Zealand! However, the protection available under the Copyright Act 1962 is often of more practical importance even given that protection is restricted to the form and expression of the work and is not a right based on the novelty of the idea. Copyright costs nothing, it is immediate and in New Zealand there are no registration requirements. All are advantages, particularly in fast-moving consumer industries.

Since the seminal case of *PS Johnson and Associates Ltd v Bucko Enterprises Ltd* [1975] 1 NZLR 311, and the 1985 Amendment to the Copyright Act, it has been clear that almost any product, product drawing, written description, advertisement, marketing tool or mock-up is protected.<sup>2</sup>

Other elements of intellectual property law have a lesser part to play. Registration of designs under the Designs Act 1953 is available, but is of little significance in New Zealand. For developments which are not obviously incorporated into a product, some firms deliberately adopt a policy of secrecy as their primary means of protection. (MacDonald & Mitchell report, at p 30, that 25% of firms surveyed adopt this policy.) This is in preference to applying for a patent, which requires disclosure of the innovative advance in return for the grant of a limited monopoly. The breach of confidence action will assist the policy of secrecy to preserve an employer's trade secrets from disclosure. In respect of

innovative marketing developments which will enhance the proprietor's goodwill, these may be secured by the action for passing off and under s 9 of the Fair Trading Act 1986.

The rights of employees to the material they have developed is an issue in all aspects of intellectual property, but the law relating to copyright and inventions (including any resulting patents) will cover most circumstances.

In New Zealand, employees must look to the common law rules to determine their rights. The relevant statutes have little to say. Section 65 of the Patents Act 1953 was intended to provide for disputes as to the ownership of inventions made by employees; and subs 9(4) of the Copyright Act 1962 provides for the ownership of works made by employees, but the test is based on the common law principles. The other statutes are silent. The role of intellectual property law in encouraging investment and innovation has been recognised, as has the need for reform of that law, but the only recent change has been accession to the Patent Cooperation Treaty.<sup>3</sup> The recently concluded Uruguay Round of Multilateral Trade Negotiations contains an Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The need to meet the requirements of TRIPS will provide the impetus for significant reform. Interestingly, the rights of employees to share in the rewards of technological developments are not addressed in the law reform documents. This is in contrast to the United Kingdom and Germany, for example, where the issue of employees' rights to

intellectual property is a matter of some legislative moment.

### The Common Law

[I]t is an implied term, though not written at large in the contract of service of any workman that what he produces by the strength of his arm or the skill of his hand or the exercise of his inventive faculty shall become the property of the employer. If the employment is of a designer that which he designs is thus the property of the employer which he alone can dispose of. If it is patentable it is for the employer to say whether it shall be patented, and he can require the employee to do what is necessary to that end.

The language used by Viscount Simonds in this quotation from his judgment in *Patchett v Stirling Engineering Co Ltd* (1955) 72 RPC 50, 57 may be inappropriate today, but it embodies the judicial interpretation that developed in England over the first half of the century and which still holds good. It was not always so. Cases such as *Heald's Applications* (1891) 8 RPC 429 show a more favourable attitude towards the rights of employees. However, over a period of years the Courts gradually preferred the rights of the employer until the highwater mark of *Patchett's* case was reached. The dictum of Viscount Simonds also shows that the Courts have equated the employee's intellectual and manual capabilities. This is logical. To argue that an employee who adds value to an enterprise because of an intellectual contribution is thereby entitled to a reward over and above the agreed remuneration is to denigrate the worth of the individual who has negotiated a remuneration based on a manual ability. If an employee receives an additional payment that is for the employer to determine, not as an entitlement for creative thought but as a reward separately negotiated.

The implied term can, of course, be varied by contract. The contract of employment of most employees will now contain a clause expressly assigning the rights to the employer in any developments which are made during the term of the employment. Indeed, in *Patchett's* case the Court was asked to determine whether the

implied term had been ousted by an agreement between the parties.

#### (i) Express terms

In the free bargaining regime promoted by the Employment Contracts Act 1991, employer/employee relationships are the subject of individual or collective contracts. The rights and obligations of the parties in so far as innovation and intellectual property, be it in the form of patents, copyright or other rights, are no exception. Most contracts of employment will expressly deal with intellectual property.

An employee, faced with a clause which transfers, or purports to transfer, rights in all intellectual property developed during the term of employment, may have little option but to agree. In the end it constitutes a decision to surrender potential future benefits in some idea or product, that may never even eventuate, for the certainty of the rewards of employment. If that decision is made, then the employee should not be allowed to renege, for without the investment made by the employer, the employee would not be in that employment. In addition to the contract of employment, there may also be a separate agreement dealing solely with intellectual property matters. This will obviously be the subject of separate negotiation.

There is no doubt that the parties are entitled to contract as they see fit as to the disposition of intellectual property, see *Patchett v Stirling* at p 58. However, the use of a wide standard clause does not guarantee rights of ownership to the employer.

#### (ii) Implied terms

In the absence of an agreement expressly providing for the disposition of inventions, copyright, original and/or novel works, the employer will still be able to assert ownership by virtue of the clause which, as Viscount Simonds pointed out, will be implied into all contracts of employment. There are, of course, factors which have to be taken into account:

- 1 Was the person employed for an ability to contribute to the organisation's pool of technical knowledge? There are any number of cases which support the proposition that if an employee has a research commitment,

whether employed generally to invent or design, then the product of that commitment belongs to the employer and an obligation will be implied to that effect. (For example, *Barnet Instruments Ltd v Overton* (1949) 66 RPC 315, *Adamson v Kenworthy* (1932) 49 RPC 57.)

- 2 If an employee has benefited from the use of the employer's time and materials in making an invention or other innovation, then it may be said that the invention was made "in the course of employment". Whatever the nature of a person's employment may be, a duty of fidelity is owed to one's employer. Use of the employer's time and materials is effectively theft of another's investment unless the product of that use is applied to the benefit of the employer. Certainly, if there is a clear connection between the resulting work and the nature of the business then the presumption must be that the employee was stimulated to produce the work by the context of the employment. If the work is produced in the course of employment and as part of the duties of the employee to perform then it will belong to the employer, together with the right to exploit any associated intellectual property rights.
- 3 Intellectual property developed by directors and senior managers is the employer's by virtue of the position occupied and the duty of fidelity owed. The position of directors as fiduciaries is well established and in this capacity it is clear that whatever property they develop they hold as trustees for the company. The same principle applies to senior managers, although the obligations are not so onerous.
- 4 Where a clause is implied into an employee's contract that the intellectual property rights belong to the employer then the employee will be deemed to be a trustee of those rights. As such, an employee may not deal with the property of the employer/beneficiary to the disadvantage of the beneficiary. Even should the employer decline to exploit the particular development, this does not permit

the employee to proceed in his/her own behalf.

Until the ownership of rights to intellectual property is clarified, it is obviously important that the value of the property be safeguarded and the maintenance of confidentiality is therefore critical. The action for breach of confidence is probably wide enough to protect even the fact that developmental work is being undertaken by an organisation — this could constitute important commercial information. Another problem is that any disclosure, even if the invention belongs to the employee, may inadvertently reveal confidential information belonging to the employer. A patent application could be such a disclosure. While it is more likely that the action will be brought against an employee, it would be available to prevent an employer, for example, negotiating to dispose of the property until ownership was determined.

## Difficulties

### (i) Restraint of trade

A clause which seeks to restrict an employee from using general knowledge or skills, learnt on the job, in making innovations and developments for another would almost certainly be an unreasonable restraint, although the use of trade secrets by a former employee can be restrained. In this context, trade secrets are usefully defined in *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724.

Employers must be concerned that a clause which provides for the ownership of inchoate rights may be held to be invalid though it is intended to apply to works made during the term of employment. Such was the fate of the provisions considered in *Electrolux v Hudson* [1977] FSR 312. In that case, the standard conditions of employment of Electrolux Ltd, which included very wide provisions as to employee inventions, were contained in documents which the defendant had not had an opportunity to read. Whitford J could have held that they did not form part of the contract, instead he proceeded on the basis that they were included in the contract. He then held them to be too wide to be enforceable.

The facts were that Hudson and

his wife had invented an adaptor for vacuum cleaners. This was not done in his employer's time nor with his employer's materials (ie in the course of employment) nor was Hudson employed to invent. The company actually wanted to suppress the invention because it believed the adaptor could interfere with the efficient working of its appliances. The invention belonged to the employee. The concern which the decision raises, and for which it has been criticised by Phillips, is the application of the doctrine of restraint of trade to subsisting contracts of employment. As Phillips points out, it is difficult to see how Hudson was restrained. (J Phillips *The Ownership of Employees' Patents in Ireland* (1976) XI Irish Jurist (NS) 331, 333.) Certainly, his employment as a storeman was unaffected, there was no attempt to claw back inventions made after the termination of employment and there was no restriction on making inventions while in employment.

In other situations, the fact that the specific clause relating to the assignment of rights is held to be void does not automatically benefit the employee. The implied contractual terms remain in place so that if the work was made in the course of employment and/or as part of the employee's duties it will still belong to the employer. The duty of fidelity and the associated duty of confidentiality owed by all employees will also subsist and will provide an employer with some further protection in that the employee remains under an obligation not to reveal any details relating to the business. In *Triplex Safety Glass Co Ltd v Scorah* [1937] 4 All ER 693, the employee argued that an express clause ousts all implication and as the relevant provision had been held to be unenforceable there was no room for other terms. Farwell J stated that it would be "an absurdity" to thereby exclude an implied covenant by an employee to act properly and honestly towards the employer. This, of course, begs the question as to the breadth of such a covenant.

### (ii) Employees' work-related duties

There is a conflict between the proposition that anything which is made while employed and to which

there is a clear connection to the business of the employer should belong to the employer — basically the proposition enunciated by Viscount Simonds; and the proposition that the employer must demonstrate that the employee was employed for that purpose, before the work will be taken to be that of the employer — in crude terms, that the employee was employed to invent, to design, to innovate. This was the view taken by the Assistant Commissioner for Patents in *Wades Application* (Decision of Assistant Commissioner Burton, 9 January 1981) p 11, one of the few New Zealand decisions on this point. It is also implicit in Whitford J's decision in *Electrolux*.

It is clear that the second proposition is too narrow when the realities of employment are considered. Innovative qualities cannot always be presumed or provided for. It is naive to assume that the only source of creative ideas is the R & D department. An employee's duties may change dramatically over the term of employment and an employer should not lose rights on the wording of a position description. The second proposition could also lead to the unacceptable situation where a person who has signed a standard assignment of intellectual property clause, conceives an idea which relates to the nature of the employing entity's business, but deliberately develops it at home. If that employee is not "employed to invent" then, subject to a duty to advance the employer's business such as would be imposed upon a director, the idea and any exploitation of it belongs to the employee.

A similar problem arises in respect of a work, which does not relate to the employer's business, developed by a person employed to research or otherwise generate innovations. Do the rights in the work belong to the employer or the employee? The better answer is that all developments made by such employees belong to the employer, whenever or wherever they are made. However, wise managers will take the precaution of spelling out the extent of such employees' obligations in some detail, preferring to risk the possibility that the provision is unenforceable.

Inevitably, the particular facts

and circumstances are definitive in each case. Factors to look for include:

- any contractual terms, including rate of remuneration;
- specific directions given to the employee, oral or written;
- the nexus between the innovation and the nature of the employing business;
- acquiescence by the employer in the employee's activities;
- use of the employer's materials and confidential information;
- the employee's position description and, importantly, the actual job performed;
- where and when the development was made.

### Statute

Employees' rights to intellectual property are only briefly covered by the Patents Act and the Copyright Act.

The Patents Act is a substantial re-enactment of the Patents Act 1949 (UK) although recent developments in that jurisdiction have rather left New Zealand hanging on to what used to be. Ironically, the economic policy of the late 16th century, when the original "letters patent" were first exploited to any extent in Tudor England, was much as it is now — encouragement of trade, of manufacturing, of invention and innovation generally — from outside the country when it could not be successfully generated from within.

Section 65 corresponds to s 56 of the UK statute, which was introduced on the recommendation of the Swan Committee, *A Departmental Committee on the Patents and Designs Acts* (Cmnd 7206 1947), to provide for those circumstances where "both employer and employee can fairly be said to be entitled to a share in the benefits of an invention", (at p 27).

Subsection 65(1) provides that:

Where a dispute arises between an employer and a person who is or was at the material time his employee as to the rights of the parties in respect of an invention made by the employee . . .

the Commissioner of Patents, or the High Court if the Commissioner declines jurisdiction, may determine the matter in dispute and make such

orders as are considered expedient. By subs (2)

the Court or Commissioner may, unless satisfied that one or other of the parties is entitled, to the exclusion of the other, to the benefit of an invention made by the employee, by order provide for the apportionment between them of the benefit of the invention . . . in such manner as the Court or Commissioner considers just.

On the face of it, s 65 allows the Court to award the invention, and the resulting patent, to one or other of the parties; alternatively, to apportion the benefit of the invention in a just manner.<sup>4</sup> Unfortunately for employee inventors, the House of Lords did not interpret it in this way.

Section 65, in the semblance of s 56, was considered by the House of Lords in *Patchett v Stirling*. The relevant facts of that case were that the employee inventor had, at various stages in his employment, negotiated agreements providing for the employer to pay royalties for patentable inventions. However, the patents in question were not covered by those agreements. Stirling demanded some payment on the basis of an understanding, an agreement to agree, between the parties. Their Lordships were unimpressed and the judgment of Lord Reid effectively rendered s 65 redundant. In respect of subs (1), he held that what was to be determined was the "legal right" of the parties, the subsection gave no power to substitute for legal rights a decision on what the Court considered to be fair and just in the circumstances. Turning to subs (2), he held that the word "entitled" meant "entitled as a matter of legal right" and there was no power for the Court to exercise its discretion. Of the way in which legal rights could be determined, Lord Reid said:

In the absence of agreement, I do not see how there can be a case where the one party is not entitled to the whole benefit to the exclusion of the other and, if that be right, the sub-section can only come into operation where there has been some agreement, express or implied, to share the benefit. If there is such an agreement and the sub-section gives no authority to override legal rights, the sub-

section cannot be used to give either party more or less than that to which the agreement entitles him. (at p 58)

The "understanding" between Stirling and his employer was not accepted as being a sufficient basis on which to found legal rights. The invention, having been made in the course of inventive duties for which Stirling had been employed, belonged to the employer and Stirling was not entitled to any benefit under the equivalent to s 65.

The effect of this decision is to restrict employees' rights to share in inventions, and to any resulting patents, to the clear words of the contract of employment or to any subsequent agreement. If there is not an enforceable agreement, then s 65 cannot be invoked. Its effect is therefore limited to circumstances in which the parties have agreed to apportion their legal rights but have not reached a decision on the size of their shares. Otherwise, the common rules apply and the employer takes the entire benefit — this is, of course, a matter of some comfort for the investing employer.

The Patents Act also recognises the possibility of unauthorised disclosure of the details of an invention. While not necessarily relevant to the employment relationship, subs 59(2) is still important to the true owner. Publication of an invention is normally fatal to the grant of a patent, by reason of "anticipation".<sup>5</sup> However, subs 59(2) provides that publication without consent does not constitute anticipation. This would cover the situation where an employee, without authority, publishes details of an invention.

For employees there is no appreciable difference between their rights to inventions and to copyright in works which they have created. The author of works in which copyright subsists is prima facie the owner of the work, however, this is subject to rules contained in s 9 of the Copyright Act. Subsection (4) deals with works made under a "contract of service"; once it is established that the person is an employee, the statutory test as to ownership is whether the work was made "in the course of the author's employment". The common law considerations as to (i) works made in the employer's time and with his or her materials; and, (ii) works made in the course of the



employee's duties, obviously apply. Subject to any contractual terms which may have been arrived at, the duties assigned to an employee, and the manner of assigning these duties, are therefore as important in deciding ownership of copyright in the works as they are for inventions.

### Other considerations

The issue is not entirely a legal one; in a societal context the OECD have identified a human resources need. (*Technology and the Economy* (OECD, Paris 1992) p 17.)

In a large number of OECD countries there are indications of a growing scarcity of scientific personnel and engineers. Furthermore, science and engineering at all levels of technical competence do not seem to be attracting a sufficient proportion of students to meet the needs of the future. Unless attitudes change, this may become a serious impediment to technological development and growth.

Without a supply of suitably trained personnel the question of employee rights to technology will become irrelevant with detriment to the nation's future technological development. The issue can be addressed at different levels, at the policy level, a greater emphasis on education in general and science and engineering in particular; at the level of legislative intervention, a recognition of the contribution of the individual to the organisation's worth. The latter is not as unusual in western economies as one might assume but, in the United Kingdom at least, to legislate successfully for such recognition has proved difficult.

The situation in the United Kingdom is that for inventions made before 1 June 1978, the common law rules apply. For employee-inventions made after that date, the Patents Act 1977 (UK) introduces three new concepts worth considering for New Zealand. All three concepts have proven difficult in practice to administer. The lot of the employee-inventor is not a fruitful one.

1 Inventions prima facie belong to the employee, subject to exceptions which reflect the common law position as to normal or assigned duties.

- 2 Even for inventions that belong to the employer, the employee is entitled to compensation if it can be demonstrated that the invention, as patented, was of outstanding benefit.
- 3 The parties cannot contract in such a way that reduces the employee's rights of ownership or compensation.

The Green Paper, *Intellectual Property Rights and Innovation* (Cmd 9117 December 1983), went further and suggested that employee inventors should be allowed to take title to inventions that were not being exploited by the employer. This was in the belief that the country needed to exploit every innovative development, something else that New Zealand policy makers might like to weigh.

Another concept worthy of consideration is that of moral rights – a recognition that the creator of a work should have the right to determine how the work, as an aspect of one's personality, should be presented to the public. New Zealand law provides only fragmented protection for moral rights, such as the limited protection in s 62 of the Copyright Act against the unauthorised alteration of "artistic works" (as defined in the Act) and the fraudulent affixation of signatures to works. While moral rights are generally confined to copyright, s 234 of the Patents Act includes something very close to an author's moral right to be named. It provides for the naming of the "actual deviser" of an invention in a patent application.<sup>6</sup>

### Conclusion

New and competitive products are required to fuel the economy. The common law position as to employer/employee rights and obligations in New Zealand coupled with the free bargaining regime supports the employer's ability to exploit investment opportunities. Employers can, however, adopt a number of useful management practices to strengthen their position.

- 1 Contracts of employment should contain a clause assigning rights in all future developments to the employer, whether clearly covered by the term intellectual property or not.

At worst, an unsympathetic Court may hold a pre-assignment

clause to be invalid but the employer is still entitled to the benefit of employee inventions made during the "course of employment".

- 2 In respect of employees who can reasonably be expected to give rise to product innovations, careful drafting is required to cover all aspects of their duties and obligations including projects pursued at home.
- 3 To avoid the argument that the employee was not employed to invent or design or otherwise be creative, regular performance reviews should include a review of the position description and a consensus should be established between management and employee as to the actual duties which are presently expected. (There is a downside to this attention to the actual duties of the employee which will become apparent if a question of redundancy ever arises.)
- 4 Contracts with senior management should focus on the duty of fidelity expected of employees in their position.
- 5 All employees should be subject to a positive requirement to disclose any discovery or improvement that they make.

New ideas commonly provide no more than the opportunity for further development – prototypes, tooling costs, regulatory consents and marketing require substantial investment. While a case can be made for employees to have rights in the intellectual property that flows from their work-related efforts, at least a strengthening of the moral rights, such reforms must be balanced against the costs incurred by the investing employer. The legal reality is that at present employers and employees are best settling their rights by clear and unequivocal agreement. □

<sup>6</sup> The time period between application for and grant of a patent is measured in years. Pharmaceutical companies are apparently the main users of the patent system, see P Macdonald & L Mitchell *Attitudes and Management of Research and Development by New Zealand Business* (Department of Trade and Industry, Wellington 1987) p 27.

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# Partnership taxation:

## Section 10 of the Income Tax Act 1976

By G A Muir, Barrister and Solicitor of Auckland

*Taxation of partnership income, or losses, can be a complex issue. This article considers the New Zealand case of Hadlee, which expressly decided, among other points, that no taxpayer partner in a firm could escape assessment of tax on income resulting from his personal exertion, by way of assignment to a family trust. The Privy Council affirmed the judgment of the Court of Appeal, which had affirmed the judgment of Chief Justice at first instance. The Privy Council did not need to deal with the interpretation of s 10 of the Income Tax Act 1976 which this article discusses.*

The "translucent" nature of a partnership, being at the same time neither a distinct legal entity capable of suing or being sued in its own name, and yet engendering such collegiality amongst its partners that they regard it as something to which they owe duties, make contributions, and receive returns, has created difficulties in determining the manner in which partnership income or losses are derived or incurred, and the persons who should be taxed upon them.

The decision of the High Court of Australia in *Everett v FCT* (1980) 10 ATR 608 to allow a tax effective assignment of partnership income in equity to a non-partner was not followed in the recent New Zealand decision in *Hadlee v Commissioner of Inland Revenue* [1991] 3 NZLR 517. One of the reasons for the differing views on either side of the Tasman was the analysis of the nature of the contributions made by partners to a professional partnership. A

further reason suggested by Richardson J was the wording of s 10, New Zealand Income Tax Act 1976. It is to the interpretation of that provision that this article is directed.

Section 10 itself reads:

10(1) When income is derived by two or more persons jointly, whether as partners, co-trustees or otherwise, —

(a) in the case of trustees, they shall make a return of that income, and shall be jointly assessable thereon and jointly and severally liable for the tax so assessed:

(b) in the case of partners —

(i) They shall make a joint return of the income of the firm, setting forth the amount of that income, and the shares of the several partners therein:

(ii) Each partner shall make a separate return of all

income derived by him and not included in any such joint return:

(iii) There shall be no joint assessment, but each partner shall be separately assessed and liable for the tax payable on his total income, including the share of the income of any firm in which he is a partner:

(c) In any case other than that of co-trustees or partners, each person by whom income so derived shall include in his return the amount of his shares in the joint income, and shall be assessed and liable accordingly.

In *Hadlee* Richardson J at 530 made the following comments:

Further, and of crucial importance for the present purposes, s 10(1) does not contemplate that for tax

### continued from p 156

- 2 *Johnson v Bucko Enterprises* concerned a lavatory pan connector. Other examples include *Wham-o MFG Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 — flying discs; *Frank M Winstone Merchants Ltd v Plix Products Ltd* [1985] 1 NZLR 259 — kiwifruit trays; *Artifakts Design Group Ltd v NP Rigg* [1993] 1 NZLR 197 — pocket diaries.
- 3 *Reform of the Patents Act 1953 — Proposed Recommendations* (Competition Policy and Business Law Division, Ministry of Commerce, Wellington 1992), this document suggested, at p 4, that one of the

objectives guiding reform of the patent system would be "the promotion of innovation . . . [and] investment in new products and processes". Other law reform documents include: *Intellectual Property: The Context for Reform* (1990 NZ Law Commission 13); *Review of Industrial Property Rights — Patents, Trade Marks and Designs — Possible Options for Reform* Vols One and Two (Competition Policy and Business Law Division, Ministry of Commerce, Wellington 1990).

- 4 One observer even suggested that s 65 sanctions the adoption of the American shopright rule which gives the employer a non-exclusive licence to practise an

invention made by an employee, usually in "the course of employment". See C R Morris *Patent Rights in an Employee's Invention; the American Shop Right Rule and the English View* (1955) 75 LQR 483, 501.

- 5 For the statutory rules as to anticipation (or prior publication) see ss 13 and 14 of the Patents Act, note also the definition of "published" in s 2.
- 6 As the first importer of an invention is entitled to apply for a patent, s 23 protects the right of the "actual deviser" to be recognised as such, as opposed to the importer who is named as the inventor on the application form.

purposes anyone other than the partners will be regarded as having an interest in partnership income. Each partner is "liable for the tax payable on his total income, including his share of the income of any firm of which he is a partner. . . ."

In summary, the structure of the legislation and in particular s 10 puts the liability for income tax in respect of the partnership income on the partner and makes it impossible for a partner to shift that liability by an assignment of a fractional part of his share in the partnership while still remaining a partner in respect of that fractional interest.

There are some starting principles which need to be considered:

- (a) If a person can sell his legal interest in property he can, subject to any statutory prohibitions, equally sell his equitable interest in that property.
- (b) Personal exertion income cannot, for policy reasons, be assigned, so therefore principle (a) holds true. You cannot sell a right to personal exertion income in law or in equity.
- (c) A partnership consists of a bundle of rights, including the right to income, a right to division of assets on dissolution, a right to an undivided share in the equity of the assets on a going concern basis (etc), and certain obligations. It is not possible at law or in equity to sell off any one of these rights without selling off *all* the rights. This does not mean that a percentage of all the rights cannot be sold, providing, however, that percentage is the same in respect of all such rights. Where this occurs at law, another partner is introduced; where it incurs in equity, the legal partnership remains the same but the partner assigning a percentage share becomes a trustee in respect of that share.
- (d) Where an equitable interest in any property is assigned a trust is created. The only relationship known in equity between the legal and beneficial owner of the same property is that of trustee and

cestui que trust; a limited or specific equitable interest such as under a charge may be an exception to this, although most charges and liens in equity take effect in re aliena and not in rem, and therefore are not to be regarded as beneficial interests in the legal property.

- (e) The Court in *Hadlee* held, in effect, that income derived from a partnership substantially as a reward for personal exertion and not from the use of property, fell within the public policy prohibition against selling (whether at law or in equity) the income from personal exertion income.
- (f) The right to an equitable assignment of a share in a partnership is recognised by s 34, Partnership Act 1908, and there is nothing in the *Hadlee* decision, either in the Court of Appeal or the Privy Council suggesting in the slightest that in equity such an assignment could not be effective.

The debate on s 10 centres on the fact that while an assignment of a partnership share in equity may be effective for general law purposes, it is not effective for income tax purposes because it is prohibited by s 10. There have been a few examples where the Courts are prepared to hold that general rules of law and equity relating to the sale or assignment of rights cannot be effective for tax purposes. The right to personal exertion income has already been mentioned; and of course there are statutory limitations in s 96 of the Act. In Australia dividends are another (implied) statutory exception on the basis that s 44(1) Income Tax Assessment Act 1936 (Commonwealth) only taxes *shareholders* in receipt of dividends, from which it might easily be contemplated that the legislature did not intend by the simple expediency of assigning a right to dividends in equity or at law, they would escape the tax net altogether, not being received by a shareholder.

Section 10 is not in the same category as s 44(1) of the Australian Act. If there was an assignment or trust under s 10 there would be no question of the income escaping tax altogether as was the case of dividends in Australia. The position

is not therefore "parallel" to *Norman's* case as suggested by Richardson J at 331.

The issue then comes to one of statutory interpretation, and in particular whether the legislature intended that the provisions of ss 226-233 should not apply where a trustee is also a partner.

Those provisions would, providing the income was either vested absolutely in interest in or was distributed to the equitable owner of the partnership share within six months after the end of the income year, make that person liable for the tax on that income, and make the trustee (ie the legal partner) taxable only as agent of the beneficial owner.

The starting point is s 9 of No 225 of 1988 which provides in respect of ss 226-233 as follows:

This part of this Act shall apply with respect to the tax on income derived in the income year that commenced on the 1st day of April 1988 and in every subsequent year . . . .

Included in those sections is a definition of "beneficiary income" which means income derived during [an] income year by a trustee of the trust which . . . [d]uring that income year vests absolutely in interest in the beneficiary (or is paid or applied within six months of the end of the income year). Where, therefore, a trustee derives income which is "beneficiary income" it is derived both by the trustee, and by the beneficiary, and is assessable to both of them, in the case of the beneficiary as assessable income derived, and in the case of the trustee as agent of the beneficiary, although clearly payment by one will satisfy the liability of the other.

It is clear that s 10 does not apply in respect of the same income deemed derived both by a trustee and by a beneficiary, being beneficiary income, firstly because the method of assessment in that situation is already set out in ss 226-233, secondly because the income is not derived *jointly*, and thirdly because none of the paragraphs (a) (b) or (c) of s 10 would on any reading apply. It is equally clear, that while income can be derived by two or more persons jointly, as in the case of co-trustees, the fact that s 10(1)(a) directs that such trustees be jointly assessable on that income and jointly and severally

liable for the tax assessed must be read subject to ss 226-233. Where a person is both a partner and a trustee, it would be a very strange principle of interpretation that would read the words in s 10(1)(b)(iii) "... each partner shall be separately assessed and liable for the tax payable on his total income ..." as not admitting the operation of the trust provisions, when any of those partners are trustees. It is submitted the words in s 10(1)(a) "... they shall make a return of that income, and shall be jointly assessable thereon and jointly and severally liable for the tax assessed ..." must be read subject to the operation of those trust provisions.

Section 10 is either a mechanical provision for allocating responsibility for returns, assessment and payment of tax between joint recipients, or is a substantive taxing provision in its own right which in some cases can override established regimes in the Act such as the trust regime, superannuation regime, the group investment regime and doubtless others. We know in relation to paragraph 10(1)(a) that it is only mechanical and subject to the trust regime, and the question of how trustees are assessed is left, not to s 10 to decide, but to ss 226-233. If partners had to be assessed under s 10(1)(b) and no other provision, obviously the second paragraph of s 10 would go beyond being merely mechanical and become substantive. Partner/trustees could ignore the application of a number of regimes in the Act which they may otherwise, by dint of their trusteeship, be subject, and no doubt could use personal losses to offset their partnership income. No doubt also, as with s 96, distributions from the partner/trustee after that date would be capital transfers. Further, if s 10 allows beneficial interests to be ignored for tax purposes when a person is in receipt of partnership income, there will doubtless be a number of trusts established to receive partnership income with exempt taxpayers such as local authorities, unions, charities, amateur sport promoters, non-profit bodies and others as trustees and co-partners. Of course the exceptions in s 61(2) and (2A) relating to public and local authority income held on trust would not apply to partnership income received by a public or local authority, if s 10 is designed to be

substantive rather than mechanical, because "... s 10(1) does not contemplate that for tax purposes anyone other than the partners will be regarded as having an interest in partnership income".

There is, in fact, an easy way to test the relationship between s 10(1)(b) and ss 226-233. If two persons became partners together holding their respective legal interests in these partnerships on trusts for the one beneficiary could it be argued that the provisions of ss 226-233 were displaced by s 10? If the answer is yes (as might be suggested on one reading of Richardson J's decision) then not only would that interpretation fly in the face of s 9 of No 225 of 1988, it would also open up enormous possibilities for tax planning, and in particular the non-application of the settlor trust regime. If the answer is, as one would undoubtedly suspect, no, then, with respect, the discussion in *Hadlee* on s 10 must be relegated to "stream of consciousness" obiter. However the beneficial ownership arises, and

however many interests in the partnership it affects, either it is correct to hold that a partner is taxed on partnership income as his own, ignoring completely who has the beneficial rights to that income, or it is not.

All this of course ignores the opening words of s 10(1) that the income must be "derived" by the persons to whom the section applies. While s 226 directs the same income can be derived by both the legal and beneficial owner (then going on to tax only the beneficial owner as principal), there is a recognised principle that there is no gain unless an item is derived by the taxpayer beneficially, and, in those circumstances, it is the beneficiary and not the trustee who derives it and who should be taxed: see *The Countess of Bective v FCT* (1932) 47 CLR 417 per Dixon J. Reading the judgment in the *Bective* case of that most learned jurist, one is left in little doubt that the interpretation of s 10 left open in *Hadlee* is not only inconsistent with *Bective*, but necessarily cannot therefore be "parallel" with *Norman*. □

## Print is best

Paul Saffo, a Fellow at the Institute for the Future in Menlo Park, California, quoting Horace:

Litera scripta manet — the written word remains. We talk endlessly about new tech-arcana like video and virtual reality, but the conversation orbits around the stuff of this page — text. In fact, the written word doesn't just remain; it is flourishing like kudzu vines at the boundaries of the digital revolution.

And Louis Rossetto, editor of *Wired*, a new magazine dedicated to the "Digital Generation".

Paper is completely random-access; it's high-resolution; it's portable; it's almost interactive in the way it gives you the ability to determine the pace, to go

backward or forward. Paper is still the best way of delivering high thought content.

And Michael Rogers, managing editor of *Newsweek Interactive*:

The initial fascination in multimedia was with audio and video. But when you use them too much you're just reinventing television. Now people are starting to appreciate text again. For the pure power of ideas, there's nothing like text, and ideas are one of those things that move us as humans. I tell my programmers: text is intellectual data compression, and it's a real cool thing.

**Horace Bent**  
The Bookseller  
30 July 1993

## *The Carbolic Smoke Ball Song*

*(To the tune of "Click go the Shears")*

*"Use Carbolic Smokeballs", the advert proudly said  
 "No more influenza nor colds in the head.  
 Nobles and princes from near and afar  
 Have used the balls and never once have caught catarrh.  
 They are a cure for many an ill.  
 Whooping cough, neuralgia and ailments caused by chill.  
 Snoring will go within seven days  
 Results that will please you all and surely amaze.*

*One hundred pounds, we will pay up the lot  
 To anyone so unfortunot  
 To have contracted the nasty germy flu  
 After doing everything we've told them to do."  
 And Mrs Carlill, without fail,  
 The wondrous smoke and fumes she promptly did inhale.  
 Fit and well until upon a day  
 She caught the flu and wondered — Would the company pay?*

*To the manager at once she sat down and wrote  
 Complaining of headache, cough and sore throat.  
 "If I had sniffed your balls you promised me  
 That you would pay at once most handsomely."  
 "Oh no, dear lady," came the reply.  
 "We reject your claim though it was a worthy try.  
 The advertisement was merely a puff  
 To entice the public just to buy the stuff."*

*And so to court to argue the toss.  
 Was it a bet? An insurance loss?  
 Offer, acceptance, consideration  
 Did they make a deal with the entire nation?  
 "Sincerity was shown", the court did say.  
 "Deposit was made, all ready then to pay.  
 A thousand pounds in Barclays Bank was put on ready call  
 There awaiting claims by one and all."*

*"Now come along", said the learned judge,  
 "An offer was made so don't you begrudge.  
 The plaintiff accepted when she did the deed.  
 She sniffed the ball and so it's clear there was no need  
 For her to tell you that she'd done it.  
 A deal is a deal, pay up, she's won it.  
 You advertised, your sales to boost.  
 Now your chickens certainly have come home to roost."*

*So take care with extravagant tales  
 About your remedy, for if it sadly fails  
 You will have to pay by the terms of the pact  
 And today beware of the Fair Trading Act.*

*Stephen Todd*