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Closer — but not too close, mate

The historical relationship between Australia and New Zealand has always been a complex one starting with the attempt by Lachlan Macquarie when Governor of New South Wales to "annex" New Zealand to his jurisdiction back in 1814 by purporting to appoint a Resident Magistrate in the Bay of Islands. Then there is provision in the Australian Constitution for New Zealand to become an Australian state should it ever decide to do so. This is not a matter that can be stopped by the Australian government but lies purely within the discretion of New Zealand — or at least that is how the Commonwealth Constitution stands at present.

In the economic field there has been a development over the years that New Zealanders know as CER, that is the Closer Economic Relationship. This is a policy matter between the two governments and is widely known in New Zealand. It does not, however, seem to be so widely known or understood in Australia. Probably this is for the simple reason that Australia tends to look elsewhere for the larger part of its international marketing. This is obviously a reflection on the relative size of the two economies. It is also an indication of geographical factors such as Perth as well as Darwin being much closer to Singapore than they are to Auckland.

New Zealand and Australia have much in common, in having both been former British colonies and in having inherited the English Common Law. At the same time there have been some differences in the way in which the two countries have developed, but these are minor when compared with the values and experiences that the two countries have shared. Historically there has been a tidal movement of population across the Tasman with sometimes a larger influx of Australians into New Zealand, and at other times, such as the present, a larger number of New Zealanders going to Australia to live than the other way around.

More recently the Australian government has become particularly conscious of this significant development. While the closer economic relationship has made the economies of the two countries more interdependent there has been a marked change on the part of the Australian government in adopting the same general attitude in respect of the movement of people. New Zealanders having to produce their passports to enter Australia has been the cause of considerable bitterness, as well as difficulties between the two governments. This has now been exacerbated by a requirement in a recent statute that New Zealanders, for the first time ever, are going to have to have visas — special category visas. In view of the general abolition of visas that is going on around the world this is an extraordinary development. Justice Michael Kirby, the President of the Court of Appeal of New South Wales, referred to this matter in a speech on 15 June 1994 at a forum discussing the Migration Reform Act 1992. The implementation of this Act has been delayed; but it is now due to come into force on 1 September 1994. In a part of his speech Justice Kirby dealt as follows with what he himself refers to as the special case of New Zealand.

> The final matter which is one of regret to me is the further change of the long-standing special arrangements which Australia has enjoyed with New Zealand. Those special arrangements date back to our history as two nations which have shared common blood, common causes in peace and war and, recently, common economic interests in the CER Treaty. New Zealand's special link with Australia is recognised in our Constitution. It was, for a time, hoped that New Zealand would become part of our Commonwealth. Although this did not transpire, we have survived for the better part of our Federation without the necessity of passports in the case of New Zealand citizens entering this country. Of course, such an exception caused no end of irritation to migration officials.
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> When passports were introduced, New Zealanders at least required no visa to enter this country. They required no permit although they could be deported for offences against the criminal law.
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> Now, the Migration Reform Act changes all this. A special category visa has been introduced for New Zealand citizens. The criteria adopted are expressed, horribly enough, as requiring that the New Zealand citizen should not be "a health concern non-citizen" or a "behavioural concern non-citizen". Put in simple language this means that the New Zealand citizen should not fail health or criminal law requirements. Introducing the obligation of a visa, even a "special category visa" for New Zealand citizens renders them liable to cancellation of their visa and thus, although permanent residents, to deportation from Australia. This "reform" runs counter to the specially intertwined history of Australia and New Zealand. It contradicts

the amity which the leaders of both countries repeatedly express. It runs counter to the economic ties which are being established to reinforce the relationship with New Zealand. It is typical of a country whose migration officials tend to operate on the principle that "if it moves – require a visa".

It will virtually force many New Zealanders in Australia to take out Australian citizenship. I believe that this is contrary to the spirit of the Citizenship Act of this country under which citizenship should be a free choice of allegiance and association with Australia: not a forced choice for self-protection and guaranteed re-entry.

I hope that there will be second thoughts about the New Zealand provision. I do not believe that it gained sufficient attention in public debate. We may, if we like, destroy the special and peculiar link between Australia and New Zealand. But if this is to happen, let it be after full and thorough discussion and a clear-sighted recognition of the damage which such changes introduce.

Whether the proposed special visa system for New Zealanders will be enforced or whether the Australian law will be amended or made administratively simple remains to be seen. But the issue does underline the different policy attitudes of the two governments. It calls in question any concern to harmonise our two legal systems except in the rather narrow commercial area. It also should put paid to any argument that New Zealand must alter its constitution to become a republic because some Australian politicians think that republicanism is an issue that will divide the Australian electorate to their advantage. Becoming closer to Australia in economic terms, for our mutual advantage, does not necessarily apply in a wider legal and constitutional context – or at least the Australian government does not seem to think so.

P J Downey

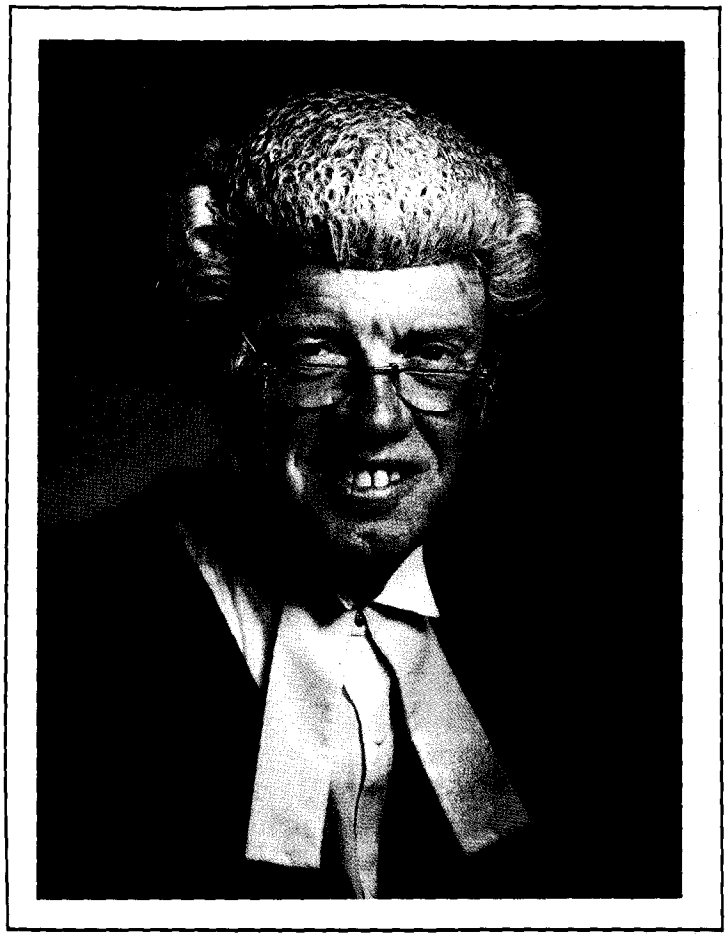
Judicial appointment

The Honourable David Stewart Morris

On Tuesday 26 April 1994 the Attorney-General announced that the Crown Solicitor at Auckland, David Stewart Morris, was to be appointed a Judge of the High Court.

In accordance with the normal practice the Attorney-General said the new Judge would be appointed initially as a temporary Judge. The Attorney-General stated however that when a vacancy became available he would be appointed permanently. His swearing in as a Judge took place in the High Court at Auckland on 12 May 1994. He was to commence sitting as a Judge on Monday 16 May 1994.

The new Judge has been a partner in the Auckland law firm of Meredith Connell and Co since 1960. He is 59 years of age having been born on 9 December 1934 at Dundee in Scotland. He arrived in New Zealand in 1949. He was educated at Dundee High School, at Fettes College in Edinburgh, and then at Auckland Grammar School. He graduated from Auckland University, LLB, in 1957. He was appointed Crown Solicitor in Auckland in 1967. At the time of his appointment to the Bench he was the longest serving Crown Solicitor in the country. As Crown Solicitor for Auckland he represented the Crown in many major criminal trials over a long period of years.



Justice Morris married Barbara Stafford Matthews in 1957. They have four children and four grandchildren. As is well known the new Judge has a particular interest in horticulture. He notes his recreations in *Who's Who* as farming, golfing and fishing. □

Case and Comment

Provisions of the Guardianship Act 1968

Adams v Wigfield [1994] NZFLR 132 and *A v J* [1994] NZFLR 206 (CA)

An appeal from the District Court (Family Court) to the High Court may be brought under the provisions of s 31 Guardianship Act 1968. Section 31(2) of the Act provides:

> Every appeal under subsection (1) of this section, except an appeal upon a question of law, shall be by way of rehearing of the original proceedings *as if the proceedings had been properly commenced in the High Court.*

The emphasis is mine.

With respect, Hammond J in *Adams v Wigfield* did not correctly apply the subsection. At p 136 of his judgment Hammond J said:

> I think it appropriate to note here also the position of an appellate Court on an appeal from the Family Court. That Court is of course a specialist Court, with particular expertise and a distinct jurisdiction in Family Court matters. In my view the normal appellate principle applies: it is not open to me simply to substitute my judgment, even if I were to disagree with the Family Court Judge, for that of the learned Judge. No authority was cited to me upon this point by counsel, but it seems to me that I should proceed on the footing that I should not interfere unless it can be demonstrated that the learned Judge erred in law; or that there is no or no reasonable evidence (having regard to the usual civil standard of proof) upon which the learned District Court Judge could have exercised or refused to exercise his discretion. The result is that it will normally be very difficult to overturn a decision of a Family Court Judge where what was involved was essentially the exercise of a discretion.

The format of the appeal provisions in the Guardianship Act in my view allow a hearing in the Family Court and where there is an appeal again in the High Court.

In *K v K* [1979] 2 NZLR 91 (CA) Cooke J (as he then was) in his judgment said this at p 95:

> . . . it must be emphasised that in s 31(1) Parliament contemplates, not an appeal in the ordinary sense, but a hearing de novo, with up-to-date evidence, and a decision by the Supreme Court Judge as to what in his opinion is in the best interests of the child at that date. There is no onus on the appellant to show the original decision was wrong.

With respect, it seems that this issue before Hammond J may not have been the subject of submission by counsel or argued in any way.

The Court of Appeal has reaffirmed its position, if that was necessary, in *A v J.* The hearing was before the Court of Appeal seeking leave to appeal as to errors of law (s 31 (4) Guardianship Act). Cooke P, with the approval of Hardie Boys J and Gallen J, expressed the issue of the appeal procedure under the Guardianship Act in this way at p 208:

> By the Guardianship Act 1968, s 31(4), there is no right of appeal to the Court of Appeal in such a case as this, originating in the Family Court, except on a question of law and with leave. By s 31(2) the appeal to the High Court was a complete rehearing of the original proceedings as if the proceedings had been properly commenced in the High Court. The rationale of the structure of the appeal provisions is clearly that, when there have been two full hearings on the facts, any further appeal should be confined to questions of law. It is not at all uncommon for the hearing in the High Court to include evidence different from that called in the Family Court. This case is exceptional, however, in that the factual situation at the time of the High Court hearing was radically different from that with which the Family Court hearing had been concerned.

It seems that the basis for the conduct of appeals to the High Court is clear, but may be misunderstood by counsel which may have resulted, with respect, Hammond J taking the approach to the appeal that he did in *Adams v Wigfield.*

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Company law issues

Westpac Securities Limited v BN Kensington, JJ Cregten as Liquidators of Stream Investments Limited (CA 381/92) [1994] BCL 33.

The Court of Appeal recently brought down a judgment in relation to a number of company law issues which have been subject to litigation since the 19th century, and which will continue to be of interest under the 1993 Act. In this case Leyland Investments Ltd (Leyland) gave a charge (by way of lien) over shares certificates which related to shares held by itself and Stream Investments Ltd (Stream), its subsidiary, over a third company, to the BNZ. This lien was given as security for borrowings made to Leyland. The BNZ did not notice that a large proportion of the shares pledged were the property of the subsidiary until it needed to

enforce the security. In the meantime Westpac advanced funds to Leyland through Stream and took up preference shares in Stream.

When both Leyland and Stream went into liquidation the issue arose as to whether or not the shares held by Stream were subject to the deed of lien granted by Leyland to BNZ. If they were not then AGC (as Westpac's assignee) would be entitled to participate in the distribution of the surplus to shareholders of Stream. At first instance Temm J held that Stream was estopped from denying that the shares it held were pledged to the BNZ.

Gault J, delivering the Court of Appeal's judgment, dealt with a number of issues. The first issue was whether Leyland as the controlling parent company (since it controlled all the ordinary shares in Stream) could pledge the property of its security. Temm J had found that the ordinary members of Stream (who were also the officers and members of Leyland) had not assented to the pledging of the shares, but had made a representation of assent that was effective to raise an estoppel. Gault J pointed out the inconsistency of this finding and held

> the correct view to be that the ordinary shareholders of Stream with voting rights did knowingly assent to the pledging of the shares owned by that company (p 11).

Having found that the ordinary shareholders had assented to the pledging of the shares the ability of the ordinary shareholders to bind the company with a unanimous resolution, and consequently the position of AGC as a preference shareholder, was considered. AGC had not been advised of the lien. The Court cited *Re Duomatic Ltd* [1969] 1 All ER 161 where Buckley J held that where

> all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.

In that case the preference shareholder had no right to receive notice of or attend and vote at a general meeting. But in this case AGC had a right to attend general meetings, but was not entitled to vote.

The Court considered a number of English authorities, as well as a number of texts (for example *Halsbury's* and *Gower*). These authorities showed there was a lack of consensus as to whether or not unanimity was required of *all* shareholders or only of those entitled to vote. The Court ultimately held that it was only necessary for unanimity amongst those entitled to vote on two grounds. The first ground was that an analysis of the cases showed there was a willingness of the Courts to relax the stringency of the rule requiring all shareholders to agree in order to bind the company as the older cases had held. The second ground was that the legislature had shown a willingness to relax formalities in relation to those entitled to vote (for example, s 137(3)(b) and s 362(1) of the Companies Act 1955). In the Court's view the emphasis in the statutes had shifted to the right to vote and consequently the Court felt "the emphasis under the common law rule so far as it relates to private companies similarly should shift". In this particular case this meant the ordinary shareholders of Stream could bind the company without notice to AGC (as a preference shareholder with no right to vote) and without any general meeting.

AGC argued that the pledging of the shares amounted to a fraud on Stream. The Court rejected this contention on the basis that the shareholders owed no duty to the company in such circumstances (*North West Transportation Company Ltd v Beatty* (1887) 12 AC 589), nor was there a duty owned to AGC itself.

What are the implications of this decision for the Companies Act 1993? Jones in his new text, *A Guide to the Companies Act 1993* (Butterworths, 1993), comments in relation to both the 1955 Act and the 1993 Act that

> [T]he approval of shareholders is effected by resolution, although informal resolutions of *all shareholders* will also be valid (see *Re Duomatic*).

This comment will now have to be revised to refer specifically to "all shareholders who are entitled to vote at a general meeting". The new Act requires notice to be given to all shareholders of meetings whose names are entered on the company's register (see ss 96 and 125), which would include shareholders who do not have a right to vote. However, this would not affect the holding in this case as AGC had a right to attend meetings when they were held. Where resolutions are passed (formally or informally) in situations where a meeting is not required to be held then a resolution of all those shareholders entitled to vote would be binding on the company.

One major defect in the structure of the financing arrangements put together for the Westpac/AGC advance was that there was no condition placed on the arrangement that the assets of Stream could not be charged without consent. The Court identified this as one means that AGC could have used to protect its position. In addition the terms of, or rights attached to, AGC's preference shares, although allowing *attendance* at a general meeting, did not provide a right to vote. If some limited right to vote was granted (for example, that any proposal for the charging of assets required a shareholders' meeting at which the preference shareholder was entitled to vote) then the failure to advise AGC could have been fatal to the BNZ's security as the unanimity required of an informal resolution could not have been achieved.

This case also illustrates a continuing utilisation by the Court of Appeal of statutes to aid the development of the common law. (See: Gunasekara "Judicial reasoning by analogy with statutes" [1993] NZLJ 446). While overseas jurisdictions have used this approach in relation to company law (see, for example, *Re an Inquiry Under the Company Securities (Insider Dealing) Act 1985* [1988] 1 AC 660), this case is the first time it has been applied in this area in New Zealand. With the new Companies Act 1993 now in place it will be interesting to see whether the principles underlying this new Act will influence the interpretation of those areas of the common law which have not been brought expressly into the new Act.

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Extinction of right of redemption

Pickersgill v Southland Building and Investment Society (High Court, Invercargill, AP 37/93, 20 December 1993) is notable only because, with respect, it constitutes useful authority on an obvious point, namely the time at which, during the mortgagee sale, the mortgagor's right of redemption is extinguished.

Cutting the facts to the bone, suffice it to say that after the expiry of a default notice under s 92(1) of the Property Law Act 1952, the mortgagee entered into an agreement for the sale of the mortgaged property. The agreement conferred on the mortgagee a right to cancel the contract any time if, for any reason other than the mortgagee's default or by virtue of any injunction or other order issued or granted, the mortgagee would be unable to complete the sale.

The sale was settled but the proceeds were insufficient to repay the mortgage. Proceedings were commenced against the guarantors for the shortfall. The main issue was whether the guarantors had been served with a notice under s 92(6). This in turn comprised two issues.

The first issue was to determine, for the purposes of s 92(6), what was the date upon which the mortgagee had exercised the power of sale, the mortgagee had to give the guarantor notice at least one month prior to the date of the exercise of the power of sale notice that the mortgagee intended to exercise the power of sale and to recover the shortfall from the guarantor. Under s 81(1), the mortgagor could redeem the mortgaged land at any time before the land had been "actually sold" by the mortgagee. Fraser J, correctly it is submitted, concluded that the date of the exercise of power of sale and the date upon which the land is actually sold are one and the same.

As Fraser J pointed out, the date upon which the power of sale is exercised may differ depending on the circumstances:

(a) Where the mortgagee enters into an unconditional contract, the date of exercise of the power of sale will be the date upon which the contract is concluded ie formed.

(b) Where the contract is conditional, but not on the mortgagor or any guarantors failing to exercise their rights prior to the settlement date, the date of exercise of the power of sale will also be the date upon which the contract is concluded. (This has to be the case because, were it otherwise, the consequence of the mortgagee being obliged to allow the mortgagor to redeem the property would be to cause the mortgagee to be in breach of the contract for sale and purchase.)

(c) Where the agreement is subject to conditions which may include the preservation of the rights of the mortgagor and guarantors until settlement date, the determination of the date of the exercise of the power of sale will depend on the facts of the particular case and the proper construction of the agreement for sale and purchase. In the present case, the date of the exercise of the power of sale was the date upon which the agreement for sale and purchase was settled. (With respect, it can be assumed that where a mortgagee sale is conditional upon neither the mortgagor nor any guarantors exercising their rights prior to the settlement date, the date of the exercise of power of sale will be the date upon which the agreement for sale and purchase is settled.)

As will be obvious from my passing comments, it is respectfully submitted that the Judge could not correctly have come to any other conclusions.

It may, perhaps, be worthwhile to state the obvious; that the mortagor's right of redemption may be revived eg where, despite the mortgagee sale being unconditional, the purchaser does not complete and the mortgagee does not obtain an order for specific performance or where the agreement does not proceed because it is conditional, as in (b) above, but the agreement is avoided because the conditions are not fulfilled or waived.

Having determined the date of the exercise of the power of sale in the present case, the second issue was whether the requirements of s 92(6) had been met. Two communications were alleged to have been sufficient.

The first comprised a letter from the mortgagee's solicitors to the mortgagor (a copy being sent to the guarantors). The letter communicated the fact that the mortgagee intended to sell the property but did not state that the mortgagee would seek to recover any shortfall from the guarantor. The letter was held to be insufficient for the purposes of s 92(6).

The second communication comprised a letter from the mortgagee's solicitors to the solicitors for the guarantors. This letter was quite explicit in advising that the mortgagee intended to recover any shortfall from sale from the guarantors. However, it was held that the letter had not been served in accordance with s 152. Service on the guarantor's solicitors was inadequate and it was not shown that the solicitors delivered the letter personally to their clients. (*Woods v Tomlinson* [1964] NZLR 399 at 406 and *Burbery Mortgage Finance & Savings Limited v Sexton*, unreported, Auckland 20 April 1989, CP 1280/86, distinguished).

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Eternal vigilance

"The price of freedom is eternal vigilance." It was a lawyer who first used those words. He was J P Curran, a member of the Middle Temple, who in the year 1790 said "It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance."

Although a lawyer spake these words, his brethren have not always heeded them as they should. They have stood by whilst wrongs have been done and have uttered no protest. Many of our freedoms, thought at one time to be fundamental, have been misused or abused, but nothing has been done to remedy the abuse.

Lord Denning:
The Road to Justice
(Stevens & Sons Ltd 1955, p 88)

Fiduciary duties of directors under the Companies Act 1993

By Bede Harris, Senior Lecturer in Law, University of Waikato

Insider trading is by no means a new phenomenon, but it is one that is very much in the media as an issue these days. In this article Bede Harris considers the position of directors under the new Companies Act because of their duties to the company. It is the author's conclusion that as far as the fiduciary duties of directors are concerned the new Act clarifies some issues, but is still basically reliant on a continuation of common law principles in important areas. It is also his view that the Act requires amendment to enable recovery of damages from directors in some unfair share transactions.

Introduction

Among the primary consequences of a director's fiduciary relationship with a company are the duties to avoid a conflict of interest with the company and not to make a profit as a result of the relationship. Although these duties are separate and distinct in that a director may, for example, make an incidental profit as a result of his or her directorship without prejudice to the interests of the company, in practice they very often overlap, in particular where a director diverts to him or herself an opportunity of which he or she became aware as a result of being a director. This article examines the impact of the Companies Act 1993 on the law relating to directors' fiduciary duties. This is an area in which case law has been prominent, particularly as regards corporate opportunities. It is therefore important to determine to what extent the Act supersedes the common law, and it is with this issue in mind that the article first deals with fiduciary duties in general, and then focuses on the regulation of share dealings by directors, in respect of which certain shortcomings in the Act are identified.

(1) Fiduciary duties

(i) Statutory provisions and remedies

Although not specifically mentioned in the Companies Act 1993, directors' fiduciary duties are implicit in the general requirement to act in good faith contained in s 131(1), as well as in ss 139-149 which deal with transactions involving self-interest. Sections 139-144 regulate the situation where a director is interested in a transaction to which the company is a party. These contain comprehensive provisions replacing the common law (represented by cases such as *Aberdeen Railway Co v Blaikie Bros* [1843-1860] All ER 249) with a statutory regime that includes a broad definition of "interested", a requirement of disclosure of interests, and a right on the part of the company to avoid transactions for which it did not receive fair value, subject to protections for third parties.

Absent from the Act however are any explicit provisions relating to conflicts of interest in circumstances other than those where the company is party to a transaction – for example, where a director usurps a corporate opportunity. Here it is submitted one has to interpret the Act as impliedly regulating such conflicts of interest through the provisions of s 145, which place prohibitions on directors' use of company information. Certainly it is difficult to imagine use of company information not being involved in some way in cases where a director faces a conflict of interest – such conflicts arise precisely because the director's knowledge of company affairs creates a tension between his or her own interests and those of the company.

Use of company information by a director is prohibited by s 145(1), and infringement of this prohibition constitutes a breach of directors' duties towards the company under s 169(3)(i). Section 145(3) provides for certain exceptions to the general prohibition against a director disclosing, using or acting upon company information, and states that this is permitted only where particulars are entered in the interests register, the director obtains prior permission from the board, and the disclosure, use or act will not or will not be likely to prejudice the company.

How do these provisions relate to the existing common law? A fundamental point to note is that s 145 provides no remedy for a breach of its provisions. Indeed, as commentators have noted[1] although the Act imposes numerous statutory duties upon directors, the Act does not expressly provide the company with any remedies against malfeasant directors, except that of an injunction under s 164. Of course, where a director is a *shareholder* the company has a remedy in terms of s 31(2), and one should also note that the existence of a derivative action at least implies the availability of a remedy to the company. Nevertheless it is submitted that in the absence of any explicit conferment of remedies on the company – and in particular an action to recover unlawful profits from directors – common law remedies for breach of fiduciary obligations, including breaches taking

the form of profit-making arising out of the use of company information, continue to be available to an aggrieved company.

(ii) The Act and the common law

The question of remedies aside, to what extent does the Act settle the major issues involved in directors' use of company information? Three important matters require attention: (a) whether the prohibition against use of company information applies in all cases or only where the director makes a profit at the company's expense, (b) how one determines whether an opportunity belongs to the company, and (c) under what circumstances a company may ratify a director's use of information belonging to it.

(a) The scope of the prohibition

So far as the first issue is concerned, the Act adopts the strict approach found in *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, where it was held that it was a consequence of the fiduciary relationship that a director has with a company that any profit made by the director by virtue of knowledge gained as a director, even if not at the company's expense, had to be accounted for. This is to be inferred from s 145(1) which imposes an unqualified prohibition upon the use of company information, and from s 145(3)(c) which provides that only when use of company information by a director will not prejudice the company may the director be authorised to use it – in other words, in the absence of authorisation, a director is forbidden to use company information even if the company will not be prejudiced thereby. Assuming the continued availability of common law remedies, a director can therefore be called to account for all profits, whether incidental or direct.

(b) Corporate opportunities

Although the Act prohibits all use of company information, it is still necessary to distinguish between use that causes no loss to the company and use that does cause such a loss, because in order to apply the exemption contained in s 145(3), which permits the board to authorise use of company information, it is necessary to determine whether use of the information is likely to prejudice the company. If no prejudice is likely to result, the board may authorise use of the information by the director, but if prejudice is likely, authorisation is not permitted. What then constitutes "prejudice to the company"?

The Act offers no definition of this term, but given that financial loss is the most obvious form of prejudice that a company can suffer, it would seem reasonable to interpret s 145(3)(c) as importing into the Act the distinction recognised in common law between those instances of misuse of company information that cause a loss to the company in the sense that it is deprived of profit that it might otherwise have made (in other words, direct profit-making by the director), and instances where it suffers no loss (the *Regal (Hastings)* situation which involves only incidental profit-making). Thus in interpreting s 145(3)(c) it will still be necessary to apply existing case law on misuse of company information in general, and on corporate opportunity in particular. The Courts will therefore still be faced with issues such as whether to adopt a strict approach, in terms of which a company will be said to have lost an opportunity even where a breakdown in personal relationships (*Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162) or legislative constraints (*G E Smith Ltd v Smith* [1952] NZLR 470) make it impossible for the company to pursue the opportunity, or whether a more liberal approach should be taken, in terms of which a company will be held to have suffered a loss only if the opportunity was "a maturing business opportunity which [the] company is actively pursuing" (*Canadian Aero Services Ltd v O'Malley* (1974) 40 DLR (3d) 371 at 382, endorsed in *Island Export Finance Ltd v Umunna* [1986] BCLC 460). Clearly the narrower the definition of "prejudice", the more numerous will be the instances in which authorisation by the board is possible under s 145(3). Finally on this issue, given the importance of the facts to cases of this type, it is hardly surprising that the legislature has not attempted what is perhaps the impossible task of defining "prejudice" and has rather left this area to develop through case law.

(c) Authorised use of company information

As stated in the preceding paragraph, use of company information in circumstances that will not prejudice the company may be authorised by the board in terms of s 145(3)(b). This is in line with the decision in *Regal (Hastings)*. However where the use of information *would* prejudice the company, the Act contains no provision allowing the board to authorise the director to use the information, and it is submitted that except for the situation where all shareholders are directors (discussed below) this renders inapplicable in New Zealand the principle contained in *Peso Silver Mines Ltd v Cropper* (1966) 58 DLR (2d) 1 and *Queensland Mines Ltd v Hudson* [1978] 18 ALR 1, in which it was held that a *bona fide* rejection of a corporate opportunity by the board means that the opportunity is one the company is no longer pursuing which can be exploited by the director. These decisions are in any event open to the criticism that a director might deliberately fail to exert him or herself in seeking to secure the opportunity for the company, in the knowledge that this would increase the likelihood that the board would decide that it was unable to pursue it, thereby making it available to the director.

If authorisation by the board is not possible in cases where the company would be prejudiced, the only way in which a director could be allowed to use company information would be by ratification by shareholders. Ratification is governed by s 177, subsection (1) of which essentially provides that a purported act which could be performed by the shareholders may be ratified by them. But this simply begs the question of what powers shareholders themselves have. Here again it is submitted that the common law remains in place[2] – a conclusion which is strengthened by s 177(4) which preserves the operation of other rules of law relating to ratification. Under the common law, shareholders may not ratify a director's arrogation to him or herself of a corporate opportunity, because this amounts to misuse of company property (*Cook v Deeks* [1916] 1 AC 554), and thus a fraud on the minority. The only exception to this rule recognised by the authorities[3] is where the ratification is unanimous (*Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592, *Re Gee & Co (Woolwich) Ltd* [1975] Ch 52 at 71 D-F). It is also true that where all shareholders are directors, unanimous assent by the board will serve as ratification (*Re Express Engineering Works Ltd* [1920] Ch 466, *Queensland Mines Ltd v Hudson* [1978] 18 ALR 1).

(2) Share dealing by directors

(i) Directors and front companies

The Act contains specific provisions governing the liability of directors for use of company information when they deal in the company's shares. Section 146 contains a broad definition of what constitutes a "relevant interest" in a share, while s 148 provides that the acquisition or disposal of an interest gives rise to a duty of disclosure to the company, subject to certain exemptions in s 147. Section 149 contains an important remedy – under subss 149(4) and (5) a director is made liable to "the person" with whom he or she engaged in a share transaction where, by virtue of the advantage the director enjoyed through access to company information, the director acquired or disposed of shares at an unfair price. The director's liability is in an amount equal to the difference between the price paid for the acquisition or disposal of the shares and the fair value of the shares. The use of the words "the person" in s 149 effectively removes the obstacle to directors' liability to shareholders contained in *Percival v Wright* [1902] 2 Ch 421, and imposes liability in any instance where a director trades unfairly with any person. Thus shareholders will have a remedy even in the absence of the special circumstances that obtained in *Coleman v Myers* [1977] 2 NZLR 225 (CA). However, as is noted by Watson and Gunasekara,[4] s 149 contains a loophole in that it imposes liability only on "a director", and thus does not cover the situation where a director operates through a front company when engaging in an unfair transaction. Although such a director would have a "relevant interest" in the shares by virtue of s 146, and would therefore have to disclose the transaction in order to comply with s 148, such a director would not be liable to pay damages in terms of subss 149(4) or (5), because it would be the front company and not the director who had entered into the transaction. Interestingly, the first and second defendants in *Coleman v Myers* operated through a front company, which was cited as third defendant, but in that case it turned out not to be necessary to make a finding against the third defendant (see the Court of Appeal decision at 362) because of the finding that on the special facts of the case, the first and second defendants had breached a fiduciary duty personally owed by them to the plaintiffs.

What then would the position be where the director acted through a front company? The only way in which the remedy provided by s 149 could be made available to aggrieved persons who had traded shares with the director would be lifting the corporate veil and holding the front company liable as if it were the director. Here again the issue of legislative intent as regards the survival of the common law is raised, because s 15 of the Act asserts that a company is a legal entity in its own right separate from its shareholders, and it may therefore be questioned whether it is still open to the Courts to lift the veil. Did Parliament intend the Act to codify the law as regards corporate personality? There is nothing in the the legislative history of the Act that addresses codification with particular reference to s 15.[5] However, while the Law Commission made the general statement[6] that it was desirable that the law should be simplied and made more accessible, it went no further than to say that the Act should be the first (and thus by implication not the only) recourse when seeking to discover the law. In light of this, there is no reason to assume that Parliament intended to remove the device of lifting the veil – indeed one assumes that had it intended to eliminate so well established a doctrine, it would have done so expressly. This being so, the Courts could lift the veil in order to give a remedy under s 149 against a front company.

But while this approach would be just and equitable where the front company was wholly owned by the director, problems would arise where, for example, the director was merely one of a number of shareholders of the front company and also a director of it, and used his position on the board of that company to propose that it enter into the transaction, the other members of the board being unaware that the director's knowledge of the affairs of the company whose shares were being traded rendered the transaction unfair under s 149. In these circumstances, although the front company would have obtained a benefit through the director's breach of faith, identifying the front company with the director and claiming damages from it under subss 149(4) or (5) would to some extent be unjust to it and its innocent shareholders, particularly if that company had altered its position as a result of the share transaction. In the final analysis then, the device of lifting the veil is of only limited use, in that the Courts are likely to be willing to use it to recover damages from a front company only when that company is wholly owned by the natural person who is the real wrongdoer.

Clearly a far more satisfactory solution would be to amend the Act in either of two ways: The first would be to make applicable to s 149 the interest provisions of s 146, thereby providing that where shares are acquired or disposed of at unfair value *either* by a director *or* by a person that has a relevant interest in the share under s 146(1) as a consequence of the director having an interest under s 146(2), then whoever entered into the transaction (be it the director or the person) will be liable under s 149(4) or (5). To alleviate the harshness of this approach, an exception to liability on the part of such a person could be provided in the same terms as apply where the company seeks to recover an impermissible distribution: s 56(1) prevents recovery where the recipient received the distribution in good faith, has altered its position as a consequence of the distribution, and it would be unfair to recover the distribution. As in the case of distributions (s 56(2)), the director could be made liable for what could not be recovered from the front company. This approach does, however, suffer from the drawback of affixing primary liability on the possibly innocent front company.

The other, preferable, alternative would be to amend s 149 so as simply to provide that the director is liable under subss 149(5) and (6) where shares are acquired or disposed of *either* by the director *or* by a person that has a relevant interest in the share under s 146(1) as a consequence of the director having an interest under s 146(2). If that were the case, then where a director of company A used insider knowledge of the affairs of that company to cause company B (in which he had an interest as defined in s 146(2)) to trade in shares of company A at an unfair price, that director could be held personally liable under s 149(4) or (5). This approach could lead to company B retaining its unjustified gain, but the deterrent effect of affixing primary

liability on the director would surely mean that cases of this type would in any event be small in number.

(ii) Extent of damages

As has already been noted, subss 149(4) and (5) impose liability on the director to pay damages to the person with whom he or she dealt. How does this section interact with s 145 which preserves a company's common-law remedy of requiring a director to account for profits made from unauthorised use of company information, even where that profit is only incidental, as would be the case in instances of share dealing? Does a malfeasant director risk paying damages twice — once to the contracting party under s 149, and again to the company under s 145? In the case of public issuer companies (to which s 149 does not apply, by virtue of s 149(6)) the answer to this question is in the negative, because s 7(3) of the Securities Amendment Act 1988 provides that the maximum liability of an insider to the other contracting party and the company combined shall not exceed the greater of the amounts for which the insider might be liable to either of those parties.

The position with regard to unlisted companies is less certain. It could perhaps be argued that by treating share transactions as a separate class, s 149 excludes liability under s 145 on the basis of the *expressio unius* principle, and further that the omission of s 149 from s 169(3) (which lists duties owed by directors to a company) is an indication that it was not intended that unfair trading under s 149 should give rise to liability to the company. The issue is, however, uncertain. Given that there would seem to be no reason why a director who involves him or herself in insider trading of the shares of an unlisted company should be in any worse position than one whose depredations are confined to companies that are public issuers, I would argued that Parliament should clarify the matter by making the liability of directors of non-issuer companies coextensive with that of companies covered by the Securities Amendment Act.

Conclusion

The issue of whether those provisions of the new Act that govern directors' duties ought to be seen as a code became the object of speculation following the removal of s 116 from the Bill originally introduced into Parliament.[7] This was a section that expressly preserved existing law on directors' duties, and its removal fuelled the argument that it was Parliament's intention to extinguish existing common law principles. This article concludes that so far as the fiduciary duties of directors are concerned, while the Act does clarify some issues it still relies for its efficacy on the continuation of a substratum of common law relating to three important areas: what remedies are available to a company for misuse of its information, what constitutes prejudice to the company arising out of such misuse, and in what circumstances it is possible to ratify the use of company information. For this reason the Act ought not to be seen as a code. Finally, it has been shown that the Act requires amendment in order to enable plaintiffs to recover damages from a director who engages in unfair share transactions through a front company and in order to clarify the extent of the liability faced by directors. □

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1 Beck and Borrowdale *Guidebook to New Zealand Companies and Securities Law* (5ed, 1994) § 211, 218.
2 Idem § 321.
3 Farrar, Furey and Hannigan *Farrar's Company Law* (3ed, 1991) 421; Loose, Yelland and Impey *The Company Director* (7ed, 1993) 185.
4 Watson and Gunasekara *The Law of Business Organisations in New Zealand* (1994) 219-220.
5 Other than a statement that separate personality is one of the essential components of a company (Report No 9 of the Law Commission — *Company Law: Reform and Restatement* § 341).
6 Ibid. § 122-23.
7 For the text of the Bill see CCH *Special Edition — New Zealand Company Legislation* (1993) 88,102.

Recent Admissions

Barristers and Solicitors

Bailey SG	Christchurch	10 June 1994
Borthwick JE	Christchurch	10 June 1994
Clephane LA	Christchurch	10 June 1994
Cobden-Cox E	Christchurch	10 June 1994
Crampton JA	Christchurch	10 June 1994
Craw JC	Christchurch	10 June 1994
Cunliffe RS	Christchurch	10 June 1994
Currie GC	Christchurch	10 June 1994
Dysart MC	Christchurch	10 June 1994
England SW	Christchurch	10 June 1994
Fee RR	Christchurch	10 June 1994
Glass SAG	Christchurch	10 June 1994
Glubb LM	Christchurch	10 June 1994
Hamilton AJ	Christchurch	10 June 1994
Harrison D	Christchurch	10 June 1994
Heald MH	Christchurch	10 June 1994
Hiini BH	Christchurch	10 June 1994
Lawrence JM	Christchurch	10 June 1994
Miles WJ	Christchurch	10 June 1994
Munting AB	Christchurch	10 June 1994
Noble MB	Christchurch	10 June 1994
O'Loughlin ML	Christchurch	10 June 1994
Penman TA	Christchurch	10 June 1994
Pratt GE	Christchurch	10 June 1994
Reaich CA	Christchurch	10 June 1994
Robertson FJ	Christchurch	10 June 1994
Robertson GJ	Christchurch	10 June 1994
Sirisena IP	Christchurch	10 June 1994
Skelton AF	Christchurch	10 June 1994
South CJ	Christchurch	10 June 1994
Sutherland NK	Christchurch	10 June 1994
Steele SL	Christchurch	10 June 1994
Tifaga KS	Christchurch	10 June 1994
Vinnell CR	Christchurch	10 June 1994
Walker RD	Christchurch	10 June 1994
White KA	Christchurch	10 June 1994
You NK	Christchurch	10 June 1994

Prescribing limits to life-prolonging treatment

By Dr David Collins, Partner, Rainey Collins, Wright & Co, also Honorary Lecturer, Faculty of Law, Victoria University of Wellington.

New developments in technology raise new ethical and legal issues. This is particularly so in the area of medicine. In this article the author considers the use of technology and the termination of the use of some procedures and treatment with the inevitable result that the patient will die. This has raised many legal problems. It raised for instance the problem in the criminal field of a charge of murder when the victim may have been kept alive for many months and then a positive step is taken to "pull the plug". The question then is whether that is what caused the death or was it the original injury. The author supports the views expressed by Lord Browne-Wilkinson that Parliament should act in this matter. He suggests that the appropriate and realistic boundaries to the duty to preserve life must be measured by deciding what is medically appropriate in each case.

Technology has equipped doctors with the ability to sustain physiological functions in patients who derive no therapeutic benefit from being maintained by so-called "life" prolonging medical procedures. Such patients have been poignantly described as being in a "twilight zone of suspended animation" (*Rasmussen v Fleming*, 741 P 2d 674 at 678.) Rapid technological developments in medicine have generated a plethora of ethical issues which have in turn influenced the boundaries of the duty prescribed by law to provide life-prolonging treatment to patients who cannot, or have not given directions to terminate their treatment.

Evolution of ethical directives

Generally speaking, modern medical ethics owe much to the pragmatism of Greek ideology and the tempering influences of biblical religion. The Greek ideals were reflected in writings about dealing with unwanted infants and the chronically ill. The latter, being of no value to themselves or the state, should, according to Plato, be allowed to die without medical attention (*Republic*, 407.) Biblical teachings on the other hand focused upon an omnipotent God to whom all were ultimately answerable. This generated a profound respect for the individual. The responsibilities of biblical faith, whether Jewish or Christian, in the relations of people are summed up in directives to "do to others as you would have them do to you" (*Matthew* 7:12) and "love one's neighbour" (Leviticus 19:18; *Luke* 10:27.) From the standpoint of medicine, this was reflected in the adjuration of the Jewish physician Maimonides:

> May I never see in my patient anything else than a fellow creature in pain. (*Oxford Companion to the Bible*, Oxford University Press, 1993, p 509.)

The intertwining of Greek ideology with biblical-based respect for the individual is now evident in a number of modern medical codes, particularly those which deal with the dying process. For example, para 22 of the New Zealand Medical Association's Code of Ethics implores doctors to:

> Always bear in mind the obligation of preserving life, but allow death to occur with dignity and comfort when the death of the body appears to be inevitable.

Resource allocation

In recent times, resource allocation has been identified as a distinct ingredient in the potpourri of issues relating to the provision of life-prolonging treatment. In *Re J (A Minor)* [1992] 3 All ER 614, Lord Donaldson MR ruled that doctors and a local health authority could not be compelled to provide intensive life-prolonging measures for a critically ill 16-month-old child because such measures were not consistent with the attending doctor's assessment as to what was appropriate for the patient. In so ruling, Lord Donaldson MR noted:

> . . . that health authorities may on occasion find they have too few resources, either human or material or both, to treat all the patients whom they would like to treat in the way they would like to treat them. It is their duty to make choices. (at 623.)

Against the ever-evolving background of medical ethics and issues relating to resource allocation, the Courts have in recent times been asked to provide guidance on the extent of the doctor's legal duty to provide life-prolonging treament to patients who cannot consent to termination of medical procedures, or who have not made a valid advance directive which relates to their circumstances[1] An understanding of that duty can be gleaned by analysing two of the key cases on this topic, namely:

Auckland Area Health Board v Attorney-General [1993] 1 NZLR 235, and *Airedale NHS Trust v Bland* [1993] 1 All ER 821.

Auckland Area Health Board v Attorney-General

The patient

Mr L was a 59-year-old man who was admitted to Auckland Hospital on 29 July 1991. He was suffering from Guillain-Barre Syndrome. On 4 August 1991 he was transferred to the Hospital's Department of Critical Care Medicine and placed on a ventilator. He continued to receive artificial ventilation until his death in mid-August 1992. After his admission to hospital, Mr L continued to deteriorate. Ultimately he suffered a complete absence of conduction along the nerves and degeneration of the nerve axons. The patient was eventually completely denervated. He could not communicate and was described as being in a totally "locked in and locked out" state.

By April 1992 the unanimous opinion of four neurologists and four intensivists at Auckland Hospital was that the patient's condition was so severe and so profound that he could not recover. They all believed that it was appropriate to withdraw ventilatory support and allow the patient to die. The patient's wife and brother (his only immediate family) agreed with the suggestion to withdraw ventilation. An Ethics Committee of the Auckland Area Health Board was also consulted. On 5 May 1992 it supported the decision to withdraw ventilation. But what was the legal position? Would a crime be committed if the patient was taken off the ventilator and allowed to die? The doctors responsible for the care of the patient sought legal advice. That legal opinion stated that although it was highly unlikely the doctors would be prosecuted, no absolute guarantee could be given that withdrawing artificial ventilation was lawful. The Solicitor-General was unable to give an undertaking that no prosecution would be brought if ventilatory support was withdrawn. The doctors were advised that in these circumstances, and from a purely legal perspective, the ideal solution would be to obtain a declaration from the High Court as to whether or not a crime would be committed if the patient's ventilator was withdrawn. The doctors and their legal adviser were very conscious of the drawbacks to this approach, not the least of which was that Court proceedings would add further to the patient's wife's anguish. However, the doctors were not prepared to risk even a remote prospect of prosecution for murder or manslaughter. Accordingly, Court proceedings were considered the only viable solution to the dilemma. It was hoped that the case would provide very useful guidance for those faced with difficult decisions as to whether or not to continue "life sustaining medical procedures".

The law

From the outset it was recognised that this would be a landmark case. There was no New Zealand precedent to follow. Careful consideration was given to asking the High Court to exercise its parens patriae jurisdiction to make a decision as to what was in the patient's best interests. Despite suggestions to the contrary from District Court Judge Inglis, (*Re H* [1993] NZFLR 225), the High Court of New Zealand still retains the ancient parens patriae jurisdiction to protect its Sovereign's subjects and, in particular, those subjects unable to look after themselves.[2] It was decided not to pursue the parens patriae option in this case. One of the reasons for not asking the Court to invoke its parens patriae jurisdiction was that decisions as to whether or not ventilatory support should be withdrawn ought be made by the medical profession in consultation with the parent's family, and, where possible, with a properly constituted Ethics Committee. It was thought that the Courts should be a forum of last resort, not a primary decision-making body.

In this case, the issue was not whether ventilatory support should be withdrawn. The only unresolved question was whether a crime would be committed if the doctors discharged what they considered to be their professional duty with the support of the patient's family and the Auckland Area Health Board's Ethics Committee.

Although it was recognised that there were risks associated with seeking a declaration, it was resolved that such an approach was the most appropriate. The major risk associated with seeking a declaration was one of jurisdiction. Traditionally, civil Courts have been extremely reluctant to make declarations as to whether or not a plaintiff would be guilty of a crime.[3] However, the circumstances of the case were so unique and the issues so significant that it was thought the High Court would be unlikely to decline jurisdiction. This assumption ultimately proved to be correct.

The issues

The High Court was asked to determine whether or not a crime would be committed if ventilatory support was withdrawn from the patient. Of principal concern were ss 151 and 164 of the New Zealand Crimes Act 1961. Section 151 of the Crimes Act prescribes the duty to provide necessaries of life. Section 151(1) states:

> **151. Duty to provide the necessaries of life** — (1) Every one who has charge of any other person unable, by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is (whether such charge is undertaken by him under any contract or is imposed upon him by law or by reason of his unlawful act or otherwise howsoever) under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission.[4]

Section 164 of the Crimes Act 1961 provides:

> **164. Acceleration of death** — Every one who by any Act or omission causes the death of another person kills that person, although the effect of the bodily injury caused to that person was merely to hasten his death while labouring under some disorder or disease arising from some other cause.

The wording of ss 151 and 164 of the Crimes Act 1961 can be traced to the code drafted in 1879 by the English Criminal Code Commission (Stephen's Code). It is axiomatic that those who drafted ss 151 and 164 of the Crimes Act, more than a century ago, could not have contemplated the life-preserving techniques of modern medicine.

Necessaries of life

Prior to the case of Mr L it had been held that "necessaries of life" included the provision of medical and hospital treatment. Thus, for example, in *R v Burney* [1958] NZLR 745 a conviction for manslaughter was upheld when the parents of a young girl failed to obtain medical attention for their daughter who died after suffering from malnutrition, staphylococcal bronchial pneumonia, anaemia and chronic skin sepsis. In that case, the failure to obtain medical treatment constituted a breach of the parents' duty to provide their daughter with a necessary of life. Similarly, in the Canadian case of *R v Tutton* (1989) 48 CCC (3d) 1299, the parents of a five-year-old diabetic boy were convicted of manslaughter after they refused to administer regular injections of insulin. Their child died from complications arising from diabetic hyperglycaemia. The failure to provide appropriate medication in that case constituted a breach of the parents' duty to provide necessaries of life.

But what of the case of Mr L? Was the provision of ventilatory support in the circumstances of his case a necessary of life? Without the ventilator the patient would immediately die, so surely it could be said that the ventilator was a necessary of life. If the ventilator was a necessary of life, would the doctors have a lawful excuse to withdraw that support from the patient?

The Court answered these questions by ruling that provisions of s 151 would not be breached if ventilatory support was withdrawn in this case for the following reasons:

No duty to provide ventilatory support in this case

The Court accepted the submission advanced on behalf of the doctors that a ventilator could not be considered a necessary of life if it could not prevent, cure or alleviate the disease or condition which endangered the health or life of the patient. Thus the case of Mr L could be distinguished from other cases in which the provision of medical assistance had been held to be a necessary of life. In the previous cases medical assistance could have cured, prevented or alleviated the patient of the condition from which he or she ultimately succumbed. In the case of Mr L there was no prospect of recovery. Maintaining him on a ventilator merely prolonged his death. The Court concluded, therefore, that Mr L's doctors had no duty to continue to provide artificial ventilation and that withdrawal of ventilatory support would not constitute a failure to provide a necessary of life.

"Good medical practice"

In addition to finding that the doctors did not have a legal duty to maintain Mr L on a ventilator, the Court also accepted the submission that the doctors would have a "lawful excuse" to withdraw ventilatory support in this case if their acts complied with "good medical practice". In this case, the presence of "good medical practice" could be held to exist if the following criteria were met:

1 That the doctors' decision to withdraw ventilatory support was bona fide and in the patient's best interests.

2 That the decision would "command general approval within the medical profession".

3 That the patient's immediate family or guardians gave fully informed consent and concurred with the decision.

4 That a recognised ethical body approved the doctors' decision.

These criteria were very similar to those which were endorsed by the Supreme Court of New Jersey in the matter of *Quinlan* (1976) 355 A 2nd 647.

Section 164

Once the Court reached the conclusion that the doctors would not commit an unlawful act by withdrawing ventilatory support, s 164 ceased to be of any real significance. If the doctors did not commit an unlawful act, they could not be said to accelerate the patient's death within the meaning of s 164. However, the Court did endorse the submission that withdrawing ventilatory support in this case would not cause "bodily injury" within the meaning of s 164.

General effect of the decision

The New Zealand medical profession and public should be relieved by the approach taken by the High Court in resolving the unfortunate case of Mr L. The Court recognised that responsibility for determining whether or not "life sustaining" medical procedures should continue to be maintained rests primarily with the medical profession, in consultation with the patient's family, rather than the Courts.

Airedale NHS Trust v Bland

The patient

Antony Bland was a 21-year-old patient who was in the care of the Airedale NHS Trust. He had been a victim of the Hillsborough Football Stadium disaster. His chest had been severely crushed which resulted in his lungs being penetrated which in turn interrupted the supply of oxygen to his brain. The injury caused irreparable damage to the cortex and destroyed all of the higher functions of his brain. For three and half years he subsisted in a persistent vegetative state. His life was maintained by nutrition and hydration supplied through a nasogastric tube. The unanimous medical opinion of those doctors who examined Antony Bland was that there was no hope of him recovering or improving in any perceptible way.

The parents of Antony Bland and his doctors concluded that no useful purpose was served by continuing medical care. They considered it appropriate to cease the supply of nutrition via the nasogastric tube and to decline antibiotic treatment if and when infection occurred. This decision was supported by independent medical opinion.

Doubts about the lawfulness of the proposed course of management prompted the Health Authority to apply to the Family Division of the High Court for declarations that it and the responsible physicians could lawfully discontinue all life sustaining treatment and medical support which maintained Antony Bland in his persistent vegetative state.

The Court process

The Declarations sought by the Health Authority were granted by the Family Division of the High Court, the Court of Appeal, and ultimately by the House of Lords. Both appeals were brought by the offical solicitor acting in his capacity as guardian ad

litem for Antony Bland. In total, nine Judges ruled that it was lawful to withhold artificial feeding and the administration of antibiotic drugs from Antony Bland, even though it was known that his death would occur a short time thereafter. For present purposes it is only necessary to focus on the five judgments of the House of Lords.

Omission/Acts of commission

One of the foundation stones to the reasoning contained in a number of Their Lordships' judgments is the proposition that doctors could lawfully discontinue nasogastric feeding in Antony Bland's circumstances because the cessation of nutrition was an omission not an act. It was reasoned that if termination of nutrition via the nasogastric tube was not a positive act, it would not constitute a crime. Although the ultimate decision of the House of Lords could not be challenged, it is unfortunate that it was, in part, based upon the contentious premise with withdrawing life support systems and procedures was an omission rather than an act. Lord Mustill and other members of the House of Lords recognised the fallibility of their reasoning process when he said:

> . . . that this chain of reasoning makes an unpromising start by transferring the morally and intellectually dubious distinction between acts and omissions into a context where the ethical foundations of the law are already open to question. [1993] 1 All ER 821, at 895.

Lord Goff also wrestled with the dubious notion that withdrawing life support systems in this instance could be classed as an omission. His Lordship sought solace in the reasoning of Professor Glanville Williams, who suggested that what a doctor does when he switches off a life support machine:

> . . . is in substance not an act but an omission to struggle

and that:

> The omission is not a breach of duty by the doctor, because he is not obliged to continue in a hopeless case. (*Textbook of Criminal Law*, 2nd edition, 1983, p 282.)

As Professor Ian Kennedy foreshadowed:

> . . . to describe turning off the [life support] machine as an omission does some considerable violence to ordinary English usage. It represents an attempt to solve the problem by logic-chopping. Such an approach may demonstrate to the satisfaction of some that no crime is involved, but it is surely most unsatisfactory to rest the response of the law to what is seen as a testing moral and philosophical issue on some semantic sleight of hand. (*Treat Me Right*, Oxford 1988, 351, cf *Barber v Superior Court of State of California*, 147 Cal App 3d 1032.)

Wny then did some members of the House of Lords become immersed in drawing artificial distinctions between omissions and acts of commission? Part of the answer lies in the fact that traditionally the law has drawn a distinction between acts and omissions. This distinction supposes that intentionally doing something is more culpable than allowing something to happen without interference. (H Kuhse, *The Sanctity of Life Doctrine in Medicine — A Critique*, Clarendon Press, Oxford, 1987, pp 32-33.) Thus, for example, Dr Cox (*R v Cox*, unreported, 18 September 1992, Crown Court, Winchester) was convicted of attempted murder for acceding to a patient's request to have her pain-ridden life terminated through administering a lethal injection. Dr Cox's actions were readily identified as causing the patient's death by an unlawful positive act, whereas if he had merely provided palliative relief (which may itself have hastened the dying process), no crime would have been committed. (*R v Adams* [1957] Crim LR 365.) The House of Lords strenuously distinguished Dr Cox's actions from those proposed by the physicians responsible for the care of Antony Bland. Euthanasia by positive steps to end a patient's life such as administering a drug to bring about death is, the House of Lords, emphasised, illegal.

It is now quite apparent that the commission/omission dichotomy cannot be easily applied to the medical scene. The general proposition that people have limited duties to save others[5] is not helpful in the medical domain because doctors are under a duty to use their skills, so far as is reasonable, to the benefit of their patients. This overriding duty should eclipse any distinctions that the criminal law may traditionally make between acts and omissions.[6] It is the doctors' failure to fulfil their duty to the patient that should give rise to liability, regardless of whether the duty is breached by act or omission.

The omission/commission dilemma was assiduously avoided by Thomas J in *Auckland Area Health Board v Attorney-General*, (supra). In that case, the Court focused primarily on the nature of the doctor's duties.

Regrettably, some members of the House of Lords became so enmeshed in the omission/commission dilemma that they wre unable to provide clear guidelines to doctors as to when life-sustaining nutrition and hydration may be lawfully withdrawn. This contrasts with the New Zealand High Court decision. As one Australian commentator has observed:

> Since, in the [United Kingdom] the whole edifice of legality of medical decisionmaking in respect of withdrawal of life-sustaining treatment depends on the Court's categorisation of the doctor's conduct in each particular case, the law is no more certain now than it was before the *Bland* case.

The same author has suggested that:

> . . . should a case of withdrawal of life-saving treatment from an incompetent terminally ill patient come before Australian Courts, the better view would be for the judiciary to adopt the New Zealand rather than the United Kingdom precedent.[7]

Thus, despite its stated objective of trying to enable doctors to make decisions relating to withdrawal of treatment independently of the intervention of the Courts, the House of Lords' categorisation means that, at least for the foreseeable future, doctors in England must continue to apply to the Courts for declaratory relief prior to removing artificial nutrition and hydration. Lord

Browne-Wilkinson acknowledged this when he said:

> I am very conscious that I have reached my conclusions on narrow, legalistic, grounds which provide no satisfactory basis for the decision of cases which will arise in the future where the facts are not identical . . . I therefore consider that, for the foreseeable future, doctors would be well advised in each case to apply to the Court for a declaration as to the legality of any proposed discontinuance of life support where there has been no valid consent by or on behalf of the patient to such discontinuance. (*Airedale NHS Trust v Bland*, at 884.)

An example of a recent application for a declaration brought before the English Courts is *Frenchay Healthcare NHS Trust v S* (*The Times Law Report*, 19 January 1994).

The doctor's duty

Despite some members of the House of Lords dwelling upon the omission/commission distinction, the primary focus of the judgments was on the extent of the doctor's duty to provide life-prolonging treatment. The House of Lords was unanimous in concluding that artificial feeding and administering antibiotics could be lawfully withheld from an insentient patient even though it was appreciated that the patient would die soon, provided:

1 Responsible and competent medical opinion was of the view that it would be in the patient's best interests not to prolong life by continuing that form of medical treatment, and
2 Continuation of that form of treatment was futile and would not confer any benefit on the patient.

Some reservations must be expressed about the reference to the patient's "best interests". One is justified in querying whether the patient's "best interests" is an appropriate concept in instances where the patient's condition is such that they have no perceivable interests. Lord Keith appears to have had reservations about assuming what was in a patient's "best interests" when he suggested:

> In the case of a permanently insensate being, who if continuing to live would never experience the slightest actual discomfort, it is difficult, if not impossible, to make any relevant comparison between continued existence and the absence of it. It is, however, perhaps permissible to say that to an individual with no cognitive capacity whatever, and no prospect of ever recovering any such capacity in this world, it must be a matter of complete indifference whether he lives or dies.[8]

Nevertheless, by examining the duty of doctors the House of Lords went a little way towards endorsing the approach advocated by Professor Kennedy when he contended:

> The real argument is not how a doctor's conduct can be characterised, *but whether under the circumstances he has fulfilled his duty to the patient* to care for him in good faith. (emphasis added) (*Treat Me Right*, supra, p 322.)

Thus, whilst aspects of the reasoning of the House of Lords may be justifiably criticised, it is reassuring that Their Lordships were prepared to declare that Antony Bland's doctors did not have a duty to preserve life at all costs by continuing futile medical procedures.

Cause of death

At first glance there is some appeal to the suggestion that withdrawing life-prolonging medical procedures does not cause death. Proponents of this line of reasoning say that the exclusive cause of death is the patient's pre-existing condition. In other words, the patient's death is the natural consequence of their disease or illness. This argument was accepted by the Court of first instance in *Airedale NHS Trust v Bland* where Sir Stephen Brown P said:

> The fact that Antony Bland's existence will terminate does not in my judgment alter the reality that the true cause of death will be the massive injury which he sustained in what has been described as the Hillsborough disaster. (at 832.)

This line of reasoning is consistent with the generally accepted view that a doctor's compliance with a patient's instructions to withhold or withdraw life-sustaining treatment will not constitute aiding and abetting suicide or amount to a culpable homicide. The patient's refusal to accept treatment permits nature to take its course. The consequential death is said to be caused by the patient's pre-existing illness or injury. (*Nancy B v Hotel Dieu d'Quebec* (1992) 86 DLR 4385; *In Re Quinlan* (supra) and *Re Conroy* 486A 2d 1209.) Similarly, where life prolonging treatment is appropriately withdrawn from patients whose injuries have been caused by the criminal acts of others, the cause of death is the patient's injuries, not the withdrawal of medical facilities. (*R v Trounson* [1991] 3 NZLR 690, *R v Malchereck* [1981] 1 WLR 690.)

It has long been recognised that the argument that the withdrawal or withholding of life-preserving treatment does not in fact cause death is susceptible to penetrating intellectual assault. As Professor Skegg recorded as early as 1984, the lack of causation argument "fudges the issues" (Skegg, *Law Ethics and Medicine*, Oxford 1984, p 167.) Others have said that it amounts to "playing with language" (Williams, *Textbook of Criminal Law*, Supplement (1979) p 9.) Clearly, but for the discontinuance of life-prolonging treatment, definable life would continue.

A further objection, and one which Thomas J stressed in *Auckland Area Health Board v Attorney-General* is that if the causation argument by itself prevailed it could exculpate doctors who failed to observe good medical practice by inappropriately terminating or withholding life-preserving medical procedures for a patient. The appropriateness of treatment would cease to be an issue if causation was the sole determinant of liability.

Conclusions

The protracted and at times convoluted process of Court proceedings and legal reasoning contrasts markedly with the highly technical and sophisticated environment of an intensive care unit. Given the historical framework in which the law is encased, it is perhaps not surprising that at times the reasoning advanced by lawyers and Judges is dubious. It is to be hoped that those who are at the front line

of providing and withdrawing life-prolonging treatment continue to respect and understand that although the diagnosis of death is within the domain of the medical community, the definition of death (G Williams, ibid, p 281), and the circumstances under which death should be allowed to occur, are within the province of the law (Blackstone, *Commentaries on the Laws of England* (1753), Vol 1, p 130; s 8, New Zealand Bill of Rights Act 1990.) Provided the legal process continues to provide solutions that accord with sound medical ethics and commonsense, there should be no tension between those who provide or withhold life-prolonging treatment and those who ultimately judge their decisions.

The nine judgments in *Airedale NHS Trust v Bland*, when combined with the judgment of Thomas J in *Auckland Area Health Board v Attorney-General* span close to 90 pages and exceed 64,000 words. This observation should not be construed as a criticism. If anything, the voluminous amount of judicial reasoning emphasises that Their Honours and Lordships were obliged to go to extraordinary lengths to provide results in those cases that were in accord with medical ethics and commonsense. In so doing, the Courts were forced to weave a tortuous thread through common law principles and a criminal code that were forged in an era when medical technology was in its crudest infancy.

Frustrated by the constraints under which they were bound to labour, some members of the House of Lords urged that the legislature address the moral, social and legal issues raised by the withholding of treatment from insensate patients who had no hope of recovery. Lord Browne-Wilkinson was moved to state:

> . . . it seems to me imperative that the moral, social and legal issues raised by this case should be considered by Parliament. The Judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then Judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed. (*Airedale NHS Trust v Bland*, at 879.)

A similar plea has been made in New Zealand.[9] If ever there is a legislative response it is hoped that parliamentarians will recognise that there must be realistic boundaries to the duty to preserve life in a medical setting. Those boundaries must be measured by deciding what is medically appropriate in each case. Where reasonable and competent doctors form the view that it is futile to persevere with life-prolonging medical procedures, the law should impose no sanction if the patient is allowed to die with dignity and comfort. □

1 Competent adult patients can decline to receive life-prolonging treatment – see s 11, New Zealand Bill of Rights Act 1990 which provides "Everyone has the right to refuse any medical treatment". Note also Cardozo J, *Schloendorff v Society of New York Hospital* (1914) 105 NE 92: "Every human being of adult years and sound mind as a right to determine what shall be done with his own body; . . .". Similarly, T A Gresson J in *Smith v Auckland Hospital Board* [1965] NZLR 191: "An individual patient must, . . . always retain the right to decline operative investigation or treatment however unreasonable or foolish this may appear in the eyes of his medical advisers".

2 For examples of cases in which the High Court has held it retains its parens patriae jurisdiction see: *Re P* [1961] NZLR 1028, *Re R* [1974] 1 NZLR 399, *Re X* (1990) 7 FRNZ 216.

3 *Imperial Tobacco Co Ltd v Attorney-General* [1980] 1 All ER 866, *The Queen v Humphreys* (1987) AC 1, 26; *Police v Hall* [1976] 2 NZLR 678; *Saywell v Attorney-General* [1982] 2 NZLR 97.

4 See also: Section 288, Criminal Code Act 1899 (Queensland); Section 149, Criminal Code Act 1924 (Tasmania); Section 265, Criminal Code Western Australia.

5 NB For the specific duty provisions of the Crimes Act 1981 see ss 151-153.

6 "President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioural Research Deciding to Forgo Life Sustaining Treatment", March 1993, pp 66-67.

7 Mendelson "Legal and Ethical Ramifications of Withdrawal of Life Support Systems from Incompetent Patients", Australian Institute of Criminology Conference, Surfers Paradise, 1993, pp 7 and 16.

8 *Airedale NHS Trust v Bland*, pp 860-861. See also R S Shapiro "The Case of LW: An Argument for a Permanent Vegetative State Treatment Statute" (1990) 51 Ohio State Law Journal 439, 447. B Jennett and C Dyer "PVS and the Right to Die: The United States and Britain" (1991) 302 BMJ 1256 at 1258.

9 Sir John Jeffries, Medico-Legal Conference, Auckland, 17 March 1993.

Contracts (?) of employment

Meanwhile, working conditions for all writers had deteriorated dramatically during the recession, and those of us actually writing *for a living*, if we were lucky enough to get work these days, were signing the same contracts our long-suffering forebears signed in 1950 – the kind that inspired a Judge to remark, "This contract is so one-sided, I'm surprised to find it written on both sides of the paper."

In 1986, I negotiated a contract for a book with CBC Enterprises based almost entirely on a model contract issued by the Writers' Union.

I thought I'd done magnificently, with clauses assuring me that my name would be on the title and spine, that I'd have prior approval of any and every change, that I would earn above-average percentages on subsidiary rights . . .

Then, Enterprises proceeded to breach. And breach. And breach. I do not exaggerate, I swear it, in saying I didn't recognize my own work. And, perhaps understandably at that point, they weren't even going to put my name of the cover.

Model contract

I went to the union's lawyer, who had drafted the model contract, and who told me: "There's nothing more you can do. If you refuse to go ahead on their terms, they'll just claim frustration, and that's that."

Power to the people! Now, I just make minor emendations to the contracts drafted by publishers. At least they don't pretend they don't know what's in them.

The one I signed for *Naked Promises*, a book on contracts, the main theme of which was inequality of bargaining power, contains the usual clauses holding me completely responsible for any untoward event or act of God, no matter how ridiculous or unimaginable.

Jeffrey Miller
The Lawyers Weekly (Canada)
13 May 1994

Unfair matrimonial property agreements — Why bother?

By Geoffrey Harrison, Barrister of Auckland

The breakdown of a marriage creates complex legal as well as social problems. As the author notes in this article an agreement entered into between the parties may on the face of it appear to be a contract, but by virtue of the statutory powers and discretions vested in the Courts it can be set aside in some circumstances. This article analyses some of the cases and makes some practical suggestions in respect of both pre-nuptial and post-separation agreements.

Introduction

Since *Aldridge* [1983] NZLR 576 and *Docherty* [1983] NZLR 586 (both Court of Appeal judgments) the Courts have shown a real willingness to accept the statutory invitations contained in s 21(10) of the Matrimonial Property Act ("the Act") to set aside unfair matrimonial property agreements; as Justice Richardson observed in *Docherty* it is a "remarkable discretion conferred on the Court". Although s 21 allows for contracting out of the provisions of the Act, agreements which depart too much from principles of generally equal sharing and fairness are unlikely to survive the challenge of judicial scrutiny; the licence granted by s 21 to depart from the Act can realistically be said to be only provisional. In addition, a failure to comply strictly with the protective certification provisions leaves a permanent stain on the "deal" often with results that come as a nasty shock to some of the participants, eg, *Connell v Odlum* [1993] 2 NZLR 257 (CA).

The Courts have sent out a consistent message since *Aldridge* regarding matrimonial property agreements; the point has now been reached where unless the certification process has been procedurally and substantially carried out properly, and the agreement itself is reasonable and fair, then it is unlikely to withstand a challenge. The same applies to compromises reached outside the Court door (whether dealing with matrimonial property, see eg *Jones v Borrin* [1989] 3 NZLR 227, or a de facto property claim, see eg *Phillips* [1993] 3 NZLR 159 (CA). It must also be remembered that under the Act the Court lacks the power to vary or amend the agreement; if the Court exercises its discretion to set the agreement aside (which wide discretion is very difficult to upset on appeal) then the Act applies with full force. Section 2(2) may, if the agreement is set aside, provide some relief to the spouse who has relied on the agreement and was seeking to uphold it but this cannot be guaranteed as the discretion under s 2(2) is also wide and the exercise of it often unpredictable.

The statutory and practical framework

Most lawyers are familiar with the provisions of s 21 and the requirement it imposes on them and their clients. The majority of s 21 agreements are drawn up by the profession for clients after a separation. It aims to record clearly the agreement reached between the separating spouses as to how they will divide their property. The situation here is to be contrasted with Australia and its Family Law Act. There, in order to have a binding agreement, the details must not only be recorded in writing and professionally certified, they must also be approved by the Family Court. There are no provisions under our Act for the "seal of approval" from the Court. If matrimonial property proceedings before the Court in New Zealand are compromised by the parties then the Courts do, by and large, carefully scrutinise these compromises before approving the proposed orders. It is commonplace in the Family Court for the Court to obtain confirmation from counsel that the compromise proposed has been fully discussed with, and understood and agreed to by the litigators and that the general principles of the Act have been complied with.

Major judgments — 1983-1993

There have been a number of major judgments from the High Court and Court of Appeal since 1983 dealing with applications to set aside s 21 agreements and Courtroom door compromises. I do not intend to embark on a lengthy analysis of the cases, but more to glean the constantly underlying judicial trends.

The leading cases are *Aldridge, Docherty, Jones v Borrin, Pountney* (1990) 7 FRNZ 156, *Coxhead* [1993] 2 NZLR 397 (CA), *Connell v Odlum* and *Phillips*.

Summary of judicial trends

(1) Agreements that depart too much from the principles of general equal sharing of property, particularly marriages of long duration (say over ten years), are most unlikely to survive judicial attack, particularly if the application to set aside is filed reasonably promptly after the agreement was signed (*Coxhead*); this also applies to compromises of litigation, eg *Jones v Borrin; Phillips*.

(2) Agreements or compromises that are signed in circumstances where one or both of the parties has been under high emotional stress are vulnerable to judicial attack; the same applies to non-disclosure or inadequate disclosure of assets and liabilities, eg *Phillips; Jones v Borrin; Coxhead*.

(3) Inadequate certification advice, despite the saving provisions of s 21(9), make the s 21 agreement particularly vulnerable to being set aside, eg *Connell v Odlum*.

(4) A second s 21 agreement which purports to rectify the imbalance of an earlier unfair agreement, but in substance does not, stands little better chance of survival than its predecessor particularly where the assets under the matrimonial umbrella are substantial, eg *Pountney*.

(5) The longer an unfair pre-nuptial agreement stays in force, the more likely it is to be set aside; the longer an unfair post nuptial agreement stays in force, the greater its chances of survival – the Courts will, in appropriate cases, pay more than lip service to the parties' reliance on the agreement in these circumstances, eg *Haronga v Sankey* (1992) 9 FRNZ 330.

In short, practitioners are wasting their clients' time and money by continuing to breed or be involved in certifying unfair agreements. Similarly, spouses seeking to substantially withhold assets from the matrimonial pool under a pre-nuptial agreement need to be clearly advised not only that the agreement can be set aside by a Court under the various s 21(10) options, but *also* that it is very likely to be set aside if an application is made following a separation; there is no love lost between s 21 and the common law notion of sanctity of contract.

Solutions

Here I will outline some suggestions for provisions to assist the quality of both pre-nuptial and post-separation agreements. There are many occasions where an agreement which provides for unequal division of property, or isolating of property away from the matrimonial pool, are entirely proper and appropriate; second marriages are a common example. I do not believe that the Courts have a bone to pick with careful identification and exclusion of assets where the circumstances, if analysed under ordinary litigation under the Act, would have resulted in findings that selected assets were separate property anyway or that unequal division of s 15 property was appropriate. In particular, if a carefully considered approach is taken by lawyers to the introduction of assets where it is a second marriage for one or both of the spouses, then the chances of the agreement withstanding judicial attack are greatly enhanced. The keys are, I believe, as follows:

(a) Draw up the agreement bearing in mind the strong principles of equal sharing in relation to domestic matrimonial property (home; contents; cars). Agreements that synchronise, in a meaningful way, with the principles of equal sharing of domestic property are far more likely to be upheld by the Court;

(b) Do not allow the agreement to go too far in one spouse's favour; the more extreme the agreement is, the more open it is to attack;

(c) Bear in mind that clients often, after signing, ignore the provisions of their own pre-nuptial agreements through intermingling. If the spouses' behaviour, following the signing of the agreement, runs counter to their written instructions and the agreement, then it is effectively a "death warrant" for the agreement;

(d) Under the "background" or "recital" passages, clearly and simply lay out why the stipulations in the agreement are why they are. Examples would include a second marriage for one or both of the couples; unequal introduction of property; perhaps an acknowledgment of a wish to retain property for the respective children of their earlier marriages;

(e) Insert "sunset" clauses, particularly where the division of property is more extreme in favour of one spouse;

(f) Related to (e) above, drafting provisions into the agreement that take account of possible change in circumstances, eg children.

A solution to the intermingling problem

Rather than identifying certain assets as being matrimonial property and others as separate property and then inserting an anti-intermingling clause, a solution would be:

(a) Selecting property for both sides to contribute into the pool which is to become matrimonial property ie that property which would normally be matrimonial property anyway;

(b) Obtain agreement on the value of these assets which are being "matrimonialised";

(c) Provide in the agreement that each spouse is a creditor to the marriage of matrimonialised property (defined in either percentage or dollar terms) being introduced;

(d) In the event of a separation then each party receives back from the matrimonial pool the appropriate pro rata value or percentage of property introduced;

(e) Equal sharing of increase in value above the value of property introduced by the two spouses or, in the event of a loss of capital, for the spouses to share on a pro rata basis.

Conclusion

A brief scan of the reported cases referred to shows clearly that litigation over matrimonial property agreements or Courtroom door compromises is messy, and often bitterly fought. The uneasy relationship that the law has with issues of human emotion is clearly demonstrated in this kind of litigation. In addition, lawyers are often pressured by anxious clients who labour under the popular myth that "After three years he/she gets half of everything". Although the Court's power to set aside under s 21 is an anathema to contract purists, the Matrimonial Property Act has now been in force for 18 years. The social engineering objects of the Act are still making their presence felt. Lawyers and their clients who ignore the objects of the Act do so, in my view, at their peril. □

Admission of first graduates from the School of Law, University of Waikato

Addresses on the occasion of the admission as Barristers and Solicitors of the High Court of New Zealand of the first graduates from the University of Waikato School of Law, at a ceremony in Hamilton, 20 May 1994.

For a report of the opening of the Law School see [1991] NZLJ 196.

The Rt Honourable Sir Thomas Eichelbaum, Chief Justice of New Zealand

The Courts are public places and generally anyone is welcome to be present and observe what is happening here. Normally however, unlike say in a theatre, the Court is not concerned with the spectators but solely with considering and deciding whatever application or case is before it. This occasion however is an exception. It is truly a significant event: the admission as barristers and solicitors of the High Court of New Zealand of the first group of graduates from Te Wahanga Ture Te Whare Wananga o Waikato – the School of Law of the University of Waikato. The Court acknowledges that by the presence on the Bench of the Chief Justice of New Zealand together with five other Judges, carrying out a function more usually performed by a single Judge. On the Bench with me are not only the resident Hamilton Judges, Justices Penlington and Hammond, but also Justices Tompkins, Fisher and Cartwright, each of whom in ways well known to many present has had a close connection with the Waikato, the University or the School of Law. On behalf of the Bench I acknowledge the presence of and welcome the Attorney-General Paul East and local members of Parliament Messrs Storey and Gallagher. We welcome rangatira of the great Tribes, Judges of the District Court and the Maori Land Court, and the Courts-Martial Appeal Court, the Chancellor and other officers of the University, and especially the Dean of the Law School Professor Margaret Wilson, their Worships the Mayors of Hamilton and other Waikato towns, the Vice-President of the New Zealand Law Society, and the President of the Waikato/Bay of Plenty District Law Society.

No ceremony of this kind would be complete without the presence of family and friends who take justifiable pride in the achievements of the candidates for admission.

I welcome you all most warmly. But of course the most important persons here are the candidates themselves and it is to their applications that the Bench must now address itself. First, in accordance with tradition I will ask the Attorney-General and Queen's Counsel if they wish to move. [Admission ceremony follows.]

On behalf of the Bench I now wish to address a few remarks to the newly admitted members of the legal profession.

You can rightly take pride in having reached completion of your degrees and admission to the profession. No one gets through a degree course easily today, if they ever did. As well you have been pioneers and the path of pioneers is never smooth. The Law School itself had to overcome well-publicised obstacles and work its way through many difficulties. The University as a whole and the Dean and Faculty of the Law School in particular, are entitled to feel much pride at being able to present you as new entrants to the profession today. It is appropriate also to make reference to the late Bill Dillon who was the director of the Institute of Professional Legal Studies course which you attended. We are very pleased that Mrs Dillon is able to be present.

You are the foundational product of this new law school, the first group who can be addressed in that way for nearly a century. I need not repeat the remarks made in the written programme, which you all have, about the special and innovative aims and aspirations with which the Waikato Law School

Graduates Admitted

Melanie J Andrews
Bryce Owen Bluett
Moana Boyd
Jenine Ann Briggs
Scott Duncan Brodie
Kerry Williams Burroughs
Andrew Clements
Toni Jean Ferrier
Joanne Gread
Kevin David Herlihy
Sarah Maree Holmes
Andrea Maree Jones
Sinead Lawlor
Merrin Loft
Nicholas Howard Loye
Kirsty Ann McDonald
Richard Middleton
James Charles Morris Parlane
Nikolas Posa
Annetta Joyce Preece
Dawn Yvonne Reynolds
Michelle Robertson
Simon Francis Scott
Kaye Irene Smith
Steven Spackman
Maria Catherine Young

Hamilton Admissions, May 1994

commenced – inspired, in many cases, by the authors of the report, itself bearing the inspiring title, *Te Matahauariki*, the meeting place of ideas and ideals. One prime emphasis, which finds reflection in the form and content of today's ceremonies, is to ensure the recognition of Maori heritage and culture as a full and legitimate part of the New Zealand legal system.

So you stand on a new threshold in your lives and careers, with a good deal of idealism, possibly mixed with concern about what the future holds. You know about the professional life you are about to enter but perhaps more in theory than on the basis of any practical experience. You will want to bring to bear upon the outside world the knowledge you have gained, the innovative spirit with which you have been inculcated, the idealism fermenting within you, and to mould and change the world for the better.

If those are your feelings at this moment I applaud them. Like other institutions the legal profession needs constant stimulus towards change, towards adaptation to a modern and rapidly changing scene, and so equally do the Courts and the very law itself. You will know already and your experience will confirm that these are conservative institutions not given to rapid transformation. There is nothing wrong with that either. They are cornerstones of our democratic process. The principles they stand for have withstood the test of time, but their practices, procedures and attitudes must keep up with the times and they need ginger groups like you to ensure that they do.

Many of the core principles and precepts have remained and should remain constant. Some relate to personal obligations and conduct. By the oath you have sworn you have undertaken responsibilities to the public at large, to the members of the profession you have now joined, and to the Courts and tribunals before whom you will practise. They are solemn and onerous obligations demanding the highest standard of integrity and professional skills. Your clients, your fellow practitioners, and the Judges before whom you will appear, will and must be able to rely on you implicitly.

No doubt some would say those are old-fashioned terms, but let no one tell you that integrity and adherence to high professional standards are out of fashion. They are as important today, indeed more important, than ever. You must ensure by your own ethics and conduct that the legal profession remains faithful to them. Likewise the Courts with your help must adhere firmly to the highest ideals of justice and integrity, and strive for maintenance of the rule of law and the independence of the judiciary. The challenge for both of us is to maintain the traditional ethos of the profession, and the judiciary, while at the same time moulding and developing these institutions so that they keep in touch with and fulfil the needs of the modern community in which they have to operate.

While those present rightly acknowledge and congratulate you on your achievements I would ask you also to reflect on how best to use the qualification you have obtained. In today's society you will not have to look around much to realise that you are in a privileged position. You have had the benefit of a broad based tertiary education. You have a degree with entry to a profession. Even those advantages do not guarantee employment but they leave you infinitely better placed than most. You will I hope use them not only for your own advancement but to return something to the community. Your general education, your lawyer's training and skills, your objectivity and powers of analysis provide the means to help and guide others. You can do so by the example you set in both your personal and professional lives – not only as competent and ethical lawyers but as parents, as citizens, as persons having something of value to contribute to every kind of community organisation, from the humble sports club committee to the City Council or Parliament.

Most civilised societies desperately need this kind of leadership from within. The nature, the quality of our community is in the end a reflection of the attitudes and values of the individual members. Achievement of the standards, moral and physical, that most of us would like needs the active support of the ordinary citizen, and the leadership of those in a position to provide it. Without that input from individuals in the community, despite all the great technological advances the democratic way of life will be in danger of disintegration. You as future leaders of your generation must show the way to restoring traditional values.

So the threshold on which you stand is not merely that of your own careers but of the contribution which you will make to the community – a contribution enhanced by the special qualities which your Law School has endeavoured to bring out by its curriculum and teaching. On behalf of the Judges I congratulate you on your achievement and wish you well for your future path in the profession to which we both belong.

Hon Paul East, Attorney-General

This is a very significant, important occasion for all of us in this courtroom today.

It is important for me. As Attorney-General, I take that responsibility very seriously indeed. Something that may not be appreciated by everyone here, is the structure of the profession. After the Attorney-General stands the Solicitor-General and he, or she, is followed by the Queen's Counsel in the order of their call to the Inner Bar. Interestingly, the patents which appoint Queen's Counsel strictly follow the order in which the Queen's Counsel were admitted to the Bar and specify on their face that the counsel is appointed next after whoever might be the preceding named individual. Barristers are ranked after the Queen's Counsel in the order in which they have been called to the Bar. At this moment in time there will be no one more recently admitted than those of you here today!

This occasion is also important to me from the perspective of being a politician. As a politician, I am acutely aware of the importance of the law and its practitioners in providing a suitable framework within which society can operate and, of course, the equally important task of balancing the rights of the individual and the rights of society. As Minister for Crown Health Enterprises, I am aware that nowhere is this dilemma more apparent that in the current debate about the detention of psychiatric patients.

It is important for the judiciary, for the most critical element of the law is its consistency. In many respects, the law is a touchstone for an ever-changing society. It is important for society that those who enter the legal profession are well trained, for the Judges of tomorrow will be selected from the ranks of those who are entering the profession today.

Today is an important occasion for the Waikato Law School. You are the first law graduates from New Zealand's newest law school. I am sure the University looks with pride at you – its latest products in an increasingly challenging and competitive educational world.

I hope that all of you will look back with considerable pride on the fact that you were one of the first graduates from the Waikato Law School. It is no mean achievement, not only for you but also for the staff and university authorities that have made such a venture possible.

It is an important occasion for your families and friends. We tend to forget that behind every successful graduate there are parents who often financially support their offspring and offer every possible encouragement. Some of you will have partners who have eased back on their own needs in order to assist you in obtaining your goals. It is their day too.

But most of all, it is your day. And that is something I invite you to reflect upon for a moment.

Some see admission to the Bar as part of a continuum – you gain entrance to the law school, you complete your law degree, you are admitted to the Bar and you get a job.

It is not like that at all. Today is not part of a continuum. It is an important event marking a critical point in your lives.

Today you are being admitted to the Bar. You are becoming an Officer of the Court with legal and professional responsibilities that spring from Parliament and, furthermore, are founded upon a legal system centuries old.

As an Officer of the Court, you take on responsibilities that are over and above those assumed by most citizens in our society.

A law degree may give you a certain status and entree to the legal fraternity and, eventually, a satisfying and well rewarded career.

Admittance to the Bar gives you that extra dimension – responsibility. Responsibility to the Court and, through the Court, to the community.

It is this element – and not the law degree – that signals your position in the community. And what position is that?

It is a position of *trust*. I ask you to remember that; not just now, not just tomorrow, but every day of your working life. It is a demanding responsibility, not one to be taken lightly, and one that means the other members of our community have enormous expectations of you.

Today, rather than your graduation, is the first day – not simply in a new career – but in a new legal and moral status in the community which lasts for the rest of your working life.

I am mindful of the fact that sometimes we are let down by individuals who, in past years, have stood in a courtroom in a ceremony like this. There are bad apples in every barrel.

However, by and large, we are well served by the legal profession in New Zealand who, over the years, have developed new laws and refined the old in a way that best reflects the society in which we live and the kind of people we wish to be.

You are joining that tradition and I thank you for being part of it. It is exciting for me to think about the potential this courtroom represents.

Do I see some barristers and solicitors? Some corporate legal advisers perhaps, some dedicated public servants, Queen's Counsels and Judges of the District and High Courts. Perhaps there is a future Attorney-General here before me!

But what is probably the most important thing is for each of you to realise your full potential in a very personal way. While the recognition that comes from holding a high and important office brings its own rewards, it is probably most satisfying to be able to say that you have always made up your own mind, and stood by your own principles in all of your dealings with other people.

And I also regret to have to tell you this, but as you leave today you are actually still at the bottom of a very steep learning curve. Your legal training will have provided you with the basic knowledge and skills but now it is over to you to develop and apply those in a way that I hope will always stand you in good stead. You go forth from today with my very best wishes for your futures.

Welcome by Christine M Grice — President, Waikato/Bay of Plenty District Law Society

Chief Justice, Your Honours,

It is my privilege on behalf of the New Zealand Law Society and the local Waikato Bay of Plenty District Law Society, representing the legal profession, to welcome to the profession our new colleagues who have the distinction of being the first Waikato Law Graduates admitted to our ranks.

As the Chief Justice commented that an outstanding feature of the Law School is its policy of active encouragement of Maori and women to take up the study of law. It has also encouraged mature students clearly evidenced by the several admitted today.

All today's candidates have put in long hours of study to achieve admission. Some have returned to study law after other careers and a number have had the added stress of prime responsibility for bringing up children while studying. This shows determination boding well for the next stage of your legal careers – legal practice which certainly requires tenacity.

The Society, especially the District Society has developed close ties with the Waikato School of Law. The Society supported the establishment of the School and since then its members have been involved with the school as guest lecturers and tutors, in mooting and other areas – now we reap the benefits as employers of the first graduates.

In 1882 the first District Law Society, Canterbury, instituted a system of prizes for academic excellence – the forerunner of the prestigious Gold Medal now awarded by that Society to the top Canterbury University Law Graduate.

112 years after that prize was instituted, the Waikato Bay of Plenty District Law Society has followed suit and instituted this Society's Medal to be awarded each year if merited for academic excellence to the top Law Honours Graduate of the Waikato School of Law. The announcement of the award coincides with today's admission ceremony.

Once again on behalf of the profession I welcome our new colleagues.

Message from the Dean of Law, Professor Margaret Wilson

The admission of the first Waikato law graduates to the legal profession is a significant event in the life of the School. When the School was established in July 1990, one of its primary objectives was to prepare students to qualify for the professional practice of law. As part of this preparation, the School undertook to teach the students not only the technical rules, but the context within which these rules are made and applied. This approach to legal education reflected the recognition of the complex world within which lawyers are required to practise their legal knowledge.

The greater diversity amongst clients in terms of gender and cultures demands increased sensitivity to the different needs of these clients. Also while all clients expect quality technical legal advice, lawyers these days are expected to provide a greater range of legal services. Lawyers have always sought to find the most appropriate remedy for the client, but today the range of remedies has increased. As the policy to remove the state from the individual's social and economic lives has been steadily implemented, the demand for the law to provide legal redress to wrongs has also increased, and will continue to increase in the future. It is in response to the needs of this type of society that the Waikato law degree was developed.

There are limits however, as to what can be taught in a classroom about the practice of law. There is no substitution for experience and this is the next phase in your legal careers. The responsibility for this next period of your training becomes not only your own responsibility, but that of the legal profession as a whole. Although the legal profession is criticised from time to time for the activities of a few of its members, the New Zealand Law Society, as the profession's respresentative, does take its responsibility to its clients seriously. The strength of the Society and its maintenance of professional standards depends on the commitment of the members to those standards. As new entrants to the profession, you now share the responsibility to contribute to the activities of the Society.

On behalf of the staff of the Law School, I wish you all the best in your chosen career. I am aware that your legal education made many demands on you, and that some of those demands may not have always been seen as relevant. I trust however now that you have embarked on your phase of training, your legal education will give you the support you require. I also hope that you will each make your own unique contribution to the law and the legal profession. □

Obituary

Maxwell Grierson, OBE, 1900-1994

By The Honourable Justice Smellie

Maxwell Rae Grierson, OBE, was admitted to the Bar in 1922 and thereafter held a practising certificate continuously until his death on Friday 10 June after a brief illness. He was aged 93 and had been at the office earlier that week.

I had the privilege of being in partnership with him for many years, as did the Hon Sir David Beattie and my judicial colleagues Blanchard J and Master Kennedy-Grant.

He was a man of enormous vitality, vast experience, breadth of outlook and diverse talents. In his youth he was three times captain of the Auckland Grammar School First Fifteen and Dux of that prestigious institution. Chosen to be an All Black in 1921 for the test against the Springboks in Dunedin, he turned it down, preferring to complete his law exams in Auckland – a decision he told me only last year at his 93rd birthday party he never regretted.

He came of a remarkable family which included six sons. One lawyer brother was lost at Gallipoli but of the other four, one designed the Auckland War Memorial Museum, another chaired the Bank of New Zealand and the Auckland Hospital Board, another established a prominent engineering and surveying firm and the fourth was the father of New Zealand Grand Prix motor racing.

The youngest, "M.R." (as he was affectionately known) outlasted them all. He practised first at Pukekohe, where he was Mayor throughout the war years and the Chief Liaison with the United States Marines based in the area. Subsequently he became the first President of the Auckland District Law Society to be elected from outside the metropolitan area. The Auckland practice was established with D S Beattie, then a rising star at the Auckland Bar in the early 1950s and never looked back. His firm Simpson Grierson Butler White, of which he was a founding partner, is today one of the largest in the country, and he held the record for the longest practising lawyer in the Commonwealth.

But a recital of his accomplishments hardly does the man and the lawyer justice: that he had integrity and humanity goes without saying. In addition, however, he quickly inspired respect and affection from those around him. He won the respect of his partners because he was loyal and fair; of his colleagues in the profession because he was fair but determined and tenacious in his clients' interests, and of his clients because he always did his best and never charged more than a reasonable fee.

In his heyday he was better known, better liked, and as much if not more respected than any other practitioner in the northern half of the North Island. And, of course, as he soldiered on – seemingly indestructible – through his eighties and into his nineties he became an icon of all that is best in what is still, and with men like him always will be, a noble and learned profession.

For his charitable works he was renowned. He often worked quietly behind the scenes. But the Auckland sheltered workshops and the Multiple Sclerosis Society were particularly important to him – he played a large part in their establishment. He was a famous figure in the life of the Auckland Grammar School: a past president of its Old Boys Association and for many years the chairman of the board of the Auckland Grammar School.

It was never dull to be in his company. He had a prodigious memory and a great fund of stories. He could take up his fiddle and play either classical or popular music and be the life of the party. He played golf regularly until only three years ago and continued to the last to be in demand as a public speaker.

He will be sorely missed at his old firm and by his former partners and many friends. "M.R." is survived by his gracious wife Freda, to whom he was married for 60 years, his daughter Heather, sons Bruce and Ian, ten grandchildren and three great-grandchildren. □

The major legal theories

A review of *Textbook on Jurisprudence*

By The Hon Justice E W Thomas

This review article by Justice Thomas concerns the work Textbook on Jurisprudence *by Hilaire McCoubrey and Nigel D White (Blackstone Press Limited, 1993). As the Judge makes clear the book under review is not only informative but stimulates further consideration of a number of issues of historical and present day jurisprudence.*

Hilaire McCoubrey and Nigel White are law lecturers at the University of Nottingham. They have written an outstanding text on jurisprudence. Their *Textbook on Jurisprudence* reviews all the main schools of jurisprudential thought. It fully achieves the authors' stated objective of providing a guide to the content, implications and problems of the major legal theories. But it does more than that; for the interested reader, it provides the opportunity to stand back from the detail of the law and reflect on the nature, quality and function of the law.

In a succinct opening chapter, the authors define the subject matter of jurisprudence as being the nature of law and the manner of its working. Not surprisingly with such a broad topic, there are a great many questions which can be asked about it. McCoubrey and White then make the sound point that these questions, being different, invite different answers. They pursue the theme throughout the text that it is therefore important to discern what question the theorist is asking, and for what purpose. If this is done, they contend, many of the perceived controversies and divergences of opinion can be seen to arise simply because different issues are being addressed. It is argued, for example, that the so-called "naturalist-positivist" debate arises from such a misunderstanding.

I am not so certain that many of these controversies do not represent direct conflicts of opinion. Moreover, in my view, it is important that any theory, however narrowly defined, be assessed against some more overall coherent theory or conception of law and the legal process. Nevertheless, one cannot deny that all too often jurisprudential commentary fails to adequately isolate the question being addressed by the theorist. The result is muddled thinking. As I observed in my monograph "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (VUWLR Monograph 5, at pp 30-31) legal theory attracts numerous commentaries, many of which misrepresent and distort the subject theory. This in turn provokes further critical comment. McCoubrey and White avoid this shortcoming. They faithfully define the theorist's purpose, state it with simplicity and accuracy, and identify the contribution which each theorist has made to our understanding of the nature of law and the manner of its working.

Classical positivism

This treatment is extended to most of the main schools of legal theory. The authors begin with classical positivism, dealing particularly with Bentham and Austin. This chapter is followed by the modified positivism of H L A Hart. I do not think that McCoubrey and White would disagree that Hart's refinement of positivist thought saved positivism from extinction. The authors then turn to classical naturalism. They begin with Plato and Aristotle, then traverse the Judaeo-Christian impact of, in particular, Augustine and Aquinas, and conclude with the social contract theorists, Hobbes, Locke and the romantic Rousseau. What is described as "the naturalist revival" deals with the procedural naturalism of Lon Fuller, the natural rights theorising of John Finnis, and the analysis of the moral nature of law of Beyleveld and Brownsword.

Marxism and post-Marxism appear in the next chapter. The Marxist perception of the non-autonomy of the law, and the relationship of positive law with economics and ideology as well as morality, ethics, creed and culture, is described by the authors as an inescapable aspect of law in general which formalist analysers often unwisely ignore, and is identified as the important contribution of this school of thought. The refinements of Karl Renner, Hugh Collins, and Bankowski and Mungham, are taken as examples of modern western Marxist writing.

Pure theorists

McCoubrey and White then move to the pure theorists such as Kant and Kelsen. Dworkin's entrenched rights thesis, which is perhaps tenable, and his conception of the law and judicial decision-making, which is certainly untenable, receives a chapter. Of considerable interest is the next chapter on Scandinavian realism. Petrazycki, Hagerstrom and Lundstedt are hardly household names, but reference to Olivecrona and Alf Ross buttress one's familiarity with this often neglected school of thought. Oliver Wendell Holmes Jr, John Gray, Karl Llewellyn and Jerome Frank are selected to portray the major themes of American realism. This chapter is introduced with a comment which has such appeal to me that I feel obliged to repeat it (at p 187):

> Formalism offers us right and wrong answers, it encourages rigidity and a dismissive attitude to any analysis of the impact of non-legal factors on the law, in other words it treats law as an isolated, closed and logical system. As far as theorists are concerned positivists such as Kelsen and Hart came the closest to this approach. . . . The *positive approach* of many practising lawyers, judges as well as academics, has none of the subtleties of the *positivist theories*. The black-letter approach to law is in reality a bastardization of legal positivism, but because of its dominance in the legal establishment it has been the subject of many critical theories, including American realism.

A valuable chapter on the critical legal studies movement, which emerged in the United States in the 1970s, precedes the final chapter relating to the concept of justice. John Rawls and Robert Nozick are the two principal theorists whose works are selected for treatment before the authors, in a rare excursion of their own, examine the concept of injustice. They suggest that "justice" and "injustice" are in fact different concepts rather than the one being merely a condition involving the absence of the other. "Justice" is defined as a condition providing the optimum *balance* between individual aspiration and collective need (the sum of combined individual aspirations), and "injustice" as a condition fundamentally denying the humanity of people both as individuals and as social creatures. I remain unconvinced that injustice can be perceived as a polar negative having its own distinctive criteria or identification. One can, I suppose, suggest that this is so simply by defining justice and injustice in different terms. But the theory is provocative and requires further thought.

Succinct summaries

Almost without exception the authors are at pains to conclude their exposition of each theory with a succinct section explaining the significance, value, and contribution of the particular theorist to the overall subject of jurisprudence. At the same time, the theories are, as far as is possible, reconciled or contrasted one with the other so as to demonstrate their inter-relationship. This treatment is invaluable in providing the text with an overall cohesion which is frequently lacking in textbooks of this kind.

Even more singular are the bibliographies, called "Further Reading", which follow each chapter. These do not consist of long and daunting lists of books and articles leaving the reader wondering how, if the author was so well and widely read, he or she managed to get it all so very wrong. Rather, the "Further Reading" consists of up to about eight references restricted to the primary texts, which I agree are all-important to an understanding of any theory, and particularly pertinent commentators. (The authors do include a reference or two to one of McCoubrey's own earlier works but, then, that is a failing which is not unknown to this reviewer either).

Other schools of thought

The selection of jurisprudential theories and theorists is sufficiently good that any suggestion that certain other theories might properly have been included in such a comprehensive work must be worded as a comment rather than a criticism. I mention two schools of thought, however, which I would have liked to see included.

The first such school is that of the law and economics theorists. Law and economics theorists advance a comprehensive view of the nature of the law and the manner of its working. And irrespective of whether it is tenable or untenable as a complete theory of law, this school has undoubtedly made a contribution to the analysis of the law and the direction it will take. Alas, Richard Posner would have to be mentioned.

In the second place, I would have liked to see a chapter devoted to the declaratory theory of law, if only to emphasise the fact that it is now a thoroughly discredited "theory". No serious observer suggests today that Judges do not make law. They make law not only when they are perceived to "extend" the scope of existing authority but also when they decline to do so in novel or different factual situations. Law is being made irrespective of the direction in which the pendulum is swinging. Admittedly, the format adopted by McCoubrey and White of exploring the subject matter of jurisprudence by reference to the main theorists, does not lend itself to treatment of the declaratory theory. Neither the formulation of that theory nor its ultimate destruction is associated with any identifiable proponent. It was largely the work of the lawyers of the 19th century. But, discredited though it might be, the declaratory theory of law is too important to disregard in a textbook on jurisprudence. Many lawyers and academics remain committed to it or, if not committed to it, continue to act as if it were still the prevailing concept.

Moreover, an appreciation of the rise and fall of the declaratory theory of law has significant implications for many areas of jurisprudence. If, for example, it is accepted as a premise that the declaratory theory is unfounded, it is not possible to approach Hart's "rule of recognition" as a criterion by reference to which legal rules are to be identified and understood internally, without a healthy degree of scepticism. Similarly, Dworkin's determinative theory of law can more quickly be perceived as a sophisticated version of the declaratory theory of law and no less implausible for its supposition.

Reconsidering some theories

Another great advantage of McCoubrey and White's book is that it implicitly encourages readers to re-visit areas of jurisprudence which they may have too quickly slighted or neglected. The theories of the Scandinavian realists fall into this category for me. Perhaps I was captured by McCoubrey and White's initial observation that had Jeremy Bentham written in a later age he might have claimed to be a realist (p 163). I have always thought that was so. Bentham's ability to stand apart from the legal process and identify its shortcomings mark him out as one of the greatest legal commentators of all time.

In any event, at some point in the past I have been much too ready to identify the psychological reactions

of people to legal formalism in Scandinavian realist theory as a somewhat inadequate extension of the conditioning of Pavlov's dogs. Something more than an expanded notion of conditioning is required to explain change. But McCoubrey and White make it clear that, notwithstanding what might be claimed for it, Scandinavian realism should not be perceived as superseding other strands of thought. Its psychological analysis offers perspectives which other theories ignore or underplay in explaining the working of law. A moment's reflection is sufficient to confirm that psychological factors are all too pervasive in our lives to be neglected in formulating a coherent conception of the law and the legal process.

Another theorist who McCoubrey and White have inspired this reviewer to re-visit is John Finnis. Finnis was basically concerned to produce a theory of rights, and he does so on the basis of an analysis deriving from a defence of naturalist jurisprudence. But his theory is firmly based in the political and legal preoccupations of the world today with fundamental human rights. In a society in which the rights-oriented approach to the law is becoming increasingly apparent, the relevance of a theory which generates basic rights from natural law is plain to see.

Echoes of such a theory are, perhaps, evident in the judicial approach to the Courts' application of the Bill of Rights. In addressing the use of the word "affirm" in the Long Title and in s 2 of the New Zealand Bill of Rights Act 1990, the Court of Appeal has effectively held that it is not the pre-existing law which is affirmed so much as the fundamental human rights and freedoms which are perceived to exist apart from the law. It is the rights and not the law which are declared. The Bill of Rights Act is therefore seen as acknowledgment by Parliament that the citizens of New Zealand possess these rights (although not to the extent that Parliament cannot abridge them). Thus in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260, Richardson J made the point (at p 277) that the Bill of Rights Act does not create new human rights. As basic human rights, the rights and freedoms do not, he said, derive from the Act. He added, "In that respect it parallels the Bill of Rights Act 1689 which was declaratory of the true, ancient and indubitable rights and liberties of the people."

Clearly, it may no longer be permissible to debunk in a single sentence, as I did in my monograph, the notion of an underlying moral order that founds a system of natural rights apart from and superior to the law. Revisiting Finnis may assist one to participate in the modern discourse on rights.

Critical legal studies

Another chapter of particular value is McCoubrey and White's exposition of the thinking of the critical legal studies movement. It is of particular value because it seeks to explain the movement's thinking in intelligible and comprehensible terms. This is something the critical legal theorists themselves seem prone to eschew, none more so than Professor Roberto Mangebeira Unger of the Harvard Law School. While Unger speaks with simple charm in conversation, he lectures with intense dramatic posturing and writes with incomprehensible obfuscation. Yet, his intellectual force is undeniable. McCoubrey and White's treatment of critical legal theory and Unger's "highly abstract and sometimes impenetrable analysis of law and society" provides a worthwhile introduction to a reappraisal of this school of thought.

To this reviewer, further reappraisal will be essential. I drew an inexact parallel between Unger's thinking and the thesis which I advanced in my monograph (at pp 48-49). The intellectual manoeuvres required to reveal "a moral order resting mysteriously on more than consensus" are described as "hocus pocus" by Unger. In its place he substitutes the imaginative vision of the rich North Atlantic countries of the present day. "This social vision", he states, "helps to make the entire body of law look intelligible and even justifiable". He proceeds: "above all it serves to resolve what would otherwise be incorrigible indeterminancy in the law. Just as the ambiguities of laws and precedents require recourse to imputed purposes or underlying policies and principles, so the ambiguities of these policies and principles can be avoided only by appealing to some background scheme of association. . . ." My concept of judicial autonomy serves much the same purpose, but is a more conscious and deliberate process.

Treatment of Rawls

Finally, I must commend the authors for their sympathetic treatment of John Rawls. Rawls' major work, *A Theory of Justice*, published in 1972, was so heavily criticised by other academics in the ensuing years that it eventually became unfashionable to criticise it any further. But much of the condemnation was unmerited. It is true that in elaborating his core theory, Rawls postulated a considerable amount of detail which, apart from being unnecessary to sustain the broad sweep of his theory, attracted and even invited criticism. I have always suspected that this detail stemmed from the lengthy gestation period Rawls' book endured. Rawls recounts, in his preface to *A Theory of Justice*, that the first version appeared in draft in 1964 and was immediately subject to critical objections. It is clear that various drafts were then completed and circulated over the next decade to innumerable erudite critics. Rawls acknowledges that he abandoned a number of his views and made basic changes to many parts of his theory. In the result, I feel that Rawls' theory incorporates a number of unnecessary refinements and distinctions, such as his theory of rights and the conception of good, which deprived it of some of the force which it would otherwise have had and exposed it to much of the criticism which it duly received.

Rawls' starting point is an idea of "justice as fairness". He expounds certain principles of justice which he believes express our intuitive conviction of the primacy of justice. To arrive at these principles, Rawls employs a rhetorical device corresponding to the state of nature in social contract theory. A number of persons, termed "original actors", are placed behind a "veil of ignorance". They are thus stripped of all knowledge of their place in society, their social and economic

position, their intelligence, their natural abilities or talents, their strengths and weaknesses, their interests or inclinations, and the like. In Rawls' theory this hypothetical situation creates a position of equality. As McCoubrey and White explain (at p 235), "they [the original actors], thus, are precluded from shaping their principles by reference to personal advantage and can only proceed upon the basis of securing, to the greatest possible degree, fairness for all, including themselves." In other words, as free and rational persons deliberating behind a veil of ignorance as to their fortunes, they determine principles of justice which they perceive will be fair to everyone. These principles serve to explain the values of the community.

Before extolling Rawls' attempt to identify and provide a basis for the principles of justice further, I should perhaps disclose a personal interest which might be thought to explain my empathy with this likeable theorist. It will be an inexcusable but harmless digression.

Posner's views

In 1974 I was invited to attend a meeting of the Faculty of the Harvard Law School to be addressed by Richard Posner, then a Professor of Law at Chicago, where he, along with everyone else including the Janitor, were imbued with Friedman economics. Posner circulated in advance a draft paper in which he promoted, as more effective and efficient, the abolition of the police and the institution of a system of law enforcement to be undertaken and paid for by the victims of crime. It was redolent of the bounty-hunters of the American Wild West, and I was suitably appalled.

I determined to speak out, and diligently prepared a number of penetrating points of criticism. After Posner had spoken to his paper the intellectual might of the Harvard Law Faculty was brought to bear on his thesis. Gradually I realised that the discussion was proceeding on a different plane from that which I had contemplated. For the purposes of argument, Posner's basic premises were accepted and criticism was internal to his theory. I decided to hold my tongue. Not so John Rawls, who was sitting diagonally opposite me. He spoke out and voiced the very points which I had so diligently prepared. Without regard to his status as a guest, the Faculty fell upon him, and that much of him which was not devoured was brutally savaged. Needless to say, my decision to hold my tongue remained unaltered.

I would like to think, however, that my empathy for Rawls rests upon the fact that he attempted to provide a rational or reasoned basis for the principles of justice and values prevalent in the community. Even if he is wrong in his analysis, the attempt deserves the highest acclaim. Most commentators prefer to rail against any attempt to explain the principles of justice or fairness, seemingly preferring a vacuum to account for the content and direction of the law. Yet, to my mind, a theory of law which does not embrace a theory of justice is certain to be incomplete and false.

The positivist's perception of the law, including Hart's modified positivism, and prescriptive theories of law, such as Dworkin's, are barren theories in the absence of a reference to the driving force of a concept of justice. It is like describing the motorcar without exploring what makes the engine go or the steering work. Certainly, the natural law and natural rights theorists have sought to meet this defect. But, ultimately, I believe the law's propellant is that sense of justice or fairness which is immanent in the community and reflected by the Judges in making and remaking the law. Rawls has sought to explain that sense of justice or fairness with a unique theory. Without such attempts we will be no closer to knowing why, given a set of facts, a Judge will conclude that the merits lie with one party rather than the other, or what it is that will cause a Judge, when determining a point of law, to make a value judgment in one direction rather than another. I am conscious, however, that a reviewer ought not to permit his personal views to intrude unduly upon a review of another's work, and share in the regret that this consciousness has manifested itself so belatedly.

Conclusion

I revert again to the excellence of this text. In all the respects I have touched upon, and in many other respects which time and space forbid me from touching upon, McCoubrey and White's *Textbook on Jurisprudence* makes a valuable contribution to one's understanding of the nature of the law and the manner of its working. For all students of the law it represents a worthwhile addition to one's reading list. □

The obituary for a bombazine or anabiosis for *Beaudesert*

By W V Gazley, Barrister of Wellington

Mr Gazley in his own idiosyncratic style, explains and defends the decision of the High Court of Australia in Beaudesert Shire Council v Smith and Ors *(1969) 120 CLR 145. This was a case in which a local authority had deprived a citizen of the right to take and use water, and for which it was held liable in damages. Mr Gazley criticises the academic criticism which he maintains is unjustly directed at the High Court decision. For those not as linguistically learned as Mr Gazley, and too busy to consult a large dictionary the words "bombazine" and "anabiosis" in the title refer to a type of cloth used for mourning dresses, and to revival after apparent death, respectively.*

Given this simple set of facts:

> The appropriate statutory authority issues to a plaintiff a licence that gives him the LEGAL RIGHT to install a pumping plant on his farm property that fronted a river. For some thirteen years the plaintiff, in accordance with the terms of his licence, pumps water from the river for the irrigation of his property. The pump is installed where there is a natural and permanent pool in the river-bed; so that, independently of surface flow, water would always be available for pumping.
>
> A Shire Council deliberately and UNLAWFULLY takes gravel out of the river-bed in the vicinity of the plaintiff's farm; and, in so doing, destroys the natural waterhole and renders the pump useless to draw water that his licence permits him to take. The plaintiff claims for consequent "loss or damage".

One need but voice the words of Lord Halsbury in *Quinn v Leathem* [1902] AC at p 506:

> If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community, nor indeed do I understand that any one has doubted that, before the decision in *Allen v Flood* in this House, such fact would have established a cause of action against the defendants.

His Lordship's reference to pre-*Allen v Flood* jurisprudence was to that of "actions on the case" authorities. In the same case, at p 535, Lord Lindley pays tribute to "actions on the case". His words:

> Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen LJ in his admirable judgment in the *Mogul Steamship Company's Case*, may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen v Flood* to be opposed to it.

If regard be paid to the judgment of Bowen LJ, in the *Mogul* case, (1889) 23 QBD 598 at 614 there is reliance on "actions on the case" judgments, the very same being applied in *Beaudesert Shire Council v Smith & Ors* (1969) 120 CLR 145, High Court of Australia. *Ashby v White* (1703) 2 Ld Raym 938, (the passage in the judgment of Holt CJ, at p 953) provides example of a distant "action of the case" even now directed to current causes of action. Thus, *Seneca College etc v Bhadauria* (1981) 124 DLR (3d) 193; Laskin CJC, from p 201. There is a modern conflation of actions on the case in J C Campbell, QC's article in (1993) 67 ALJ from p 94.

Yet, the High Court has been persistently maligned for its rendering the Beaudesert Shire Council liable to pay damages to Smith. This, on ". . . a cause of action . . . found either in, or by analogy with, an action on the case for trespass" (p 152 of *Beaudesert*) when Smith's legal right "to take, use, and dispose of . . . water" was rendered nugatory by the illegal actions of the Shire Council.

The latest condemnation of which I am aware is that of Professor Fridman in [1993] 1 *Tort Law Review* at p 34. After citing, out of its context, the usual criticised passage from the High Court of Australia decision, Professor Fridman writes:

> This remarkable statement sent shock waves through at least the Australian academic world. It also produced judicial revulsion and denunciation.

Why? This mere stuff-gownsman — the state of whose gown bespeaks the age of its wearer — is able to appreciate no more than the black and white of the fundamentals of the law; and condemns the tittle tattle grey that pervades the course of judicial adventurism. He finds *Beaudesert* as but a correct application of basic principles of tort liability.

The public is so clearly told (by Lord Diplock in *Gouriet v UPW* [1978] AC at p 500) that

> . . . the jurisdiction of a civil Court to grant remedies in private law is confined to the grant of remedies to litigants whose RIGHTS (my emphasis) in private law have been infringed or are threatened with infringement.

Then, that same law Lord informs the public (in *A-G v Times Newspapers* [1974] AC at p 309) that:

> The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established Courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities: . . .

To me, on the facts stated above, the plaintiff suffered damage by reason of his statutory rights as licensee being infringed by the "unlawful, intentional and positive acts" of the Beaudesert Shire Council which failed to observe the correlative statutory duty imposed on it. The "shockwaves" can be directed at the academic world; and "revulsion and condemnation" directed at the judiciary, where there is failure to recognise first principles and the heritage of the common law that had its origin in Holt CJ's words in *Ashby v White* (1703) 2 Ld Raym at p 953.

> 2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; (a) want of right and want of remedy are reciprocal.

Academics and Judges may the more readily comprehend that *Beaudesert* is merely an example of basic common law jurisprudence were they to recite the whole of the passage from which the disfavoured excerpt emanates. The maligned excerpt given by Professor Fridman at p 34 of [1993] 1 *Tort Law Review* is that the decision in *Beaudesert* is

> that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.

The decision requires this passage to be preceded, as it is in the judgment of the Court, with the words

> Bearing in mind (that) regard must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of a statutory duty to recover damages for his injury, it appears that the authorities do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.

It would be even the better would academics and Judges resort to the actual ratio decidendi of *Beaudesert*. It appears in the headnote; and is particularised at p 152. It reads

> It appears to us, therefore, that if what the appellant did was actionable at the suit of Smith and his personal representatives for damage suffered thereby, liability must depend upon the broad principle that the Council intentionally did some positive act forbidden by law which inevitably caused damage to Smith by preventing the continuing exercise of his rights as a licensee in the manner in which they had been enjoyed for some thirteen years.

and, following the statement of the authorities relied upon, the Court says (at p 155):

> There is, therefore, a solid body of authority which protects one person's lawful activities from the deliberate, unlawful and positive acts of another.

This, the very essence of the regular administration of justice, is applied by *Beaudesert*.

Rather than being directed to *Beaudesert*, "revulsion and denunciation" should be directed to, and heaped on, a novitious jurisdiction consisting (according to Professor Fridman in [1993] 1 *Tort Law Review* at p 119) in:

> The idea that interference by one party should give rise to tort liability even though no property right of the plaintiff has been affected, no physical injury is inflicted on the plaintiff or his property, and no contract to which the plaintiff is a party has been broken or its performance hindered or disrupted, . . .

This present day venture into judicial lawmaking – a tort of "interference with trade or business" – as so expressed by Professor Fridman is both unlawful and unnecessary. However, the judicial and academic entrepreneurs of to-day are too late. A regular jurisdiction for interference with "Trade, Profession or Calling" was established by giants of the common law as far back as 1902. Interference with trade or business for New Zealand was established by the three members of our Court of Appeal in 1914: *Fairbairn Wright & Co v Levin & Co* (1914) 34 NZLR 1. It is as true today as it was when decided. Let not today's impresarios tamper with it. The principles are stated by Stout CJ at p 17; and by Edwards & Sim JJ, at p 29. [I contend that the historic principle of tortious liability is correctly stated by counsel at p 9 of *Fairbairn Wright*:

> The basis of an action of tort is the commission of a wrongful act as regards the party complaining, and prejudically affecting him in some legal right. Merely that it will directly do him harm in his interests is not enough

and I say that *Beaudesert* is merely application of orthodox principles of tortious liability].

The *Fairbairn Wright* application of orthodox tort principles to interference with trade or business depended on the trilogy of *Mogul Steamship Co v McGregor* in 1892; *Allen v Flood* in 1898; and *Quinn v Leathem* in 1902, as distilled by Professor Dicey in [1902] 18 LQR 1. Then, that trilogy of cases depended on "a solid body of authority" which included actions on the case relied on in *Beaudesert*. They were, and are, by no means mere ghosts – as (1967) 40 ALJ 296 invites. The condemnation of *Beaudesert* in this *Australian Law Journal* article is based on improperly lifting out of its context the same passage as did Professor Fridman in [1993] 1 *Tort Law Review* at p 34; and then alleging against the High Court that it had "formulated a broad new principle of tort law:". The authors would have done better to have appreciated the ratio decidendi that, without more, is paragraph (3) of the headnote; and argued, if they could, against that.

For the whiz kid entrepreneurs, so

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Law and equity in the solicitor and client context

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The distinction between equity and common law appeared to have been abolished by statute in England by the Judicature Act of 1873 when the Courts of Equity and Common Law were joined. In fact, of course, the abolition of the distinction has not completely happened, or at least not in any simple way. In this article Jayne Francis considers this issue in particular in so far as it affects the solicitor and client relationship. She supports the view that common law remedies should be available for breach of equitable rights.

The equitable remedy of compensation[1] for breach of fiduciary obligation has thus far produced a dichotomous approach in New Zealand. One view is that equity has the means to provide for all contingencies relating to compensatory awards within its own jurisdiction.

The other view is that the common law rules relating to damages may be used to regulate an equitable award of compensation as the objectives of such awards in the two jurisdictions are the same. The latter view has been expressed in a number of cases in New Zealand over the last fifteen years and appears to be gaining ground.[2] Indeed it has been said that what the Courts now have available for a breach of fiduciary duty claim is a "basket of remedies."[3]

As the words imply this is the manifestly pragmatic view that the Court can choose the remedy which best fits the circumstances of the case and will facilitate the desired result. It is founded largely on judicial recognition of a broad concept of the law of obligations, that is to say the view that the traditional taxonomy of for example, contract, tort and equity, should be abjured in favour of a unified law of obligations. (See eg Tettenborn *An Introduction to the Law of Obligations* Butterworths 1984.) More simply put, it is the view that it is no longer necessary to determine the source of an obligation.

Necessarily this has ramifications in a number of areas providing fuel for debate; viz Cooke P's tart comment recently: "[T]he inculcated belief of many present day lawyers that there is a clear and watertight division between contract and tort can be a simplistic belief." (*Trevor Ivory v Anderson* [1992] 2 NZLR 517, 524.) However, traditionally the systems of law and equity have been distinct and their interaction confined in that, whereas equity was available in the common law jurisdiction to fill gaps in the remedial capacity of that jurisdiction, the common law could not reciprocate in respect of equitable matters. (Meaher, Gummow and Lehane *Equity, Doctrines and Remedies* (3rd ed 1992) 3-25). To make available common law remedies for breach of equitable rights this traditional distinction has therefore to be ignored and the two systems "fused", or said to be "interacting". Authority for this is said to lie in what is known as the "fusion theory".

The fusion theory was first used in this way in New Zealand by Sir Robin Cooke in *Day v Mead* [1987] 2 NZLR 443 (CA). The facts of the case should be well known, but briefly they are that a solicitor gave a businessman client professional advice in relation to two investments made by the businessman in a company in which the solicitor was also an investor and for which he acted. The advice was unsound. When the company went into receivership and the client lost his investment he sued, alleging negligence on the part of the solicitor, breach of an implied term of skill and care in their contractual relationship and breach of fiduciary duty. As to breach of fiduciary duty, the Court of Appeal found that there was a conflict of interest on the part of the solicitor sufficient to require full disclosure, that such disclosure was not made, and therefore the solicitor was in breach of his fiduciary obligation to his client. The problem, however, lay with the fact that to a large extent the client had contributed to his own loss.

All members of the Court of Appeal accepted that apportionment of the sum awarded could be made, the majority considering the jurisdiction to apportion as being one available in equity. However Sir Robin Cooke's approach was to abnegate a greater extent of recovery for breach of fiduciary duty than for breach of contract or negligence when the same factual situation covered all three causes of action. To put this into effect His Honour used a line of authority which established that monetary compensation as a free-standing remedy was available in equity[4] and classed these decisions as illustrations of a development towards the fusion of the common law and equity. (*Day v Mead*, at 451.) It is evident that this cutting through of the various obligations to the nature of the breach alone is a manifestation of the unified law of obligations theory. (P J Cooke and D W Oughton *The Common Law of Obligations* Butterworths 1989.) One can see this through His Honour's use of analogical reasoning. This reasoning was across all three of the relevant

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anxious to impose on the public some novel unprincipled jurisdiction: Why not have regard to the articles, "Principles [and I accentuate "Principles"] of Liability for Interference with Trade Profession or Calling" by Sarat Chandra Baska in [1911] 27 LQR 290 & 399; and [1912] 28 LQR 52? To-day's pundits fail to appreciate the service accorded to them by the masters of the past. □

causes of action with no attempt at analysis by way of traditional classification. For example, in support of his proposition that contributory negligence principles should be used by equity, His Honour cited La Forest J's statement in *Doiron v Caisse Populaire D'Inkerman L'tee* (1985) 17 DLR (4th) 660 concerning the utility and application of contributory negligence principles to a contract cause of action (at 679):

> Contribution is now consistent with prevailing theories of both the law and the market place . . . [T]he fairest approach is to apply the now ordinary rules of contributory negligence.

In a multiple obligation situation such as *Day v Mead* this view is that there is no justification for a remedial differential as the *nature* of the breach is deemed the primary consideration. In the second Court of Appeal decision in *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) Cooke P demonstrated the technique employed when applying this theory:

> [I]t would seem excessively legalistic to insist on concurrent duties. What is important is the substance of the duty falling on the particular defendant in the particular circumstances, to ascertain which it may be necessary to consider various possible sources – tort, contract, equity, statute. Once the substance has been identified, questions of breach and remedy remain.

This theory has as its objective the rationalisation of remedies concerned with the one situation whether their source be equitable or of the common law. For example, Professor Rickett[5] has called the result of a case "incongruous" in which the obligations were in the traditional way discretely applied. In *Mid-Northern Fertilisers v Connell, Lamb, Gerard & Co* (1991) 3 NZBLC 102, 032 the owner of two companies sold his businesses. The purchaser borrowed the full purchase price, the finance company taking the first charge and the owner the second. The same firm of solicitors acted for both vendor and purchaser. It was found that the vendor's solicitor was negligent in failing to warn his client of the effect of the finance company's security. However, Thorp J held that this conduct was not the cause of the loss suffered by the vendor. Accordingly, there was no liability in negligence. There was, however, a breach of fiduciary duty of non-disclosure, and in equity causal principles did not limit recovery. Rickett says that the attraction of the unified law of obligations theory is that it avoids such a result as upon application of the theory, only two questions are posed: what is the fundamental interest that should be protected in these circumstances? And following from that, which remedy will best serve to further that protection? (Ibid.) What Professor Rickett's criticism illustrates however is that if the law of obligations theory is adopted tortious principles will predominate because the fundamental interest that is being protected is the reliance interest and reliance is the cornerstone of negligence. This is also evident in Cooke P's decision in *Day v Mead.*

Furthermore, because the interest to be protected is defined as reliance, the remedy which best serves this interest is compensation. The objective of compensation is to return the injured party to the position she was in before the harm was caused, in other words restoring the *status quo.* In order to do this compensation may include the repayment of incurred expenses, compensation for lost opportunity/ies, compensation for economic or physical harm suffered and compensation for expenses incurred in rectifying the effects of the harm. (P J Cooke, D W Oughton *The Common Law of Obligations* p 46.) These concepts are mainly tortious; not all of them are relevant to the principles relating to equitable compensation. Thus, for the law of obligations theory to apply, the remedies relating to equitable compensation will be subsumed into the tortious compensatory principles in order to achieve these objectives. This can be clearly seen in *Day v Mead* when Cooke P said (at 451):

> Compensation or damages in equity were traditionally said to aim at restoration or restitution whereas common law tort damages are intended to compensate for harm done, but in many cases the present being one that is a difference without distinction.

If this happens there is no problem with disproportionate results pertaining to the same set of circumstances. This is the attraction of the theory. However, as stated earlier, the problem the theory does face is the traditional distinction between the system of law and the system of equity. To overcome this it is said that the common law and equity are intermingling now, as a result of "fusion" of the two systems. (See Cooke P in *Day v Mead*, supra, 451.) In *Elders Pastoral Ltd v BNZ* [1982] 2 NZLR 180, 193 Somers J said it in this way:

> In some cases . . . there has been a fusion in the sense that one general rule has replaced a plurality of rules. In other areas there are signs of a blending process – *Day v Mead* may come to be seen as such as a case.

The spirit of *Nocton v Lord Ashburton*

That this blending process, or "cross-fertilisation",[6] is seen as desirable is particularly evident in a multiple obligation situation. In the area of professional advice giving an additional factor is that the rules in relation to negligent misstatement have been developed according to a similar methodology to that employed for breach of fiduciary duty. Hence the perception may be that fusion has already occurred in the substantive rules relating to these causes of action [7] adding fuel to the belief that different remedial results is unjustifiable. It is prudent therefore to examine whether this perception is correct and how it has come about.

It is generally accecpted (see Cooke P in *Day v Mead,* 451) that a modern development in the compensatory jurisdiction of equity by which equity had begun to award damages for breach of fiduciary duty was reaffirmed by Viscount Haldane LC in *Nocton v Lord Ashburton* [1914] AC 932, 946 (HL). In *Nocton v Lord Ashburton* the House of Lords confirmed that a personal remedy was available against a fiduciary, requiring compensation for any loss arising from his or her breach of duty. The circumstances were those of professional advice giving in the solicitor-client context. The

defendant had been the plaintiff's family solicitor. A conflict of interest arose when the plaintiff client advanced money secured on a building project in which the defendant solicitor was personally involved. Nocton's partners had written to the plaintiff advising him of Nocton's financial interest in the project and urging him to obtain independent advice but the plaintiff had gone ahead with the transaction. A year later, however, the plaintiff was persuaded to release his security, the effect being to promote Nocton's security to first mortgage. When default occurred on the advance it was discovered that the plaintiff's security was inadequate. The English Court of Appeal held, *inter alia*, that the release of security was procured by fraud, gave judgment in deceit and ordered an inquiry into damages. In the House of Lords the release was held to be a breach of fiduciary duty, but the Court of Appeal's decision as to damages was allowed to stand as being the same as that equity would have awarded for breach of fiduciary duty.

The importance of the decision was that their Lordships accepted that if there was a fiduciary relationship between the parties liability could lie for defective advice. To accept this their Lordships had to distinguish an earlier decision which had laid down that such liability would only accrue in the event of fraud. Viscount Haldane LC stated (at 955):

> I do not find in *Derry v Peek* an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action. In other words, it was decided that the directors stood in no fiduciary relation and therefore were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe.

In the course of his decision His Lordship also made other, more general, comments. He said (at 947):

> Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties . . .

This leaves open the type of relationship and the type of duty. A duty to take care could thus be interpreted as arising in consequence of the fiduciary obligation, rather than the fiduciary obligation being defined as a distinct duty of loyalty.[8] This analysis infers fusion of the principles in relation to negligence and fiduciary duty, an inference that could be seen to be confirmed by His Lordship's subsequent statement (at 957):

> [S]ince the Judicature Act any branch of the Court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty.

Some years later these and other open-ended dicta from *Nocton v Lord Ashburton* were used by the common law when it became clear that legal rules were required to compensate certain other users of information who suffered loss as a result of relying on the accuracy of information. (Cooke P J and Oughton DW *The Common Law of Obligations* supra at p 467.) In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575 a bank gave inaccurate information to a third party inquirer about the financial viability of one of its customers. Compensation in a case such as this was seen as necessary to ensure the information giver gave accurate, but not necessarily perfect, information. The latter requirement would deter her from producing the information. A balance of interests, thus, was necessary and the measure of standard to be "reasonable" and objectively ascertained.

There was also the problem of how to limit the liability of the information producer to third parties as although the information might be of value to such third parties the producer obtained no benefit from their reliance on the information. (ibid). Enter the special relationship, analogous to the fiduciary relationship, which was held in *Nocton* to attach a personal obligation to the fiduciary. The House of Lords, focusing on the reliance interest, provided that a duty to take care could arise as a matter of general law even in the absence of a contract or fiduciary relationship. Lord Reid said (at 583):

> [In *Nocton*] Lord Haldane did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.

Although this special relationship requirement has also been seen as "equivalent to contract" – viz Lord Devlin in *Hedley Byrne* itself (at 608):

> If it were possible in English law to construct a contract without consideration . . . the question would be, not whether on the facts of the case there was a special relationship, but whether on the facts of the case there was a contract –

the device was used as a means to avoid a floodgates problem and as such the focus came to be on refinement of the special relationship requirement. As a result the equitable compensation remedy faded almost into non-existence. La Forest J, in the Supreme Court of Canada has provided a succinct history of the overlap and development of the

fiduciary and tortious obligation in this area in *Canson Enterprises Ltd v Boughton & Co* (1992) 85 DLR (4th) 129; [1992] 1 WWR 245, 271:

> [W]hen one moves to fiduciary relationships and the law regarding misstatements, we have a situation where now the courts of common law, now the courts of equity moved forward to provide remedies where a person failed to meet the trust or confidence reposed in that person. There was throughout considerable overlap. In time the common law outstripped equity and the remedy of compensation became somewhat atrophied. Under these circumstances, why should it not borrow from the experience of the common law?

The use of the compensatory remedy in equity began to resurface in New Zealand in *Coleman v Myers* [1977] 2 NZLR 225. In that case Cooke J (as he then was) made it clear that he saw the remedy as being available because of the fusion of law and equity found in *Nocton* and *Hedley Byrne*. He stated (at 359):

> [The respondents] do not contend that monetary compensation or damages may not be awarded for breach of fiduciary duty. That such an award may be made is shown by the speech of Viscount Haldane LC in *Nocton v Lord Ashburton* [1914] AC 932, 958; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575 and *Mutual Life and Citizens Assurance Co Ltd v Evatt* [1971] AC 793; [1971] 1 All ER 150 and other high authorities pointing in the same direction. Since the fusion of common law and equity and the twentieth century developments in the law of negligence any argument to the contrary would be of unattractive technicality.

In *Day v Mead* (at 450) His Honour returned to this case and to *Van Camp Chocolates v Aulsebrooks Ltd* [1984] 1 NZLR 354 in which he made similar comments.[9] He also interpreted Professor Finn's statement in his text on *Fiduciary Obligations*[10] viz; that if justification were needed for equity to award compensation then "no great violence to principle is wrought if they are regarded as modern developments in the compensatory jurisdiction of Equity which was so forcefully reaffirmed by Viscount Haldane LC in *Nocton v Ashburton*" as referring to an equitable development towards acceptance of common law damages, tortious damages, or fusion.

Thus it is possible to see that overlap in the development of tortious and fiduciary liability in the area of professional advice has lent itself to the view that there has been a fusion of principle relevant to these causes of action sufficient to provide impetus for rationalisation of their remedies. However if one takes a different approach to examining this development it is submitted that the conclusion can be drawn that equitable "development" is *not* dependent on "fusion". That is to say that the common law damages remedy and the remedy of equitable compensation are discrete, that the tortious and fiduciary obligations have developed in separate ways and that it is the equitable methodology supplied in *Nocton* only which was used as a guide by the common law to develop the tort of negligent misstatement, not a fusion of principle.

In *Nocton* Viscount Haldane, although using the word "care" as aforequoted, made it clear that in finding liability the jurisdiction was equitable and dependent on the relationship of confidence. He stated (at 957):

> Courts of Equity had jurisdiction . . . to order the solicitor to . . . make compensation if he had lost [the client's property] by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.

The defective advice causing loss was a "constructive fraud" or "moral fraud" (ibid) the equitable variation of common law fraud. It was not defective in the sense of the competency standard defined by the common law duty of care. Similarly the right to compensate for this "fraud" was drawn from the equitable jurisdiction alone, from the analogy of the replacement of trust property.

An award for loss within this compensatory jurisdiction is, it is suggested, what Professor Finn was referring to in his text as "a modern development" of equity founded on *Nocton*.[11] It was not meant, as Cooke P implied in *Day v Mead*, to be an acceptance of fusion in the sense that the common law concept of damages was fused into equity by *Nocton* and it should be noted that Professor Finn concluded his comment thus:

> [The equitable] jurisdiction has been invoked to compel fiduciaries to make pecuniary restitution to their beneficiaries where, through breach of a duty of good faith, they have deprived a beneficiary of his property or of other valuble rights. (P D Finn *Fiduciary Obligations* The Law Book Co 1977 p 167.)

Here the trust analogy or restitutionary objective of equity is stated.

In a recent comment Derek Davis[12] has also concluded that the case law preceding *Nocton* made it clear that obtaining monetary compensation was a free-standing remedy in that it was not attached to rescission and that compensation for loss was seen in the same way as available in Equity's exclusive jurisdiction in the *Nocton* decision.

When *Hedley Byrne* was decided the House of Lords said, approving Lord Denning's dissenting judgment in *Candler v Crane Christmas & Co* [1951] All ER 426 (CA), that Viscount Haldane's dicta in *Nocton* provided the source for a general duty of care to be imposed in the event of a special relationship. The fiduciary relationship found in *Nocton* provided an analogy for the Court in *Hedley Byrne* to establish care principles. The special relationship can therefore be seen as a device borrowed by the common law to limit the parameters within which liability could then be imposed. There was no attempt by the House of Lords to lay down one all-encompassing principle to be applied by both jurisdictions. This may be because the special relationship requirement is only the first step and the fault concept underlying negligence liability necessitates an objective assessment of conduct as a second step. With the fiduciary relationship fault is not in issue in the assessment of liability. The criteria for imposition

of liability must therefore be different in substance.

This leaves Viscount Haldane's statement that:

> [S]ince the Judicature Act any branch of the Court may give both kinds of relief, and can treat what is alleged either as a case of negligence as common law or as one of breach of fiduciary duty.

If this is read in light of the above argument it can then, it is suggested, be interpreted as confirming the view that the Judicature Act intended both jurisdictions as available if pertaining to the same circumstances, but separate. (Perell *The Fusion of Law and Equity* p 59.)

What is the present position on fusion?

Thus far the reason for the application of the fusion theory in the area of professional advice giving has been examined. Cooke P provided the first direct application of this theory in *Day v Mead* saying categorically that fusion had occurred. Since *Day v Mead* there has been, in the High Court, such comments as: "We have not yet reached the stage where the conventional ingredients of causes of action can be ignored for the purpose of enabling the Courts to arrive at some ill-defined and undisciplined objective of being fair." (*Equiticorp Industries Group Ltd v Hawkins* [1991] 3 NZLR 700, 727, per Wylie J.) And there has been approval of fusion. In *NZ Land Development Co v Porter* [1992] 2 NZLR 462, 469 Tipping J said "Let us carry the fusion of law and equity into the area of damages". And in *Cook v Evatt* [1992] 1 NZLR 676; (1991) 3 NZBCL 102, 219 Fisher J assumed, obiter, that "contributory responsibility" (as His Honour phrased it) was now a complete or partial defence to a claim for breach of fiduciary duty and said that exemplary damages could be available in "serious and exceptional cases".

In the Court of Appeal there has been the pro-fusion statement in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (delivered by Cooke P, but Richardson, Bisson, Hardie Boys JJ concurring) that the monetary award in the case for breach of an equitable obligation of confidence should equate with damages at common law and that a full range of remedies should be available as appropriate, no matter which jurisdiction they originated in. However, the judgment is notable for its limiting words: "in a case of the present kind" (p 301); "for any purpose material to this appeal" (p 301); "in the circumstances of the dealings between the parties" (p 301). There have also been assertions by Cooke P in *AG for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 172 that as the law and equity were now mingled the full range of legal and equitable remedies was available to the Court for a breach of confidence action. And there has been his endorsement of this approach in *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144, 148.

In *Elders Pastoral Ltd v BNZ* [1989] 2 NZLR 180 His Honour, Cooke P, again referred to the "intermingling of law and equity" (at 186) as justification for holding Elders liable to account as a constructive trustee in the absence of a fiduciary relationship, saying this intermingling was in accord with the "general approach of this Court in such cases as *Day v Mead*". However, this was not the general approach in *Day v Mead*. This statement and those in the other pro-fusion cases just noted[13] show that His Honour is attempting to build on this decision and it is of interest to note again Somer J's comment in *Elders* that *Day v Mead* may *come to be seen* as an example of the blending process between law and equity. (*Elders Pastoral Ltd v BNZ* [1989] 2 NZLR 180, 193.)

In *Mouat v Clark Boyce* (1992) 2 NZ Conv C 191, 188; (1992) NZBLC 102, 536; [1992] 2 NZLR 559 (CA); [1993] 4 All ER 268 the issue of apportionment of compensation for breach of fiduciary duty on the grounds of contributory negligence was canvassed specifically by the Court of Appeal. The facts were that an elderly widow and her son instructed solicitors to prepare and register a mortgage security against the widow's home, the money being advanced to the son. The solicitor advised the widow to obtain independent legal advice, but she declined to do so. The son was in a precarious financial state and later defaulted on the mortgage. The case went to the Court of Appeal twice and on to the Privy Council. The fusion question was not in issue in the Privy Council as the hearing centred on whether there had been breach of the causes of action pleaded. In the Court of Appeal however, the opportunity is afforded of ascertaining the views of five appellate Judges – albeit, with the exception of Cooke P, unexpressed. McGechan J alone made passing reference to the traditional fusion view, saying:

> Equity, the controlling arm of the legal system in this conscience area . . .

However, it is evident that His Honour approached the apportionment question as one governed by equity alone, as did Sir Gordon Bisson. At the second hearing the views of Gault J and Richardson J appear at first reading to be that of the unified law of obligations. However this interpretation may be misleading. Richardson J said:

> Up to this point I have said nothing about the claim for breach of fiduciary duty. While a separate cause of action, it was based on the same conduct on the part of the solicitors and the same ensuing loss. Where there is or ought to be a shared responsibility the damages in equity may be abated (*Day v Mead*) and I agree with Holland J that in the circumstances of this case it is just and equitable that the final award be the same whether in tort or for breach of fiduciary duty. (*Mouat v Clark Boyce* [1992] 2 NZLR 559, 573.)

As stated earlier the approach of the majority in *Day v Mead* was to allow apportionment according to equitable principles. This suggests that the latter sentence should be interpreted in this light, that is to say that equity may use the common law in the circumstances of this case as a guide to apportionment, a borrowing of the methodology not fusion of the principles.

Gault J, who had dissented on liability at the first hearing, said (at 574):

> Where, as here, findings in negligence are made on pleadings and evidence that are advanced in

> the same terms in both contract and tort once the same failure amounts to breach of fiduciary duty, it would be formalistic in the extreme to draw distinctions as to remedy. At least in these circumstances, apportionment according to contributions to the loss should be made.

Again this appears to suggest adherence to the law of obligations theory. However His Honour then goes on to say as Richardson J did (at 575):

> Clearly the same apportionment is appropriate in respect of the breach of fiduciary duties on the basis outlined in *Day v Mead*.

It is apparent that the same comment can be made with respect to Gault J as to Richardson J and it is suggested that both Judges' reference to the same remedial considerations in this case is a "matter of form"[14] approach and does not imply support for the fusion theory. Certainly there was no confirmation of the "basket of remedies" availability expressed by Cooke P in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* supra, although the opportunity presented itself.

This leaves Cooke P's judgment which alone contains express advocacy of the fusion theory. His Honour said (at 566):

> Returning to the professional person's duties the basic duty resulting from the relationship is to exercise reasonable care and professional skill, and it extends I think to due diligence. In addition and of special importance when there is a conflict of interest there may, depending on the particular facts, be duties of disclosure . . . For breach of these duties, now that common law and equity are mingled, the Court has available the full range of remedies including damages or compensation and restitutionary remedies such as an account of profits. What is appropriate to the particular facts may be granted. . . . *Day v Mead* upheld abatement or apportionment in equity which, given due allowance for the high standard of conduct required of a fiduciary, comes to the same as reduction for contributory negligence.

His Honour drew support for this from a decision of La Forest J (Sopinka, Gonthier and Cory JJ concurring) in the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co*, supra. In this case La Forest J cited *Day v Mead* as authority for a merger of the principles of law and equity. The other four judgments in *Canson* which opposed La Forest J's view of fusion were explained by Cooke P as being of a fine difference in the route taken to achieve the same result. This "fine" difference was their assessment and abatement of the damages on equitable principles alone for breach of fiduciary duty and their abjuration of tort analogies. With respect, this is not a fine difference at all, but represents the traditional view of the interrelationship between the two systems. As His Honour himself said this was the same view as that held by Casey and Hillyer JJ in *Day v Mead*.

Conclusion

This paper has examined the case for the fusion of law and equity, expressed by the President of the New Zealand Court of Appeal, Sir Robin Cooke, to be the contemporary state of New Zealand law. It has been argued that the President's view that the fusion of law and equity has been achieved in the various obligations relating to the solicitor and client relationship is not a general proposition accepted by the New Zealand Courts. What has been accepted is that since *Day v Mead* the equitable remedy of compensation has been widened to allow apportionment considerations. A dual approach to liability in the two jurisdictions has been maintained and there has been no one rule laid down in relation to compensation.[15] Whether the introduction to equity of apportionment considerations is seen as a result of the "borrowing" of a common law concept or as inherent in the equitable fairness feature becomes then, it is suggested, a question of taxonomy, choice of label being influenced, it appears, by one's inclination for the law of obligations theory. □

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1 The writer prefers the term "compensation" to damages.

2 In *Coleman v Myers* [1977] 2 NZLR 225 Cooke J (as he then was) referred to the mingling of law and equity in the context of compensation for breach of fiduciary obligation.

3 See P D Finn "Constructive Trusts – A New Era" (1993) NZ Law Conference Papers 203, 225; *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 per Cooke P.

4 *Coleman v Myers* [1977] 2 NZLR 225, 359-362; *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354; 361; *Nocton v Lord Ashburton* [1914] AC 932.

5 Rickett "Equity in Commerce" New Zealand Law Society Seminar, March 1993 p 32.

6 The term is Professor Maxton's. "Equity Update" New Zealand Law Society Seminar October 1993, P3.

7 R P Meagher, W Gummow and J R F Lehane p 230 however state that this area is an example of the "fusion fallacy". Also see *Daly v Sydney Stock Exchange* [1981] 2 NSWLR 179, 197 in which it was said that the *Hedley Byrne* principle "neither depends upon the existence of a fiduciary relationship nor converts a relationship which was not, at its inception, a fiduciary one into such a relationship".

8 This has opened the way for the sort of developments seen in Canada in a line of stockbroker cases where the fiduciary obligation has been held to be one of care regardless of any element of disloyalty. See *Culling v Sansai Securities Ltd* (1974) 45 DLR (3d) 456 (BCSC); *Burke v Cory* (1959) 19 DLR (2d) 252; *Laskin v Bache & Co Inc* [1972] OR 465 (CA) and *Maghun v Richardson Securities* (1986) 58 OR (2d) 1 (CA).

9 At 361. He said: "Despite an argument . . . challenging on historical grounds the jurisdiction to give damages for past breach of confidence, we would respectfully associate ourselves with the rulings that this can be done. At the present day it should not matter whether the award is described as damages for tort or equitable compensation for breach of duty . . ."

10 P D Finn *Fiduciary Obligations* The Law Book Co Ltd 1977, p 167.

11 See also P W Michalik "The Availability of Compensatory and Exemplary Damages in Equity: A Note on the *Aquaculture* Decision" (1991) 21 VUWLR 391, 408 "The effect of fusion cannot go beyond allowing remedies to mix without changing the nature of either. Thus the remedy must be either inherent in the equity of old or a development of a modern equity, left substantially unchanged by fusion."

12 J Davies "Equitable Compensation: Causation, Foreseeability and Remoteness" in *Equity, Fiduciaries and Trusts* Walters (Ed) Carswell 1993.

13 For example, in *Aquaculture Corporation*, supra, *AG for UK v Wellington Newspapers Ltd* [1983] 1 NZLR 129. This usage also occurred in *Canson Enterprises* supra (discussed infra).

14 *Nocton v Lord Ashburton* supra; *Canson* supra (per McLachlin J).

15 In *Downsview Nominees Limited & Russell v First City Corporation* [1993] 1 NZLR 513 (PC); [1990] 3 NZLR 265 (CA) affmd; 15 TCL 48/1 their Lordships said, in the context of receiverships that the tortious obligation and the equitable had distinct objectives. Their Lordships also warned against "extending the ambit of negligence so as to supplant . . . equitable rules in relation to every kind of damage". See also *AWA Ltd v Daniels* 9 ACSR 383 (Supplementary judgment).

M'aidez — This is Mayday!

By Nigel Jamieson, University of Otago

Jeffrey Miller's legal skit on Mayday, reprinted from the Canadian *Lawyer's Weekly* at [1994] NZLJ 199 is not so silly as it sounds. Underlying the legal, as with every other brand of humour, lies something serious. In the case of "M'aidez! — Help me!" what brings about the cry has proved deadly serious to the law.

A number of legal systems, notably those of the Weimar Republic and Imperial Russia, and in turn those cultic systems of Nazi and Soviet law which succeeded them, have been suddenly felled, and tragically brought down with great cost to their victims, by the failure of the cultic grundnorm on which each legal system was based. This will sound far-fetched to all who turn a blind eye to Rasputin's Russia, or who, now that communism has crashed, happily apply economic jurisprudence to those limited resources that survive the cold-war competition between east and west.

We are too far removed from Napoleon to recall how all but the French regarded him literally as the Antichrist. Strange as it may seem for the son of a Corsican lawyer he picked up the disease from the Celtic Scots. As Chesterton reports "the clouds of pride and madness and mysterious sorrow hang more heavily on the noble houses of Scotland than on any other of the children of men . . .". When *Fingal* was a seventeenth century European best-seller, Napoleon was a passionate reader of Macpherson's sequel *Ossian*. It was this same book that rekindled the Celtic mythology of supermen without which Nietzsche would have remained an unknown nihilist. And it was the same demonic obsession from the Celtic fringe that swept Napoleon to power across Europe until he was finally trounced out of Russia in 1812 to meet his Waterloo in 1815. In so far as the French and Scots still maintain the Auld Alliance against England (for which see Scott's *Tales of a Grandfather* and Mackie's *History of Scotland*), history goes on repeating itself. That alliance, beginning with its first formal treaty in 1295, is based on a Celtic twilight that every now and then flickers into the sacrificial flame of Baal-worship. It is not at all surprising that the "M'aidez" call is French. When did you say the *Rainbow Warrior* went down?

Some increasingly few of us are close enough to Adolf Hitler's time to remember him as one demonically possessed. Der Adolf was always one for celebrating the Rites of Spring. As this festival of Walpurgis Night still takes place in Bavaria, it happens on the last night of April heralding in the first day of May. If you dare sound the depth of the occult that increasingly pervaded the Reichsfuhrer's mind then read Philippe van Rjndt's *Trial of Adolf Hitler*. The Nazi mind, although housed in the puny body of a Nordic-obsessed German, aspired to Napoleonic grandeur. This was the prevailing Scots connection. With no possible military justification for Celtic star-gazing, it took the "initiative" to fall into the same pit as Napoleon by waging war against Holy Mother Russia. Hitler, believing a Germanic Wagner to be every match for a Slavonic Tchaikovsky, hoped to turn 1812 into a triumph for 1941. The spirit of the Antichrist — the Lawless One — is remarkably prone to get bogged down in the same rutted precedents for losing battles — in both Napoleon's and Hitler's case by breaking Bismarck's advice never to fight both east and west — on two fronts at once.

As for the last Mayday in the Soviet Union, readers may remember that we spent it in Minsk ([1991] NZLJ 215, 320, 341). That was an occasion shared with remembrance for the victims of the Chernobyl disaster. This was the result of the radioactive djinn that deformed developing babies and left 7000 children suffering from leukaemia in Minsk. The Chernobyl catastrophe which overwhelmed those children on a Mayday five years previously, eventually brought about the end of the Soviet Union in 1991, and re-established — with Minsk as the new capital of the Commonwealth of Independent States — the ancient White Russian nation of Byelarus. Just round the corner from the apartment in which we lived lay a couple of French cannons. We presumed them to be left over from Napoleon's retreat which, as with Hitler's defeat, moved slower through Minsk on the way out, than the Ride of the Valkyries on his way in.

Our secular society is apt to shrug off the occult as fantasy. The old Walpurgis Night has been described as "a monstrous sabbath of unclean spirits cavorting in obscene revelry on the mountain tops". Do lawyers realise that *A Clockwork Orange* is only one expression of a pagan Saturnalia, Floralia, or Walpurgis Night? Some time ago I gave up a longstanding family tradition of relatively benign Scottish Country Dancing because once you know what you're doing you realise you're casting spells. At the moment a Maori clergyman is trying to exorcise the New Zealand haka. I hope he manages it. There's a lot of work to be done by dance ghostbusters. Witchcraft — that is why the Puritans banned Maypoles. (For what other reason would people erect and dance round phallic monuments?) But for witchcraft's most serious expression, read Pierre van Paassen's *Days of Our Years* in which he describes how the modern Mayday, as resurrected by von Ludendorff for the purposes of the Third Reich, becomes successor to the Hohenzollern Hun. Here are von Ludendorff's own words of 1928:

> the Jews are not our enemies because of their race, but because one of their subtlest rabbis, that man called Saint Paul, distilled the poison of the Christian myth out of the life story of Jesus of Nazareth. The Jews are the enemies of the Nordic race because they produced Christianity, which has been the poison that has destroyed the vitality of the Aryan peoples. Think of our Teutonic ancestors — the whole world was afraid of them . . .

In antipodean Aotearoa-New Zealand the spring equinox is upside down. Mayday is now our Labour Day. Here is a festival of rising unemployment for some and a seven-day working week for others — truly one day of our lives in which to cry out "M'aidez!" □

Australian and New Zealand Society of International Law ("ANZSIL")

Second Annual Meeting

By K I Murray, of Wellington

The second annual meeting of ANZSIL was held in Canberra from 27-29 May 1994. The meeting consisted of a conference attended by some 160 speakers and delegates convened over 2½ days at the Australian National University. The conference was organised by Professor Philip Alston and other teaching staff at the Centre for International and Public Law in the ANU.

The keynote address was given by Senator Margaret Reynolds on the topic "The Internationalisation of Australia". Senator Reynolds was probably the only speaker without formal legal qualifications at the conference. She nevertheless gave an enlightening address on the dynamic impact that international law is having on Australian domestic law and policy.

Senator Reynolds for part of her career had worked in northern Queensland and her address contrasted the innate parochialism of rural Australia with the effect that international norms are having on the lives of women and Aboriginal people in particular, even in such far flung places. Senator Reynolds just happened to have known a Mr Eddie Mabo and his family during the years she lived in northern Queensland, which added a certain poignancy to her address.

The keynote address was followed by addresses from no less than 42 speakers between the start of the conference on the Friday morning until its Sunday midday conclusion. Speakers were held rigidly to 12-minute speaking slots with time for debate at the end of each session. Typically there were four speakers in each session. In the main, speakers were drawn from the ranks of international law teachers at Australian universities, from the Australian Department of Foreign Affairs and Trade (DFAT) and the Office of International Law in the Attorney-General's Department in Canberra. Mr Paul Hunt of the University of Waikato and legal advisers with the New Zealand Ministry of Foreign Affairs & Trade (MFAT) however chaired several sessions, and Dr Scott Davidson of the University of Canterbury presented a paper on "Recent Developments in the Inter-American Court of Human Rights".

Topics

The conference covered a vast array of international law topics and issues. Space does not allow for even a summary. The titles for each session may however convey something of scale and dimension.

The first session was on International Treaty Monitoring (Justice Elizabeth Evatt spoke on the recent work of the Human Rights Committee of which she is a member). Europe: from Community to Union was the next session. Human Rights: the Australian Dimension and International Law: The Year in Review, concluded the first day's programme. The remainder of the conference included sessions on humanitarian and refugee law, theoretical dimensions of international law, the changing role of non-governmental organisations, the United Nations (including a feminist analysis of the Security Council), the law of the sea and finally, current issues in human rights.

Challenge of international law

For this rapporteur the ANZSIL conference reinforced the enormous challenge that international law presents. International law making is burgeoning across a wide front. Even for the international law practitioners and academics it is difficult to keep up with the play. As international law increasingly affects individuals and businesses within States, individuals and non-governmental organisations are pressing for space at the negotiating tables. The existing institutions and law-making processes themselves are under stress. The end of the Cold War has not yet seen a dramatic improvement in the effectiveness of the UN as many had hoped.

On a more positive note the United Nations Convention on the Law of the Sea is set to come into force on 16 November 1994 now that Guyana has lodged the 60th Instrument of Ratification. Two legal advisers from DFAT explained the creative legal steps being taken to endeavour to have the Convention come into force with immediately binding amendments to the provisions relating to the international seabed area. Also a New Zealand initiative in the Sixth (Legal Committee) of the General Assembly is likely to bear early fruit if a Draft Convention on the Safety of UN Personnel can be completed during the Assembly's next session later this year - a fortuitous development which the 250 New Zealand personnel assigned to Bosnia may directly benefit from.

Copies of the conference papers and further information about the Australian and New Zealand Society of International Law can be obtained from:

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