THE NEW ZEALAND
LAW JOURNAL
21 DECEMBER 1994

Law and the International Year of the Family

This past year, 1994, was designated the year of the family. A perusal of family law cases reported during this year is not a pleasant occupation. And the year began badly, indeed tragically, with the killing of three children aged seven years, three years and 18 months by their father Alan Bristol in early February in Wanganui. The children died of carbon monoxide poisoning, as did the father himself. Questions were raised about the fact that the children were in the care of the father in terms of a Court order. An inquiry on the circumstances of the tragedy and the legal issues and decisions involved was conducted by Sir Ronald Davison, formerly Chief Justice. During the course of the year there have been other family tragedies involving deaths, as well as the sorry succession of family law cases that end up in Court.

In respect of 1994 it is important to note that it was an "international" family year. It had been proclaimed as such by the United Nations. In many ways therefore an issue of particular significance is that of child abduction by removing a child across an international border and so out of jurisdiction contrary to the legal rights of a parent. This is a sad and difficult area of the law.

The relevant statutory provisions in New Zealand are ss 12 and 13 of the Guardianship Amendment Act 1991. This amending Act was passed to implement the Hague Convention on the Civil Aspects of International Child Abduction. The objects of the Convention are stated to be to secure the prompt return of children wrongfully removed, and to ensure that rights of custody and access granted under the law of one state are respected by the law of the state to which a child is removed. On the face of it s 12 provides for both of these principles in that it directs in subs (2) that if the grounds of application in terms of subs (1) are made out then "the Court shall make an order" for the return of the child forthwith. But nothing is simple, because subs (2) is made subject to s 13. Section 13 sets out at great length grounds for refusing to make an order.

A couple of cases will illustrate the complexity of the questions that can arise in abduction cases, starting with the issue of abduction itself. In *S v S* [1994] NZFLR 657 Ellis J had to consider the case of a nine-year-old who had lived with his mother for five years, and then since 1990 in Australia with his father in terms of a custody agreement, and subsequently a consent order by a New Zealand Court. The mother lived in New Zealand and the father in Australia. The boy came to visit his mother twice. On each occasion he did not want to return to his father, but did so eventually after the first visit at Christmas time 1992. On the second visit for Christmas 1993 the mother felt she could not force the boy to return and applied for custody.

The point at issue in the case in respect of which it is reported, is whether the boy came within the terms of s 12(1)(b) of the Guardianship Amendment Act 1991 so as to establish jurisdiction under that section. In short, had the child been wrongfully removed or retained as it is expressed in the Hague Convention. The problem before the Court was the father's right to have custody of the child in New South Wales and this raised questions of Australian law. The Court accordingly adjourned the case for further argument in respect of Australian law. The case is of particular interest in emphasising the need for great care in the drawing up of agreements and orders, and the taking of appropriate steps in all jurisdictions that might be involved.

An interesting Australian case decided by the High Court of Australia in June 1994 was *ZP v PS* (1994) 122 ALR 1. In that case the High Court split four to three in a most surprising way. All the Judges agreed that the principle to be applied in the particular case was that the paramount consideration was the welfare of the child. In the appeal to the Full Court of the Family Court of Australia a majority of two Judges, Kay and Graham JJ, had held that the case should be determined in Greece where there was a Court order that the mother had temporary custody but this was conditional on her not taking the boy out of Greece. She did so. This breached the order and therefore meant the boy had been removed illegally from one country to another.

The mother and father had been born in Greece but lived in Australia for a period. The mother had acquired Australian citizenship. The parties had married in Greece, and continued to live there. The boy was born in Greece. At the relevant times Greece was not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

In the Family Court at first instance Mushin J ordered that the child Demetrios should be returned to Greece on the ground that the illegal removal of the child from Greece by the mother made Australia a wholly inappropriate forum for determination of the welfare of the child. On appeal it was held that the forum non conveniens principle was, in itself, inadequate. The majority of the Full Court held that the issue was to be decided either by the inappropriate forum test, or by the principle that the welfare of the child is the paramount consideration. Nicholson CJ dissented on the ground that it would not be in the best interests of the boy for the case to be decided in Greece, because the mother had changed her mind and decided she would not return to Greece. He considered that the boy would thus be deprived of the physical presence of his mother. He gave no weight to the boy being deprived of the presence of his father should a Court order that he stay in Australia in the custody of his mother. In fairness it must be noted that the mother had been the care-giver. Nevertheless this point

of the child not being deprived of his mother, if adopted as a principle of law would be an added incentive to trans-border abduction. The majority Judges described the case in this way:

> The parents are [sic] born in Greece. They were married in Greece. The child was born in Greece. The child has lived all of his life in Greece, save for the months since his removal to Australia by his mother. The child speaks the Greek language fluently, and save for a few distant relatives in Australia, the child's entire extended family on both the maternal and paternal sides reside in Greece. The father has an ongoing relationship with the child. Almost all of the witnesses who would be required to give evidence in respect of the matters in issue between the parties reside in Greece. There is an order of a Greek court restraining the removal of the child from Greece without the consent of both parents or an order of the court. In the simplest of terms this is a case about the custody of a Greek child who was taken from his homeland.

The judgment of Mason CJ, Toohey and McHugh JJ in the High Court states at p 13:

> Notwithstanding those passages in the judgment of Kay and Graham JJ which suggest that they saw the case as one primarily concerned with competing jurisdictions, their judgment, when read as a whole, shows that they decided the real issue in the case. . . . Although they concluded that the result reached by Mushin J was plainly correct, they did not accept his Honour's reasons. They correctly perceived that the court ultimately had to focus on the interests of the particular child, and they concluded that "the interests of *this child* require that issues relating to *his* welfare be determined by the courts in Greece" (our emphasis).

The majority of the Judges in the High Court turned their decision on the mother's statement that she would not return to Greece in any event. This was contrary to her original statement when the case was being considered at first instance. The fact that an appeal Court will find a decision of a lower Court wrong in law because a party to the proceedings has changed her mind on an incidental matter is surprising; but then an appeal Court must deal with the matter before it in terms of reality at the time of the appeal hearing.

An analysis of the decisions in this case illustrates the complexity of the law and the differing conclusions that can be drawn from the evidence. The result was as follows:

1 Mushin J and Nicholson CJ both agreed that the relevant principle to apply was forum non conveniens.

2 Applying that formula Mushin J held that the child had to be returned to Greece; but applying the same formula Nicholson CJ considered the child should not be returned to Greece, but that the Australian Court should consider the issue of the boy's future. This was in part at least because the mother now said she had changed her mind about going to Greece even though the father was to pay her costs of travel and accommodation.

3 Kay and Graham JJ held that whether applying the forum non conveniens or the interests of the child test, the matter should go back to Greece for decision.

4 Mason CJ, Toohy and McHugh JJ, in a joint decision, considered that the forum non conveniens test was not applicable, but that Kay and Graham JJ had nevertheless also applied the correct test of the welfare of the child and that the boy should accordingly be returned to Greece.

5 Brennan, Deane, Dawson and Gaudron JJ, in two separate decisions, decided that Kay and Graham JJ having taken the forum non conveniens test into account as an alternative had thereby vitiated their decision and that the whole issue should therefore be remitted to a Judge of the Family Court. Since these four Judges constituted a majority of the High Court that was the decision of the Court.

6 For the mathematically minded, six Judges favoured returning the abducted boy to Greece and five Judges favoured a determination on custody being made by an Australian Court.

Given this extraordinary array, or rather disarray of judicial views one can only say that the Australian law seems to be in a state of considerable confusion. The interestingly complicating factor in this particular case is of course that Greece was not a party to the Hague Convention. If it were one wonders how the High Court could have avoided applying the objects stated in the Convention to this case given that the Court has raised international conventions almost to the position of constitutional principles – see for instance *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417 and *Commonwealth v Tasmania* (1983) 46 ALR 625.

Certainly in this case of *ZP v PS* (1994) 122 ALR 1 the Court has paid scant attention to a Convention signed by Australia which thereby accepted that there should be the prompt return of a child wrongfully removed from one country to another, and that the rights of custody and access granted under the law of one State should be respected by the law of the State to which a child had been removed. The ancient Greeks, like the Romans, distinguished between the law applicable to citizens and that applicable to aliens – whom they called barbarians. In this case it could be suggested the Australian High Court has elected to treat the Greeks as the barbarians! This case can hardly be said to show respect for the present-day Greek Courts and legal system; and it does, in its effect, demonstrate encouragement for trans-border abduction.

Family disputes over custody and access are one of the more tragic consequences of marriage break-ups. To use the term the best interests of the child or children is perhaps to hide the reality behind a pleasant-sounding formula because, in most cases, it will not be to any degree, in the interests of a child to be divided up between adults in conflict. The question of trans-border abduction only adds to the complexity and poignancy of the situations that arise.

P J Downey

Editorial addendum, see p 435.

The International Year of the Family in New Zealand

By Rhyl, Lady Jansen, Chairperson of the New Zealand International Year of the Family Committee.

Reprinted from Butterworths Family Law Journal, September 1994.

In November 1989 the United Nations General Assembly proclaimed 1994 the International Year of the Family. The key principle expounded by the United Nations is:

> The Family, in all its diverse forms, constitutes the basic unit of society and the widest possible protection and assistance should be accorded to families so that they may fully assume their responsibilities within the community.

The emphasis is on an increasing awareness of those issues to highlight the importance of families; to encourage a better understanding of their functions and problems; to promote knowledge of the economic, social and demographic processes affecting families and their members; and to focus attention upon the rights and responsibilities of all family members and provide an opportunity to examine the obligations and responsibilities of family members, society and the state.

Diversity

The world's families are extraordinarily diverse. All over the world powerful demographic and socio-economic forces are reshaping the structure of families. Populations and families are ageing. Households are changing in size and composition. People are getting married and having children later in life. Some families comprise adults only – others are child-centred. Some may have more than one generation, others may comprise different ethnic groups. Children may be raised by grandparents, fathers, cousins or by a person with no blood relationship at all.

There has been an increase in new forms of family association such as reorganised or blended families and consensual unions and there is a significant number of single parent households (mostly women) with children. Families with one mother, one father and their children are now a minority. These changes have far-reaching consequences for social security systems, national economics and society as a whole.

According to HJ Skolaski, Coordinator of the International Year of the Family:

> The family is the place where needs are met, differences are accepted, rights are respected, all individuals without exception are offered a platform from which to make a meaningful contribution to a better life in their home, their future, their community and the greater society.

A family is needed to nurture its individual members. If we examine the needs of children which must be provided for in order to produce well balanced individuals, the needs of children, adults and the family unit are similar.

There are the physical needs of food, shelter, protection, warmth, rest and exercise. Then there are the emotional needs of love and security which develop the ability to care and respond to affection, and the intellectual needs of language, new experiences, praise and recognition, and responsibility. The most influential factor in the development of values and standards of behaviour in a child is the model provided by the principal adults in the child's life. In this way the child is prepared for life outside the family.

The New Zealand International Year of the Family Committee was appointed in October 1993 to promote, publicise and celebrate the year. Our main message for the year is simply "The family is good for life". The committee has chosen this message as the family is both creative and sustaining. A decision was made to promote the positive role of the family while acknowledging that there are negative issues which are affecting many families. There is a wide range of community services available to strengthen and support families.

The committee was asked to achieve two special objectives, the first of these being an information programme. To this end the committee has established a research project in five regions with a diverse range of service provisions to investigate the best way that families can access helping agencies. By improving communication we stand a chance of getting help to people more quickly, more efficiently and at an earlier stage.

Conveying information about the rights and responsibilities of parents towards their children and children towards their parents is the second objective. Parents and guardians are expected to provide reasonable supervision and care until the age of 14, to provide for their physical needs, and to ensure their attendance at school between the ages of 6 and 16.

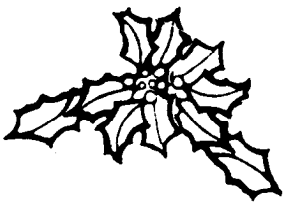
The Committee has promoted local seminars throughout New Zealand communities where the issues currently facing families are being discussed. □

Editorial addendum

Since the editorial for this issue was typeset there have been two interesting developments in New Zealand. The first is the decision of the Court of Appeal, reported in the newspapers on 10 December, that a girl whose New Zealand mother brought her here despite the father having access rights in Arizona, should return to the United States. The second is the reported wish of Dr Elizabeth Morgan to return to the United States with her daughter Hilary Foretich; this is despite a New Zealand Court having expressly decided that the best interests of the child were that she should live in New Zealand and not in the United States – a decision of defiance of the American judicial system that seemed somewhat surprising to many people, except feminists, in the first place!

P J Downey

Christmas Messages



From the Attorney-General, Hon Paul East

I am grateful to have this opportunity to extend to all members of the legal profession my best wishes for the Christmas season. As I write this Christmas message, we approach the conclusion of what has been a fascinating year in the political life of our country.

With the election of the first Government under MMP less than two years away, there has been a considerable amount of activity as we prepare to face the challenges that lie ahead. In the last year, we have seen a number of new political parties emerge. New boundaries have been announced that change the face of the New Zealand electoral map. Some of this activity has not been without contention with a legal challenge being mounted against the manner in which the Maori electoral option was conducted.

It can confidently be anticipated that we will see an increasing number of changes to the political landscape as the first MMP election draws nearer. The momentous change to our system of government brings with it a considerable amount of uncertainty. We are indeed fortunate that in our Courts, our legal system and our profession, we have a solid foundation upon which to build for the future. I anticipate that over the next few years we will look increasingly to the profession to take the lead in resolving many of the issues and concerns that will arise during the transition to MMP.

I take this opportunity of congratulating Judith Potter for the manner in which she carried out her duties as President of the Society. I welcome Austin Forbes to that position and look forward to working with him in the future. Members of the profession have continued to provide invaluable assistance to Parliament by presenting submissions of the highest quality to our select committees. The President and Council members have maintained a close relationship with Members of Parliament and the Government. I thank the profession for the contribution it has made.

May I extend to all members of the profession and their families my best wishes for Christmas and the New Year.

Recent Admissions

Barristers and Solicitors

Alchin RA	Hamilton	16 September 1994	Monin A	Dunedin	9 September 1994
Arns JM	Hamilton	16 September 1994	Mozessohn J	Auckland	3 November 1994
Attfield JM	Dunedin	9 September 1994	Mudie RE	Dunedin	9 September 1994
Barton BI	Dunedin	9 September 1994	Osborne CB	Dunedin	9 September 1994
Begg JE	Dunedin	13 May 1994	Overweel R	Dunedin	13 May 1994
Belsham DH	Dunedin	9 September 1994	Partridge LJ	Auckland	28 November 1994
Blake A-MT	Dunedin	13 May 1994	Peskett AW	Dunedin	13 May 1994
Clark M	Dunedin	13 May 1994	Price CA	Dunedin	9 September 1994
Cogger DS	Dunedin	13 May 1994	Rea EJ	Dunedin	13 May 1994
Cowan JD	Dunedin	9 September 1994	Routh RW	Dunedin	9 September 1994
Deacon MB	Dunedin	13 May 1994	Santamaria JG	Auckland	28 November1994
Edwards MJ	Dunedin	13 May 1994	Scott PW	Dunedin	13 May 1994
Gray TA	Auckland	21 October 1994	Shine RJD	Dunedin	9 September 1994
Green TM	Dunedin	13 May 1994	Stratford QJC	Dunedin	13 May 1994
Hammond MD	Dunedin	9 September 1994	Thom B	Dunedin	9 September 1994
Hughes JM	Dunedin	9 September 1994	Timpany VJ	Dunedin	9 September 1994
Johnstone JM	Dunedin	9 September 1994	Tongue KS	Dunedin	9 September 1994
Leachman S	Dunedin	13 May 1994	Toomey LR	Dunedin	13 May 1994
Manousaridis N	Auckland	25 November 1994	Waters B	Hamilton	16 September 1994
Martin JL	Dunedin	9 September 1994	Woodhouse SJ	Hamilton	16 September 1994

Christmas and beyond to 1995 — some abroad thoughts from home

From Austin Forbes, President, New Zealand Law Society

I believe the profession can look forward to 1995 with optimism — things generally are improving and should continue to do so. The bottom line for most firms and practitioners should be better than last year and I think we can justifiably feel that the public's perception of the profession is somewhat better than it was two years or so ago. Improved public confidence in lawyers is the primary goal of the Board of the New Zealand Law Society.

Some important, indeed fundamental, issues will confront the Board in 1995. The most challenging of these will be to map out a blue print for the future administrative structure of the profession. This is being called "the big picture" question by the Board. In my view the present federal structure of a national law society and 14 semi-autonomous district law societies can no longer be justified as being in the profession's or the public's best interests. It is surely not the most efficient and cost-effective way of governing the profession or fulfilling the collective statutory obligations of law societies and serving the needs of members for a strong professional association. So expect more on this matter in 1995.

There will be a range of other changes, challenges and choices confronting the New Zealand Law Society in 1995. The public, the news media and the Government can be expected to continue to hold the profession accountable and to keep it under close scrutiny.

It will not always be easy to know how best to plan for or react to the competitive and consumer-driven demands that will continue to confront the profession. A paramount challenge, which I believe is becoming more urgent, is how we can provide quality legal services at a cost-effective price. Any credible and fair notion of access to justice and legal services depends on these being available at an affordable cost. As an example the position has now been reached where the cost-effectiveness of a defended court hearing for, say, $50,000 (and not merely $15,000) would now usually be very questionable. This basic problem simply has to be addressed.

The focus of legal practice will and must continue to shift to being client or customer-centred rather than lawyer or provider-centred. The profession has already made progress in this regard in recent years but the process will need to be an on-going one. Practice management standards will necessarily have to continue to reflect and support this changing focus.

The traditional areas where the profession has had an exclusive right of practice have been in conveyancing and the right of audience in the Courts. A more general privilege, of course, is the exclusive right of practitioners to practise as barristers and solicitors and to hold themselves out as such. These exclusive rights are now under increasing threat and are certainly no longer truly exclusive. Non-traditional providers of legal services now include accountants, taxation agents, counselling agencies, banks, merchant banks and finance houses, trustee corporations, the Public Trust Office, resource management and planning consultants, industrial advocates, architects and engineers, legal publishers and other legal information providers and various government departments and state-owned agencies. Even this list is probably not exhaustive.

The consequence of this must be that the profession will have to be willing and able to provide and market its skills and services as being superior but, nevertheless, still cost-effective. People will consult lawyers if there are no alternative providers or if the alternatives are considered to be inferior.

Inevitably the profession is going to have to have a greater range of skills beyond formalistic legal qualifications. Many lawyers will find, if they have not already done so, that it is essential that they have familiarity with basic economic, business and financial information principles and even a range of psychological and sociological skills. At the same time the need for greater technical legal competence will continue to be required.

The ways in which legal services have customarily been provided will also continue to change. The trend towards store-front and similar types of practices and suburban offices is likely to continue. There will be further demand for mixed or multi-disciplinary practices which can include lawyers who hold practising certificates. Trans-Tasman mega firms are another likely development in the near future.

The demands of clients, as the consumers of legal services, will be for more information about the services they receive and about fees. There will be demands for greater openness and more formal and transparent relationships with an increased accountability by their lawyer.

To meet these challenges the New Zealand Law Society will need to be increasingly proactive and not merely reactive. The profession will and is entitled to expect strong and efficient leadership. The New Zealand Law Society Board and I are committed to doing all we can to ensure that this is what the profession gets.

However, for the next few weeks such grave and weighty matters can be put to one side while most of us enjoy Christmas and a holiday. I hope that 1995 will see at least most of the profession having moved out of surviving and into thriving mode.

Case and Comment

Contract and tort

Henderson v Merrett Syndicates Limited [1994] 3 WLR 761. (Lords Keith, Goff, Browne-Wilkinson, Mustill and Nolan.)

In 1986 Lord Scarman, in the course of delivering the judgment of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, had suggested that there was nothing to be gained by the law seeking to develop a liability in tort where the parties were in a contractual relationship, especially where the relationship was in a commercial context (p 107). Strictly speaking his Lordship's comment was obiter as in *Tai Hing* the duty sought to be established was more extensive than that provided for in the contract, however the statement appeared to be a clear indication that when the issue of concurrent liability did come before the House of Lords or the Privy Council it was not going to receive a favourable reception. As *Henderson v Merrett Syndicates Ltd* has shown this has not proved to be the case.

In New Zealand *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 has been used as authority for the proposition that whenever there is a contract between two parties, and one of these is in breach of a duty to the other, any action for breach of that duty can only be founded on contract. That is a tortious liability cannot arise when there is a contract between the parties. Although the rigour of the rule in *McLaren Maycroft* has been relaxed of recent years *Merrett* is still of importance for New Zealand. Our Court of Appeal has indicated it will reconsider the rule when an appropriate case arises, but the appropriate case has yet to appear, and there are conflicting decisions in the High Court (cf *Rowlands v Collow* [1992] 1 NZLR 178, Thomas J, and *Titley v Harris* (High Court, Blenheim, 26 April 1991, CP 37/88, Tompkins J)).

There are practical consequences in a finding in favour of concurrent liability. Perhaps the most important of these relates to when time starts to run for the purposes of the Limitation Act 1950. If a claim is based on an action for breach of contract time starts to run from the date of breach, but in an action for the tort of negligence time does not begin to run until the plaintiff has suffered the damage. In a latent damage case this can be several years after the time any contract has been completed. The effect of this is nowhere better illustrated than in *Titley v Harris*. There the damage occurred six years and eleven days after the contract in question was completed. The cause of action in contract was therefore statute barred, which meant the only way the plaintiff could succeed was if he was allowed to sue in tort. Tompkins J considered he was bound by the rule in *McLaren Maycroft* and ruled the action in tort could not proceed.

Merrett

These were appeals of preliminary issues of principle arising out of actions brought by underwriting members (Names) of Lloyd's against their underwriting agents in an attempt to recoup at least part of their losses following unprecedented claims made upon Lloyd's underwriters. The preliminary issues of principle common to many of the actions related to the existence, scope and nature of the legal obligations of underwriting agents. In particular the issue of concurrent liability in tort and contract arose for determination. On the hearing of the preliminary issues Saville J found in favour of the Names, and the Court of Appeal agreed with him. The matter went to the House of Lords.

An underwriting agent may act in one of three different capacities:
(a) a members' agent who advises on the choice of syndicate, places names on the syndicate chosen by them and gives general advice; or,
(b) a managing agent who underwrites contracts of insurance and pays claims; or
(c) a combined agent who acts as both a members' agent and a managing agent.

Briefly, those who wish to become a Name (if they are not an underwriting agent) appoint an underwriting agent to act on their behalf pursuant to an underwriting agreement. Until 1990 each Name entered into underwriting agency agreements with an underwriting agent, who was either a members' agent or a combined agent. This agreement governed the relationship between the Name and the agent in so far as the agent was acting as a members' agent. Where the Name became a member of a syndicate managed by a combined agent it also governed the relationship between the Name and the agent in its capacity as managing agent. These Names were known as direct Names. If a Name became a member of a syndicate managed by another managing agent the Name's underwriting agent entered into a sub-agency agreement appointing that managing agent its sub-agent to act as such in relation to the Name. These Names were known as indirect Names.

The direct Names sought to hold the managing agents liable in contract, and, as there was a question of limitation in at least one of the actions, in tort. The indirect Names sought to establish a duty of care in tort owed to them by the managing agents in order to establish a direct liability to them by the managing agent. Essentially the issue was did the managing agents, whether members' agents or not, owe a duty in tort to both direct and indirect Names? In none of the underwriting agreements was there an express provision imposing a duty upon the managing agent to exercise due care and skill in performing the relevant function under the agreement. There was, however, no dispute that a term

to that effect had to be implied into the agreement.

The main argument advanced by the managing agents against the imposition of a duty of care in tort was that it was inconsistent with the contractual relationship between the parties. Where the Names were direct the managing agents argued that the contract between them and the Name legislated exclusively for the relationship thus excluding a parallel duty of care in tort. Where the Names were indirect it was argued that the structuring of the contractual relationship via a contractual chain embracing indirect Names, members' agents and managing agents deliberately excluded any direct responsibility of the managing agent to the indirect Name including that of a duty of care. Additionally it was argued that no duty should be imposed because the loss suffered was "purely economic loss." Lord Goff considered this latter aspect of the managing agents' argument first before examining the impact of the contract on any liability which might be imposed.

Liability for economic loss

In deciding whether liability should be imposed in the present case for economic loss Lord Goff returned to first principles. His Lordship considered the seminal decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 which established that liability could exist for negligent misstatements. In *Hedley Byrne* the House of Lords had decided that a duty of care could be imposed in respect of words as well as deeds, and that liability could arise in negligence not just for economic loss attendant upon physical damage but for economic loss alone. Lord Goff pointed out that imposition of liability under *Hedley Byrne* was founded on the twin concepts of assumption of responsibility and reliance. Hence liability would arise where the relationship between the parties was such that one party, possessed of special skill, assumed or undertook an assumption of responsibility towards the other, who in turn relied upon that special skill. The concept of special skill was to be understood broadly and encompassed special knowledge. In Lord Goff's opinion the principle extended beyond the provision of information and advice to include the performance of other services. This meant that when a person assumed responsibility to another in respect of certain services there was no reason why liability should not be imposed for economic loss which flowed from the negligent performance of the service. Thus once a case fell within *Hedley Byrne* it was unnecessary in His Lordship's opinion to embark on any further inquiry as to whether it was "fair, just and reasonable" to impose liability for economic loss.

In this instance, on the facts, there was an assumption of responsibility by the managing agents towards the Names in their syndicates. The managing agents held themselves out as possessing a special expertise to advise the Names on the suitability of risks to be underwritten, and on the circumstances in which, and the extent to which, reinsurance should be taken out and claims settled. The Names, as the managing agents knew, relied upon that expertise and advice. Prima facie a duty of care was owed in tort and since it rested on the *Hedley Byrne* principle no problem arose because the loss was economic. The duty was, however, subject to the impact, if any, of the contractual context.

The contractual context

As His Lordship noted there were two possible solutions available to a Court when there was a possibility of concurrent claims arising from a breach of duty: either the Court could insist that the claimant pursue the claim in contract, or it could allow the claimant to select the remedy he or she preferred. His Lordship briefly reviewed the position in other jurisdictions, and then referred to the practical consequences which could be at stake if the plaintiff was confined to his or her remedy in contract. In England this included not just issues of limitation but loss of the benefit of the Latent Damage Act 1986, the absence of a right to contribution between negligent contract breakers, differing rules as to remoteness of damage and the availability of the opportunity to serve proceedings out of jurisdiction.

Lord Goff returned to the *Hedley Byrne* principle which, as a matter of logic, he thought capable of application not only where the services were rendered gratuitously, but also where they were rendered under a contract. He observed that while historically a contractual solution had been adopted towards concurrent liability *Hedley Byrne* had provided the opportunity to reconsider the question anew, and although at first this had not been done Oliver J had taken up the challenge in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 and found in favour of allowing the plaintiff to select the most favourable remedy. Lord Goff wrote with admiration of the in-depth analysis of the case law, and the reasoning behind it, provided by Oliver J, and confirmed the Judge's finding that there was not, and never had been, any rule of law that a person having alternative claims must frame his or her action in one or the other. Moreover His Lordship thought it consistent with *Donoghue v Stevenson* [1932] AC 562 that concurrent remedies should be available.

Counsel for the managing agents had argued that *Midland Bank*, also founded on *Hedley Byrne*, was wrongly decided. He based his argument on the reasoning of Kaye "The Liability of Solicitors in Tort" (1984) 100 LQR 680 who would have restricted *Hedley Byrne* to those cases where there was no contract. This also involved regarding the law of tort as supplementary to the law of contract. However the argument was rejected by Lord Goff who observed that the law of tort was the general law, out of which parties could, if they wish, contract. If necessary, Lord Goff thought the House should "develop the principle of assumption of responsibility as stated in *Hedley Byrne* to its logical conclusion so as to make it clear that a tortious duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract." As the common law was not antipathetic to concurrent liability a party should be entitled to take advantage of the remedy which was most advantageous to him or her. His Lordship continued (p 789):

> [In] the present case liability can, and in my opinion should, be founded squarely on the principle established in *Hedley Byrne* itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties,

> and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous.

The appeals were dismissed as the existence of a duty of care was not excluded by virtue of the relevant contract regime.

In conclusion it is of interest to note that in reaching his decision Lord Goff referred to New Zealand developments, and in doing so paid particular tribute to Christine French's article "The Contract/Tort Dilemma" (1981-84) 5 Otago LR 236. His Lordship referred also to Thomas J's decision *Rowlands v Collow*, mentioned earlier, where His Honour had decided in favour of concurrent liability.

Merrett is to be welcomed. Not only does it accord with the general tenor of comments in the Court of Appeal when the matter has arisen for discussion (see for example *Mouat v Clark Boyce* [1992] 2 NZLR 559, 565 per Cooke P), but it may also indicate some relaxation of the "legal conservatism" previously a characteristic of the House of Lords and the Privy Council.

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Statutory derivative actions and insider trading

Re BNZ Ltd; Kincaid v Capital Markets Equities Ltd [1994] BCL 1185.

This case involved a preliminary hearing to determine the evidence to be considered by the Court for an application under s 18 of the Securities Amendment Act 1988. In this judgment Henry J discussed the relationship between ss 17 and 18 of the Act.

Section 17 allows a shareholder to require a public issuer to pay for a barrister's opinion as to whether there is a cause of action for insider trading against an insider, subject to the prior approval of the Securities Commission. Section 18(1) allows an application to be made to the Court by a shareholder (or a person who was a shareholder at the time of the sale of purchase of shares in question) for an order that the shareholder can exercise a public issuer's right of action against an insider. Section 18(2) directs the Court to grant leave for a shareholder unless "the public issuer does not have an arguable case against the insider" or "there is a good reason for not bringing the action". Section 18(3) allows a shareholder to apply for leave to apply to take over proceedings which have been commenced by a public issuer against an insider and s 18(4) directs the Court to allow to grant leave unless the public issuer is conducting proceedings in a proper manner or there are good reasons for not continuing the proceedings. If leave is granted under s 18(2) or 18(4) then s 18(5) provides that the public issuer is obliged to pay the costs of the action against the insider.

In *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152 the Court of Appeal dealt with a s 18 application. In that case a barrister's opinion had been obtained under s 17 and it found a cause of action against some insiders, but cast doubt on whether a cause of action existed against other insiders. Cooke P, who delivered the Court of Appeal's judgment, commented on the relationship between ss 17 and 18 (at p 160):

> Although the Act does not make the obtaining of an opinion a condition precedent to an application under s 18, it will usually be desirable and in accordance with the apparent intention of Parliament to have one.

Cooke P noted with approval that McGechan J ([1993] 2 NZLR 657) had restricted the High Court hearing to a consideration of the barrister's opinion and evidence for and against that opinion, and that affidavit evidence as to the existence or otherwise of an arguable case would only be accepted "on strong grounds such as incontrovertible evidence" (p 160). He further commented that:

> An application under s 18 is not intended to be a trial in advance; Judges will act rightly in taking a somewhat exacting view of the material they are prepared to consider.

The facts of the *Kincaid* case related to the sale by Capital Markets Equities Ltd (a wholly owned subsidiary of Fay Richwhite and Co Ltd) of BNZ shares to the National Provident Fund in 1990. Mr Kincaid had applied to the Court for an order allowing him to commence the s 18 action without first requesting the appointment of a barrister to provide an opinion under s 17. No doubt, wishing to save time and expense he decided to rely upon the Securities Commission's 1992 report into the BNZ (*Report of an Enquiry into Certain Arrangements Entered into by Bank of New Zealand in March 1988* (1993)). As Henry J noted the Securities Commission's enquiry was comprehensive, involving consultations both in New Zealand and overseas as well as hearings in New Zealand. The Securities Commission found that the BNZ's profit for the year ended 31 March 1990 was substantially overstated. Kincaid argued that the inside information possessed by the insiders included the existence of a captive insurance scheme and its impact upon the reported accounts, and also included knowledge of problems with the bank's Australian operations which would consequently require a future provision in the accounts and a capital injection.

Although Henry J noted Cooke P's comment that it will usually be desirable that a s 17 opinion be obtained prior to a s 18 application, he pointed out that s 18 does not make this a prerequisite (p 5). He then considered the status of the Securities Commission report. He noted that the report was founded in the Securities Commission's jurisdiction under s 10 of the Securities Act which allows the Securities Commission to carry out investigations and s 28 of the same Act which allows the Securities Commission to publish reports. The terms of reference of "the enquiry were directed to the captive insurance arrangements and their effect", and that insider trading was not "directly addressed" nor the subject of specific findings. For that reason he refused to equate the Securities Commission's report with a s 17 opinion, which is designed expressly to deal with the

issue of insider trading in its statutory context, and "is available for the very purpose of considering a leave application" (p 6).

The difference between the s 17 opinion and the Securities Commission report however was not fatal to the report's admissibility. Henry J took the view that the Act gave the Court a wide discretion to control the procedure of the application and accordingly the Court "should adopt practices which best give practical effect to the intention of the legislation while recognising the need not to offend established principle" (p 6). Accordingly he was prepared to admit the report on the basis that the Securities Commission was a statutory body which had responsibilities under the Securities Amendment Act 1988, and on the basis that the report followed an in depth enquiry which included consultation and the examination of witnesses. He also noted the report would be used for an application for leave to bring an action and would not be used to grant relief or establish rights or liabilities (p 7). To that end he refused to follow *Savings & Investment Bank Ltd v Gasco Investments (Netherlands) BV* [1974] 1 WLR 271 where the Court had not accepted statutory reports in the context of an application for an interlocutory preservation order.

What was the basis for admitting such evidence in relation to the s 18 application in the absence of a s 17 opinion? In Henry J's view opinion material could be received and considered provided "it came from a source in which the Court can have an acceptable degree of confidence" (p 7). The weight to be given to the report, its conclusions and opinions would be a matter of analysis, argument and ultimate decision. In his view the report represented no more than the Securities Commission's opinion and did not constitute findings that were binding on the parties or the Court. As a result Henry J was prepared to order that the report could be received and considered as an expression of opinion reached in the context of the terms of reference of the enquiry, and would ultimately be given a weighting that took into account other evidence and the submissions of counsel. However, he pointed out that what he had said did not amount to an indication that the report was admissible at the trial, and he also left open the possibility that the defendants could again challenge the report's admissibility at the s 18 hearing to be held in early 1995.

Having taken a step away from the Court of Appeal's view on s 17 opinions Henry J was also prepared to admit other evidence to rebut the conclusions of the report. The plaintiff had objected to the defendants filing affidavits which contradicted the Commission's report, on the basis that this was a conflict that the Court should not have to deal with at the s 18 application stage. Although he agreed with counsel that the Court had to avoid a trial situation when considering a s 18 application, he did not accept that objection. He felt that as he was not dealing with a s 17 opinion (which had been the case in *Wilson Neill* where McGechan J had taken a strict line against contradictory evidence) he should be prepared to receive and consider the affidavits in question as providing relevant evidence in respect of matters which go to the issues of "arguable case" and "good reason" (p 8). As a consequence of this he was prepared to allow the defendants to file affidavits and also to allow the plaintiffs to submit affidavits in reply, but he made it quite clear that the affidavits had to be confined to the issues at stake, and in meeting the contentions of the other party (p 10).

Both sides also sought to file further affidavits on varying issues and sought to oppose the affidavits of the other party. Henry J was not prepared to consider this issue at this stage, and instead decided to leave this issue to the hearing. However he made it quite clear that he would not allow cross-examination of the deponents (p 13).

Implications of the Kincaid *decision*

This case represents one of the few decisions on Part I of the Securities Amendment Act 1988 six years after its enactment. The *Wilson Neill* case took a fairly narrow view of the relationship between ss 17 and 18. Henry J's decision to allow the use of the Securities Commission's report is a welcome advance on the position put forward by the Court of Appeal, since it does not tie shareholders into obtaining a s 17 opinion which may take some time to obtain.

The question is how far will the latitude for evidence to support a s 18 application extend? What remains unclear from Henry J's judgment is what will constitute "a source in which the Court can have an acceptable degree of confidence". Will the Courts only consider a report as extensive as the Securities Commission's BNZ report? From Henry J's emphasis on the statutory basis of the Securities Commission's powers and the report it would appear that only a similar report by the Securities Commission, or a body like the Serious Fraud Office (assuming it was prepared to release a report) would be sufficient to supply a s 18 application. However, I would argue that the Court should be prepared to admit other opinions (for example, an opinion provided by a firm of solicitors on behalf of a client) on the basis that (a) the Court of Appeal in *Wilson Neill* made it clear that the onus of proof rested on a person who opposed the granting of leave under s 18; (b) section 18 requires the opponent of the application to show that there is no arguable case to be raised or no good reason; and (c) as Henry J was prepared to allow affidavit evidence to rebut a report which was not a s 17 opinion, opponents of a grant would be able to adduce contrary evidence which they alone possess, and which may not have been available to the other side.

As Henry J has shown the s 18 application does not need to expand into a substantive trial provided there is tight control of the process and the issues are clearly defined at an early stage.

The *Kincaid* decision broadens the potential of the insider trading provisions and particularly the s 18 applications, which is commendable in the absence of a state agency having a direct role in regulating insider trading. Whether future decisions will continue to allow flexibility into s 18 applications remains to be seen.

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Is scandalising the Court a scandal?

By J L Caldwell, Senior Lecturer in Law, University of Canterbury

The independence of the judiciary, and hence the integrity of the legal system, is an essential element of our constitution. Judicial decisions of course are not always right — even at an appeal Court level — and consequently there is not only a place but a need for critical analysis of judicial reasoning. Personal criticism of Judges however is a different matter. These issues were discussed in an editorial in October last year at [1994] NZLJ 358. In this article Mr John Caldwell discusses the topic of contempt, of scandalising the Court, in depth. He concludes, in agreement with the earlier editorial comment, that the contempt jurisdiction has a valid and necessary function, but he suggests it should be invoked sparingly. There was an editorial, and a piece by Professor John Burrows on this topic in the Wellington newspaper The Dominion *on 23 November 1994, after Mr Caldwell had written this article.*

Introduction

At the end of the 19th century the Privy Council proclaimed that the offence of scandalising the Court was, in the English jurisdiction, "obsolete" (*McLeod v St Aubyn* [1899] AC 549 at 561). To the regret of some later jurists, the diagnosis of obsolescence proved premature;[1] and although in England there have been no scandalising convictions for the last sixty years, in the last twenty years in New Zealand there have been at least two (*Solicitor-General v Radio Avon* [1978] 1 NZLR 225 (CA) and *Solicitor-General v Henderson* (High Court, Christchurch Registry, M 32/85, 29 November 1985, Cooke J).

The Laws of New Zealand title "Contempt of Court" has suggested (in paragraph 2) that in due course the "wider perceptions" contained in the New Zealand Bill of Rights Act 1990 may be held "to modify" the superior Court's general inherent jurisdiction to punish for contempt, or at least its procedures. In Canada, the Ontario Court of Appeal has already decided that the offence of scandalising the court, as presently understood, infringed the Canadian Charter of Rights and Freedoms (*R v Kopyto* (1987) 47 DLR (4th) 213). However, in a recent judgment of the Full Court of the High Court, concerning the reporting of a juror's comments, it was suggested by Eichelbaum CJ and Greig J that the Canadian Charter, and cases such as *R v Kopyto*, should be distinguished (*Solicitor-General v Radio NZ* [1994] 1 NZLR 48 at 60-62). After lengthy analysis of the relevant provisions in the New Zealand Bill of Rights Act, their Honours decided that conduct interfering with the administration of justice was not protected by the Act. Accordingly, as scandalising the Court has long been characterised as such conduct, the scandalising offence would, for the time being, seem to remain extant.

Of the two heads of scandalising jurisdiction, the first concerning the scurrilous abuse of Judges, is the wider and more controversial. To take recent examples of its potential scope: if lawyers indulged in "vulgar abuse" of Judges, as was alleged by the Chief Justice and Attorney-General ("Judging the Judges" *Law Talk* 422, 19 September 1994, 3) in their joint statement on the comments of barristers published in the *Independent* of 2 September 1994, then it would not be an idle threat to rattle the contempt sabre. (See the comments of the President of the New Zealand Law Society: Forbes, "Personal attacks not on", *Law Talk* 422, 19 September 1994.) Similarly, an editor of the *National Business Review* who concluded an editorial on a judgment of the Court of Appeal with the words "[t]here are fossils on the bench who should be pensioned off and the sooner the better"[2] might well have occasion to become personally acquainted with that bench.

The second, and commonest, form of scandalising occurs where there is an allegation of judicial bias, corruption or improper motivation on the part of either an individual Judge or the Judiciary as a whole (see, for example, *Solicitor-General v Radio Avon*, supra, and *Solicitor-General v Henderson*, supra). Hence, to modify another recent incident, were a Shadow Minister of Justice to suggest, outside Parliamentary shelter, that a High Court Judge in ordering permanent suppression of the name of a convicted sex offender had been influenced by an "old boys network",[3] then intriguing questions about the ambit of this head of jurisdiction could be raised.

The three above examples of insulting comment about current Judges all occurred in a six-week period during the spring of 1994. During that time further disparaging abuse about individual Judges emanated from highly-placed public figures. For instance, the Shadow Minister of Finance, also enjoying Parliamentary sanctuary, described a former Chief Justice appointed to chair a tax inquiry as "the least distinguished Chief Justice this century".[4] One could reflect that the former tradition of according public respect and courtesy to the Judiciary had become rather badly frayed.

The question then worth asking is whether the scandalising jurisdiction could be activated in the 1990s in order to moderate the nature of criticism of Judges. It is perhaps unfortunate that the offence is termed "scandalising" or "contempt" because, as Lord Cross once suggested, ". . . the very name of the offence predisposes many people in favour of the alleged offender" (*Attorney-General v Times Newspaper* [1974] AC 273 at 322). But even under a different nomenclature it is doubtful whether a majority of New Zealanders would support prosecution for this type of conduct. Almost certainly, most New Zealanders would doubt the requirement for a Judge to be treated with any more public deference than a politician or other public figure,[5] and a retiring Judge's suggestion that Judges need to enjoy mystique[6] would in all likelihood be perceived to be archaic and self-serving. In this climate of opinion, any action for scandalising the Court is unlikely (Burrows, *News Media Law in New Zealand* (OUP, 1990, 3d) at 253).

However, the rationale for this offence, as discussed below, is of the greatest importance. The offence is concerned with nothing less than the preservation of the due administration of justice – an interest in which every citizen assuredly has a stake. It may be trite to observe, but without a respected justice system, all freedoms, including that of freedom of expression, are vulnerable. As such, retention of the scandalising offence can, in this writer's view, be justified; and its very occasional utilisation should not be seen as unthinkable.

Purpose of the law

The power to punish for scandalising the Court is generally said to have been established in *R v Almon* (1765) Wilm 243, 275 where, in a judgment prepared but not delivered, Justice Wilmot said the principle was based upon the need for the Courts ". . . to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eys of the public".

Whilst in modern times the Courts might discount the need for irradiation, the essential concern remains the same. As Richmond P put it in *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225:

> [t]he justification for this branch of the law of contempt is that it is contrary to the public interest that public confidence in the administration of justice should be undermined (at 230).

Hence, while the sub judice rule is designed to protect the integrity of actual, particular proceedings, and the interests of identifiable individuals in that case,[7] the scandalising rule is concerned with a more abstract interest in the sound administration of justice on a continuing basis, both in the present and in the future (see eg *Attorney-General v Times Newspapers*, per Lord Simon, supra, at 320). Naturally, though, any impairment of the effective functioning of the Court system must have direct consequential effects on individual citizens. To adapt an analogy, individual litigants who may in the future seek to draw from the stream of justice will suffer if the stream is poisoned upstream (*R v Davies* [1906] 1 KB 32 at 35).

The broader societal considerations also weigh heavily. Any civilised society needs and authoritative decision-making process; and scandalising comment which shakes the confidence of the general public in the integrity of the Courts, to which all persons are necessarily subject, has the capacity to undermine a supporting wall of that society. As Lord Simon explained in *Attorney-General v Times Newspapers Ltd*, supra, at 316, the determination of disputes by an objective code of rules may inevitably be subject to human failings, but this method of determination must be clearly preferable to a system of dispute resolution based on force or private or public influence. There are hints of a similar concern on the part of Richmond P, also delivering judgment in the 1970s, when his Honour said:

> [n]o-one can question the extreme public importance of preserving an efficient and impartial sytem of justice in today's society which appears to be subject to the growing dangers of direct action in its various forms. It is to that end, and to that end alone, that the law of contempt exists (*Solicitor-General v Radio Avon Ltd*, supra, at 229).

A frequent contention of the Courts, though it inevitably appears a little contrived, is that the scandalising offence is not concerned with the dignity or hurt feelings of an individual Judge. Rather, the Courts assert, they are seeking to uphold respect for the system of judicial administration of justice. The scandalising jurisdiction thus aims to protect the functions rather than the feelings of the Judges.

Yet one should not readily discount the impact that an insult on the Judge's reputation might subconsciously have on a Judge's judicial performance. As Justice Frankfurter put it, with typical American openness: "[t]o deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels" (*Pennekamp v State of Florida* 328 US 331, 359). Expressing himself rather more cautiously, Parker CJ also contemplated that a Judge could be so influenced by an offending article that his or her impartiality ". . . might well be consciously, or even unconsciously, affected "(*R v Duffy* [1960] 2 QB 188 at 200 but cf the views of Hope JA in *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887 at 902).

Legitimate criticism of the Courts

The International Covenant on Civil and Political Rights 1966, which can be expected to play an increasingly important part in domestic judicial thinking (*Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266), recognises freedom of expression in Article 19, subject to any "necessary" legal restrictions for respect of the rights and reputations of others. Freedom of expression is, of course, also affirmed in s 14 of the New Zealand Bill of Rights Act 1990; but, by virtue of s 5, the freedom is subject to "such reasonable limits as can be demonstrably justified in a free and democratic society".

The scandalising restrictions probably do constitute such reasonable limits (see *Solicitor-General v Radio New Zealand*, supra, cf *R v Kopyto*). But, needless to say, the Courts have frequently reiterated the extremely high value that is to be placed on freedom of speech, and have expressed the desire to ensure that ". . . legitimate open discussion of matters of public concern is not

inhibited or stifled" (see eg *Solicitor-General v Radio New Zealand*, supra, at 58 per Eichelbaum CJ and Greig J; and *Solicitor-General v Radio Avon Ltd*, supra, per Richmond P at 230). Obviously, in a free society, criticism of the Courts is not only permissible but desirable;[8] the only requirement is for the critical comment to refrain from scurrilous abuse and imputations of partiality and impropriety.

(i) Comment that refrains from scurrilous abuse

At the broadest level it has been frequently reiterated, particularly by Australian Judges, that comments, even if "outspoken, mistaken, or wrong-headed" are immune from liability if they are directed to a definite public purpose (*Gallagher v Durack* (1983) 152 CLR 238 at 243; and *R v Dunrabin ex p Williams* [1935] 53 CLR 434 at 442; *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887 at 906). In contrast, comments of a gossip-column nature, designed more to titillate or entertain, are unprotected. In a similar contempt context, the same judicial thinking has been seen in *Solicitor-General v Radio New Zealand*, supra, at 58, when the Full Court of the New Zealand High Court announced it was satisfied disclosure of jury reactions to new evidence did not ". . . raise any legitimate matter of public concern, or otherwise advance the public good or the cause of justice". In the High Court's view the broadcasts achieved no more than "the titillation of the listening public".

In determining whether the comment is public-spirited or gossipy titillation the Courts seem to consider that the degree of invective is relevant. Comment can be free provided it is expressed "temperately" (*Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 337); it can be in bad taste provided it is kept "within the limits of reasonable courtesy" (*R v Commissioner of Police of the Metropolis ex p Blackburn* [1968] 2 QB 150 at 155-156). However, if the comment is couched in the "inflammatory" language of "abuse and invective" (*Attorney-General v Butler* [1953] NZLR 944 at 946), or of "sarcastic suggestion" (*R v Dunrabin ex p Williams*, supra, at 444), then it may well have transgressed the boundary, and have become "scurrilous abuse".

In *R v Kopyto*, supra, Judges of the Ontario Court of Appeal who were opposed to the existence or ambit of this head of the scandalising doctrine denied that the manner of expression could be pivotal. Cory JA argued that colourful, and perhaps disrespectful, language may be needed to ignite or inflame the interest of the public (at 226-227); Goodman JA stated that "[o]pinion which may be lawfully expressed in mild, polite, temperate or scholarly language does not become unlawful simply because it is expressed in crude, impolite, or acerbic words" (at 259). As Cory J A summed up, the Courts are not "fragile flowers that will wither in the heat of controversy" (at 227). Conversely, Dubin JA, who was more supportive of need for the offence in order to maintain public confidence in the administration of justice, dismissed the floral metaphor as "trite" (at 266).

Often, it can readily be conceded, unintelligent abuse will undermine the reputation of the speaker rather more than his or her target of the justice system (*Badry v DPP* [1982] 3 All ER 973 at 980 per Lord Hailsham LC). On the other hand, it does not require a profound knowledge of human history to appreciate the power of abuse and vitriol to move public opinion. When such abuse, by definition lacking any rational intellectual core, is calculated to undermine public confidence in the Courts, then, in exceptional cases, it might be appropriate to invoke a legal response.

(ii) Comment that refrains from inputing improper motives

Whilst many commentators and some Judges are strongly critical of the first head of scandalising the Court (ie of scurrilous abuse), there is a greater acceptance that imputations of impartiality or improper motive may need to be restricted (*Attorney-General v Blomfield* (1913) 33 NZLR 545 at 561, per Williams J, and at 582 per Chapman J). Not only are insinuations of partiality inherently insulting, but most importantly and seriously, as Cooke J noted in *Solicitor-General v Henderson*, supra, the suggestion of partiality does strike "at the very heart" of the system of administration of justice (at 6).

Accordingly, where proposals for reform have been mooted by such bodies as the Phillimore Committee and the Law Commission in the United Kingdom, and the Australian Law Reform Commission, it has been recommended that criticism of Judges should still be constrained by the introduction of a specific offence of imputing improper conduct to a Judge.[9] Cases in the last twenty-five years have invariably involved these imputations; (see, for example, *Re Wiseman* [1969] NZLR 55; *Solicitor-General v Radio Avon* [1978] 1 NZLR 225 and *Solicitor-General v Henderson* High Court, Christchurch Registry, M 32/85, 29 November 1985, Cook J) and, it is now likely, as author David Pannick claims, that, irrespective of the vehemence of the language used, there is little danger of a person being prosecuted for scandalising the Court, unless that person has alleged a lack of judicial impartiality. (Pannick, *Judges* (OUP, New York, 1987), 115, cited by Maxton, *Contempt of Court in New Zealand* (PhD thesis, Auckland University, 1990)).

Obviously enough, it is clearly acceptable for a commentator to suggest that a Judge has been swayed, either consciously or unconsciously by a particular consideration in making his or her judgment; but contempt does arise if it is suggested that a Judge has been affected by some personal bias, or has acted mala fide, or has failed to act with the impartiality required of judicial office: *Attorney-General of New South Wales v Mundey*, supra, at 911-912. The classic statement is that of Lord Atkin in *Ambard v Attorney-General for Trinidad and Tobago*, supra, where his Lordship pronounced:

> [t]he path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune (at 335).

In this case, a newspaper article, entitled "The Human Element", was critical of an apparent disparity in sentencing in two cases. It was held not to constitute contempt. Lord Atkin, upholding the liberty of any member of the public or the Press to criticise "temperately and fairly but

freely" any episode in the administration of justice, declared that there was no evidence that the appellant had acted with "untruth or malice or with the direct object of bringing the administration of justice into disrepute".

In the above observations, Lord Atkin alluded to two matters, to be discussed below, as to whether truth or justification is a defence, and as to whether the defendant must have mens rea. First, however, there needs to be a more detailed examination of the actus reus of the offence.

The need for a real risk that public confidence in the administration of justice will be undermined

In New Zealand, it is established law that a person cannot be convicted of contempt for scandalising the Court unless there is ". . . a real risk, as opposed to a remote possibility" that the statement made would "undermine public confidence in the administration of justice" (*Solicitor-General v Radio Avon* at 234). Attention must therefore be focused on the effects of the words used; and, while empirical proof of the risk will be intrinsically difficult to obtain or assess, the Court simply cannot avoid examination of the risk issue.

Under the first head of the scandalising jurisdiction it has already been seen that a vilifying, abusive manner of expression might be considered to pose the risk of undermining public confidence, whereas rational argument might not. However, the manner of speech is probably less relevant wherein imputations of impartiality are made. With both heads of jurisdiction, though, it can be said that the factors which may be taken into account by the Judges in their assessment of risk would include the following: the statements published, the timing of the publication, the size of the audience reached, and the likely nature, impact and duration of their influence (*Solicitor-General v Radio New Zealand*, supra, at 56). Some of these matters will now be considered in turn.

(i) Size of audience:

The wider the audience, the greater the associated risk of undermining confidence of the public must be. For instance a statement imputing partiality may not be contempt if it were made privately to a dozen people, but it could become so if that statement to those people was subsequently televised (*Attorney-General of New South Wales v Mundey*, supra, at 916).

In *Solicitor-General v Radio Avon*, supra, the Court of Appeal was satisfied that the radio broadcasting of an imputation of judicial partiality to a likely audience of 50,000 people did carry a real risk that public confidence would be undermined (at 234); and in *Solicitor-General v Henderson*, supra, the High Court took into account the "substantial" audience of a newly-established Sunday newspaper (at 9).

(ii) Impact of statements:

In considering the impact of a statement on public thinking, some regard must be had to ". . . the context of the times when it is published" (*Solicitor-General v Henderson*, supra, at 9). In the early Privy Council opinion in *McLeod v St Aubyn* [1899] AC 549, delivered at the end of the 19th century, their Lordships referred, in a regrettably racial way, to the contempt jurisdiction allegedly being needed more for some populations than for others (at 561). At the end of the 20th century it might certainly be assumed that the population of a Western democracy was of sufficient intelligence and sophistication to have their confidence in the justice system unperturbed by comments of a scurrilous nature. For instance, in *R v Kopyto*, supra, Houlden JA argued that the Canadian citizenry was not so gullible as to lose confidence in the Canadian judicial system because of criticism (at 255). Similarly, in *Gallagher v Durack*, supra, the majority of the High Court, whilst finding contempt in the particular case, recognised that "in many cases the good sense of the community will be a sufficient safeguard" (at 243).

In the New Zealand context, however, Eichelbaum CJ and Greig J have argued that in earlier more stable periods, where there was a "strong general respect for authority, conventions and institutions, the justice system could more readily withstand the occasional aberration . . ." (*Solicitor-General v Radio New Zealand*, supra, at 56). However, from their Honours' examination of the judgment of the Court of Appeal in *Solicitor-General v Radio Avon*, delivered in 1977, the two Judges discerned an importance being placed on preservation of the justice system, given the "growing forces to which the system was subjected". The Full Court of the High Court held that those observations applied "even more strongly today" (ibid, at 53).

Similar judicial sentiments were evident in the judgment of Cook J in *Solicitor-General v Henderson*, supra. In that case his Honour felt that whilst a majority of readers would reject an insinuation that partiality was shown to an accused because of his Catholic faith, other readers would accept the allegation as plausible in ". . . this age when so many are ready to challenge tradition and the established order and view authority with disrespect if not distrust . . ." (at 7). Additionally, it was pointed out by Cook J that in contrast to earlier periods of history where New Zealand enjoyed a smaller population, it was not now possible for an individual Judge to be a well-known personage — the inference being that an attack on a Judge's partiality was unlikely to be balanced by a reader's own knowledge of the Judge.

(iii) Nature of publication:

Miller has argued that other things being equal one could expect statements in the popular press or television to be more likely to ground liability than statements in the "quality" Press, specialist periodicals, or even books. (Miller, *Contempt of Court*, Clarendon Press, 1989, 377.) In *Attorney-General v Blomfield*, supra, for instance, Williams J distinguished the publication of a cartoon in a "light and slightly flippant periodical" with the publication of similar imputations "in a serious way in a daily newspaper published in Auckland" (at 562.) In his Honour's opinion, the latter publication would be far more likely to have a detrimental effect upon the administration of justice.

Equally the identity of the person making the statement may be influential (*R v Kopyto*, supra, per Goodman JA at 264). If the maker of the statement lacks any credibility, then it is hard to see how public confidence could be undermined. A Cabinet Minister's public comments (eg *Re Ouellet (Nos 1 and 2)* (1976) 72 DLR 95) must thus have a greater effect on public thinking than, say, a statement by an unknown person on a soap-box in Cathedral Square.

Cases from both New Zealand and overseas have therefore tended to involve either the media, public figures (eg Trade Union leaders), or professional persons such as solicitors.

Intention

Following the decision of the Court of Appeal in *Solicitor-General v Radio Avon*, supra, it must be accepted that it is unnecessary for the prosecution to establish that the defendant intended to undermine public confidence in the Courts (at 231-233). In New Zealand the mens rea requirement will be satisfied by proof that the statements in issue were knowingly published; and consistently with observations of Lord Diplock in *Attorney-General v Times Newspapers Ltd*, supra at 309, the offence of scandalising is committed when there is "conduct which is calculated to undermine public confidence in the proper functioning of the Courts". The test is objective, and "what is required is judicial satisfaction that the conduct infringes the principles" (*Solicitor-General v Radio New Zealand*, supra, at 57).

In some other jurisdictions, it can be noted, the usual mens rea principle is required.

Defences of fair comment or justification

When partiality or improper motives on the part of the Judge is suggested, the question arises as to whether a defence of fair comment or justification is available.

Despite Lord Atkin's intimation in *Ambard v Attorney-General for Trinidad and Tobago* that imputations of improper motives would necessarily constitute contempt, the New Zealand Court of Appeal, drawing on overseas dicta, has indicated that a defence of *fair comment*, now known as "honest opinion" under s 9 of the Defamation Act 1992, is probably available (*Solicitor-General v Radio Avon*, supra, at 231, and most especially at 234). In England, the defence of fair comment in this area of law was assumed to be part of English law by Salmon LJ and his colleagues in their Report: *The Law of Contempt as it affects Tribunals of Inquiry.* (See Borrie and Lowe's *Law of Contempt* (2d ed, Butterworths, 1983), 241.)

Assuming that a defence of this kind is available the Courts would be interested in how genuine the opinion was;[10] and the Court of Appeal has hinted that good faith and honesty provides a protective shield against liability. In *Re Wiseman* [1969] NZLR 55 the Court of Appeal asserted that "[n]o wrong is committed by any member of the public who exercises the ordinary right of criticism in good faith, in private or public, public acts done in the seat of justice" (at 58). Similarly, when the Court of Appeal came in the *Radio Avon* case to consider the earlier judgments delivered in *Attorney-General v Blomfield*, it held that the cartoons probably fell within the scope of "honest and reasonable criticism or comment" (supra, at 238).

However, in *Solicitor-General v Radio Avon* the Court of Appeal was more hesitant as to whether the defence of *justification*, now known as "truth" under s 8 of the Defamation Act 1992, would be available. According to Richmond P there were greater difficulties with that defence, though later in his judgment he characterised the defence as "possible" (supra, at 234). In *Attorney-General v Blomfield* Williams J had also held that a person could not bring forward evidence in justification, though in his Honour's opinion it should ideally have been possible to do so (supra, at 563).

The difficulties associated with the defence of justification include a concern that persons may be encouraged to dredge up incidents or statements from the Judge's past that are irrelevant to his or her capacity to administer justice, but nevertheless damage public confidence. As well, the defence would necessarily allow the trial to revolve around the impugned Judge's conduct, imposing an invidious task on the trial judge. Moreover, given the assumed public interest in the maintenance of confidence in the system of justice, the defence is not necessarily "logically relevant". (The point made by Burmester, "Scandalising the Judges" (1985) 15 *Melbourne University Law Review*, 313 at 337.)

Where there is genuine concern about a Judge's conduct, then complaints can be presently directed through private channels such as the Attorney-General, an MP, or the Law Society. Appropriate action can subsequently be taken at an official level, and an aggrieved person is not without redress. Nevertheless, a more formal and specific mechanism for making complaints about Judges does seem desirable; and there is obviously much to be said for the establishment of a Judicial Commission, as recommended by the Royal Commission on the Courts in 1978. (*Royal Commission on the Courts Report, 1978* (Government Printer, 1978), 198. See also the comments of Associate Professor Bill Hodge broadcast on National Radio: *Listener,* October 15, 1994, 85.)

Reform

In 1913, Denniston J described the scandalising jurisdiction as being "wholly inconsistent with the trend of modern ideas" (*Attorney-General v Blomfield*, supra, at 574). Since that time a number of academic commentators in New Zealand and abroad have urged that the offence should be abolished. (For example, see Maxton, supra, and Walker, "Scandalising in the Eighties" (1985) 101 LQR 359.) It is said that the offence is too uncertain in its ambit, too arbitrary in its application to justify infringement of the fundamental right of freedom of speech, and that the arguments supporting its retention are too speculative.

Yet, it is significant that after examination of the law and policy considerations neither the Phillimore Committee in the United Kingdom, nor the Law Reform Commission of Canada, nor the Australian Law Reform Commission recommended the outright abolition of the offence. All the bodies preferred reform, and the Australian Law Reform Commission argued that the "bulk of academic commentary" favoured reform rather than abolition. (Australian Law Reform Commission Report No 35 *Contempt* (1987), 263; and see, for example, Borrie and Lowe's *Law of Contempt*, n 14, at 246.)

A major argument in favour of retention of the scandalising jurisdiction, has been the assumed inability of Judges to reply to criticism voiced against them. By convention, Judges cannot enter the fighting arena or bid in the marketplace of ideas, for that would imperil their appearance of impartiality. Similarly their unique position would seem to disable them from instituting defamation

proceedings. Unlike any other public figures, they are effectively unable to refute any damaging allegations; and, as Justice Kirby puts it, they are "a shackled combatant" in media attacks upon them. ("Judges under Attack" [1994] NZLJ 365 at 366.)

It might be thought, of course, that the high reputation of Judges would be a sufficient safeguard against the undermining of public confidence; but here, regard must be not only to the prevailing public suspicion and distrust of authority, as identified by earlier New Zealand Judges, but also to the nature and influence of today's popular media in shaping public views and consciousness. In the words of a former New York editor there has been "the corruption of journalism by the culture of entertainment . . . tuned to emotional stimulation rather than information" (O'Neill, "Who Cares About the Truth", Nieman Reports, Spring 1994, 11 and 14). This "disease of entertainment", as Justice Kirby bitterly complains, means that news and comment are often blended into a general mix of a superficial personalisation of issues. ([1994] NZLJ 365 at 366.)

These criticism will strike a responsive chord with many New Zealanders. When, for example, a prominent former New Zealand television news executive can admit that news is "not analysis" but is rather a "show" with "pace and style";[11] the prospect of the New Zealand public becoming well-informed and acquiring a balanced perspective on the justice system seems remote. Morever, as Cooke J noted in *Solicitor-General v Henderson*, (supra at 8), proceedings of the Court in newspaper are neither as widely reported nor read as at the turn of the century, when the Court may have taken a more liberal view of contempt, assuming that the then full reportage of the Courts pages was as widely and keenly read as the sports pages (see *Attorney-General v Blomfield* at 562). Additionally, the ethos of the media in the modern era is such that a breach of the boundaries of legitimate comment by one member or sector of the media would put pressure on others to follow suit (*Solicitor-General v Radio New Zealand*, supra at 56). There is what Justice Kirby calls the "pack mentality". ([1994] NZLJ 365 at 366.)

Delivering judgment in different social conditions, Williams J suggested that scandalising the Court resembled ". . . some antique weapon which will probably do more harm to those who use it than to those against whom it is used" (*Attorney-General v Blomfield* (1913) 23 NZLR 545 at 563). Today, though, the general contempt jurisdiction can be regarded as ". . . an even more significant branch of the law . . . than it has been historically". (Editorial comment of P J Downey "The legal system at risk" [1994] NZLJ 357 at 358.) Thus rather than being discarded as obsolete, the scandalising weapon should, in this writer's view, merely be treated with the utmost caution and kept securely locked away. In the meantime, we must not forget the whereabouts of the key. □

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1 See *Badry v DPP of Mauritius* [1982] 3 All ER 973 at 979 per Lord Hailsham LC. When a QC at the Bar, the Lord Chancellor had himself been the subject of a scandalising action: *R v Commissioner of Police of the Metropolis ex p Blackburn (No 2)* [1968] 2 QB 150.

2 See the editorial comment in *The National Business Review*, October 14, 1994, 15.

3 The comment, made under the cloak of Parliamentary privilege, by the Hon P Goff MP, was described as "unforgivable" by Mr J Miles, the President of the New Zealand Bar Association. It was characterised as "ludicrous" and "objectionable" by the Vice-President of the New Zealand Law Society, Mr P Salmon QC: *The Christchurch Press* 2 September 1994, 3.

4 The comment to this effect by the Hon M Cullen MP was described as inaccurate by every lawyer interviewed by the *National Business Review:* September 16, 1994, 21.

5 See, for instance, the comments of a range of persons interviewed in "Should the Judiciary be immune from criticism?": *Metro,* October 1994, 154.

6 See the article on and interview of Holland J in *The Christchurch Press,* 12 November 1994, Weekend p 5.

7 For discussion of the recent case-law, see Burrows, "Media Law" [1994] *NZ Recent Law Review*, 280, 287-289. More generally, see Burrows *Media Law* (OUP, 1990), 253-285.

8 See, for example, Justice Kirby's encouragement to informative, critical discussion of the judiciary: Kirby "Judges under Attack" [1994] NZLJ 365 at 366.

9 Phillimore Committee Report (1974) Cmnd 5794 para 68; Law Commission's Report No 96, *Offences Relating to Interference with the Course of Justice* (1979) paras 67-68; and the Australian Law Reform Commission Report No 35 *Contempt* (1987) 266-267.

10 Curiously, though, s 10(3) of the Defamation Act 1992 provides that, under the Act, a defence of honest opinion shall not fail because the defendant was motivated by malice.

11 See the comments of Marcia Russell in "Teenage Mutant Ninja News. How Television Appeals to the Lowest Common Denominator", *Metro*, June 1990, 56. See also Atkinson, "Hey Martha! The Reconstruction of One Network News" *Metro*, April 1994, 94-101.

Law and justice

Science has challenged common sense; one theory of science holds that we can never have knowledge, as opposed to mere opinions, about morality. Anthropologists have shown how various are the customs of mankind: the dominant tradition in modern anthropology has held that those customs are entirely the product of culture, and so we can conclude that man has no nature apart from his culture. Philosophers have sought to find a rational basis for moral judgments: the dominant tradition in modern philosophy asserts that no rational foundation can be given for any such judgment . . . Many people have persuaded themselves that no law has any foundation in a widely shared sense of justice; each is but the arbitrary enactment of the politically powerful. This is called "legal realism," but it strikes me as utterly unrealistic. Many people have persuaded themselves that children will be harmed if they are told right from wrong; instead they should be encouraged to discuss the merits of moral alternatives. This is called "values clarification", but I think it a recipe for confusion rather than clarity. Many people have persuaded themselves that it is wrong to judge the customs of another society since there are no standards apart from custom on which such judgments can rest; presumably they would oppose infanticide only if it involved their own child. This is sometimes called tolerance; I think a better name would be barbarism.

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The Moral Sense (Free Press, 1993, viii)

A distinction between illegality and precluding a party from relying upon a plea of illegality

By John Timmins, Barrister of Auckland

Illegal contracts are unenforceable unless they are validated under the Illegal Contracts Act 1970. But is there a principle to the effect that a party can be precluded from relying upon a plea of illegality? John Timmins considers this question with particular reference to the Howick Parklands *case and two commentaries relating to it previously published in the* New Zealand Law Journal.

The decision in *Howick Parklands Building Company Limited v Howick Parklands Limited* [1993] 1 NZLR 749, has attracted the attention of academic commentators. Jeremy Finn, a Senior Lecturer in Law at the University of Canterbury, was critical of the judgment in an article entitled, "Justice Not According to Law", published at [1993] NZLJ 331. Another academic, Yvonne van Roy, a Senior Lecturer in Commercial Law at Victoria University of Wellington, continued the attack in a more recent article called "The Enforceability of Contracts Which are Illegal Under the Commerce Act 1986" published at [1994] NZLJ 181.

Both commentators were highly critical of an alleged finding by Thomas J that the Courts have a residual power to enforce a contract which is illegal, even though the statute which creates the illegality clearly excludes the operation of the Illegal Contracts Act. No one could cavil with that criticism. However, it is contended in this article that this is not what Thomas J in fact held.

The relevant findings

The facts of the *Howick Parklands* case are summarised in the articles referred to. They are even more fully set out in the judgment itself. For present purposes it will suffice to say that the parties had entered into a marketing agreement relating to the development of a housing estate. During the course of the agreement the plaintiff's solicitors advised the plaintiff that the agreement was in all probability illegal under the Real Estate Agents Act 1976 and the Commerce Act 1986. This advice was made known to the defendants and was duly confirmed by their own solicitors. Various suggestions were made by the plaintiff's solicitors as to how the arrangement between the parties could be restructured so as to avoid contravening the Acts in question. The defendants' agent, however, declined to entertain any re-arrangement. The defendants continued to insist upon adherence to the suspect agreement and to take advantage of it in the knowledge or belief that it could or might not be able to be endorsed against them (at p 766).

Thomas J found that, for various reasons, the defendants' representative set about the task of "engineering" an "agreed termination" in a manner which the Judge clearly regarded as being unconscionable. He held that the defendants had in fact repudiated the agreement. At the trial the defendants contended, inter alia, that the contract contravened ss 27, 28 and 36 of the Commerce Act. Section 89(5) of that Act provides that nothing in the Illegal Contracts Act applies to any contract entered into in contravention of the Commerce Act.

The Judge dealt with a number of issues, only one of which was the Court's power to preclude a defendant from relying upon the plea that the agreement was illegal under the Commerce Act. It takes up but a small proportion of the judgment and is put forward as an alternative to a number of other findings, one of which is that the agreement was not in fact illegal.

This note is restricted to the issue which is most in need of clarification, and it is central to Finn and van Roy's various criticisms of *Howick Parklands.*

Precluding a defendant from relying on illegality

It is necessary to review the interpretation which Finn and van Roy seem to have adopted. Finn states, for example, that this "new principle arrogating to the Court the power to enforce contracts which Parliament has declared to be void cannot be sanctioned". Van Roy believes that it is unfortunate that the Court considered that it was necessary to "find a residual power and to override the express provisions of the Illegal Contracts Act". Such strong criticism should be clearly based fairly and squarely on unequivocal findings in the judgment. But, on a fair reading of the judgment it becomes plain that neither assertion is correct.

The most helpful approach to the judgment is to recognise that it is necessary to distinguish two discrete issues. The first is whether the Court can enforce an illegal contract (apart from rectification under the Illegal Contracts Act) notwithstanding the illegality. The second issue is whether

a defendant can be precluded from relying upon a plea of illegality. Finn and van Roy concluded that the *Howick Parklands* judgment is about the first issue. Thomas J was clearly addressing the second issue.

Thus, Thomas J held that the defendants were precluded from relying upon the plea that the contract was illegal. Such a finding did not require him to hold that the agreement was in fact illegal. To use the Judge's own language (at p 765), the defendants were denied "*the benefit of the finding* that the contract is illegal and void". (The Judge dealt elsewhere in his judgment (at p 762) with the Court's obligation to consider a question of illegality when it is drawn to the Court's attention). (Emphasis added).

Exercise of residual power to avoid unconscionable result

To arrive at their interpretation Finn and van Roy appear to have relied upon an isolated statement in the judgment without referring to the substance of Thomas J's full reasoning. In itself, the phrase, "a residual power to enforce a contract" could lead a casual reader to conclude that he has held that the Court has a residual power to enforce an illegal contract (apart from the Illegal Contracts Act). But the Judge at once goes on to stipulate that this may be done "where it would be inequitable or unconscionable in the circumstances of the particular case to allow the defendants the *benefit of a finding that the contract is illegal and void*". (Emphasis added). These are the key words; denying the defendant the benefit of a finding that the contract is illegal. If, of course, a defendant is precluded from relying upon a plea of illegality, there is in fact no finding that the contract is illegal and it thus remains enforceable. That is the seminal point of Thomas J's decision on this issue.

There are many other expressions which confirm this interpretation. For example, the Judge emphasises (at p 766) that the principle is not the same principle as that recognised in the Illegal Contracts Act in that it "*does not seek to validate or repair contractual obligations otherwise rendered illegal*". He again states (at p 766):

> . . . it should be stressed that it is not the same principle as that underlying the Act; it is much more restricted and is *closely related to the concept of estoppel.* . . . The principle I am here referring to is designed to *preclude* an unworthy defendant from relying upon or benefiting from the alleged illegality in the first place. (Emphasis added).

It is to be acknowledged that, if a defendant is prevented from relying upon the plea of illegality, and the contract is *in fact* illegal, the effect of the two interpretations is no different; an illegal contract is enforced by the Court. But this is not to say that the principle or residual power Thomas J speaks of is a residual power to enforce an illegal contract. Rather, it is a residual power to preclude the defendant from relying upon the plea that the contract is illegal, thus denying the defendant the benefit of a finding of illegality. Even if the plaintiff conceded that the contract was illegal, the residual power is still not a power for the Court to enforce an illegal contract. It remains a power to deny the defendant the benefit of a finding to that effect.

Judicial technique employed

Although the construction of a judgment should not turn upon the order in which the Judge deals with various points, the interpretation adopted by Finn and van Roy could possibly have been avoided if Thomas J had reversed the order in which he dealt with the question of illegality and the question whether the defendants could rely upon their plea of illegality. But the Judge makes a series of findings adverse to the defendants' claim, moving from one to the other on the "assumption" that the prior finding is in error. This is a fairly typical judicial technique at first instance.

Thus, Thomas J contemplates that he may have been wrong in reaching his previous finding on no less than four occasions. Finally, he deals with the question whether the defendants can rely upon their plea of illegality on the "assumption" that he is wrong in holding that no breach of the Commerce Act had been "established". From the perspective of academic critics it would no doubt have been better if the Judge had first held that, in the circumstances of the case, the defendants were precluded from relying on their plea of illegality. It would then have been unnecessary for him to decide whether the contract was illegal or not. However, a Judge is more concerned with ensuring that the parties receive a clear and comprehensive result.

Sources of the principle applied

The substantive support for this article's contention, however, is to be found in Thomas J's attempt to extract the principle which he applied from three different "sources". Each of these sources is consistent with the interpretation here advanced. None would support the view that a contract may be enforced by the Court, notwithstanding that it has been held to be illegal.

The first "source" is stated by Thomas J (at p 766) to begin with the simple aspiration that the Courts should never willingly countenance the prospect of being used as the vehicle for injustice. The Judge suggests that Justice Frankfurter's words cannot be improved upon to make the point. "Is there", that Justice once asked, "any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?" (*United States v Bethlehem Steel Corporation* 3.15 US 289 (1942) at p 326). Thomas J suggests that if statements of this kind are not meant to be dismissed as mere rhetoric or sentiment, they must be given practical recognition in the day-to-day life of the law, and that to do that in the instant case meant that the Court should not be prepared to condone the misuse or abuse of a common law rule. Nothing in this "source" suggests that the Court can enforce a contract which has been held to be illegal. Rather, it goes directly to the notion of *precluding* the defendant from using the Court as an instrument of inequity or a vehicle for injustice.

The second "source" is the Court's existing ability in certain circumstances to weigh up the parties' comparative merits and grant or refuse relief accordingly. Situations where the parties are not in pari delicto, and the statute in issue has been enacted for the benefit of the plaintiff, have been recognised in the past in this regard. (See *Anson's Law of Contract* (26th ed, 1984) at p 351). In effect, the defendant is *prevented* from relying upon the alleged illegality by reason of his or her wrongdoing.

The third "source" is explicitly linked to the concept of an estoppel. Thomas J refers (at p 767) to equitable estoppel in its broader sense as the basis to support the Court's refusal to lend its aid to a defendant where in the circumstances it would be unconscionable to confer on the defendant the "advantage arising *from a finding* that the contract is illegal". (Emphasis added). The Judge does not, of course, assert that the defendants have any "rights" which they can be properly "estopped from raising" (ibid), but as the issue of illegality provides the defendants with what is in effect a "defence", they are at least in a position which is analogous to a person seeking to rely upon "rights".

The Judge then said (at p 768):

> Howick Parklands has raised and pursued the issue, and it does not seem to me to offend against principle that it should, in the circumstances I have discussed, be *precluded from relying upon and having the advantage of the defence*". (Emphasis added).

"It would", he continued (at p 768), "be inequitable and unjust to allow it [the defendant] to do so and, in doing so, turn its back upon a state of affairs or assumption which created in Liberty Homes *an expectation that the issue of illegality would never be raised*". (Emphasis added).

Again, it cannot be suggested that this "source" justifies the interpretation of the judgment which Finn and van Roy seem to have adopted. How can the concept of estoppel go to the question of whether the Court can enforce a contract which has been found to be illegal? It clearly goes to the question whether a defendant can be *precluded* from relying upon a plea that a contract is illegal.

Conclusion

Therefore, when viewed objectively, Thomas J's judgment cannot and does not mean what Finn and van Roy have claimed. If there is to be criticism of the judgment then it should be directed at the question whether a defendant can be precluded from relying upon the plea that the contract is illegal. But in the context of this increasingly New Zealand approach to fairness taken by our Courts, it is hard to see how such criticism could be properly mounted.

A R Galbraith QC adverted to this case in an article published at [1993] NZLJ 320. He had this to say (at p 322):

> It was not suggested that any of these doctrines could be directly applied or that any of them should be extended. Approached as precedents, they could all be readily distinguished. Rather, the doctrines are referred to in the judgment as the "sources" for a principle which, at the end of the day, accords with commonsense, achieves justice between the parties, and is consonant with correct perceptions of justice.

There can be little doubt that the principle articulated by Thomas J enabled the Court to avoid a conclusion which would have been manifestly unjust. (Finn concedes that the merits of the case rested with the plaintiff). Surely such a principle provides a useful residual power in the armoury of the law. This is particularly so where it is held (as was the case here; see the Judge's discussion of the relevant market to take for the purposes of the Act (at p 769) that the agreement did not run counter to the objectives of the Commerce Act, and that the plea of illegality, if upheld, would have benefited a party which, on the Judge's findings, had acted unconscionably. The same principle would no doubt apply if the defendants had been guilty of fraud or undue duress in inducing the contract. Where such circumstances exist, one can understand the Judge's reluctance to accept that a doctrine founded in public policy can be used in a way which public policy could never have contemplated or condoned. □

TV in Court

Citing the OJ Simpson media circus south of the border, Canada's chief justices have re-affirmed their traditional opposition to allowing television cameras to film trials.

A large majority of the Canadian Judicial Council, composed of the chief justices of the federally-appointed courts, concluded at their September annual meeting in Regina that televising court proceedings "would not be in the best interests of the administration of justice," particularly at the trial level where witnesses and jurors are involved.

The council's position, which is not binding on individual courts, was first adopted in 1983.

Jeannie Thomas, executive director of the CJC, said the impact of the televised proceedings in the Simpson case, as well as the recent decision of the Judicial Conference of the United States to bar TV in the federal court system, were "significant factors" in the council's decision.

But not all courts are following the CJC's lead.

In response to a request from the CBC, the judges of the Federal Court of Appeal voted in September to launch a two-year pilot project, starting Jan 1, 1995, allowing televised proceedings in the appeal court pursuant to yet-to-be-announced guidelines established by the court.

The Supreme Court of Canada also allows television and radio coverage of selected appeals on an experimental basis.

In the United States, 47 states allow some form of television coverage. But US federal judges voted in September not to renew a three-year pilot project permitting coverage of some federal civil trials.

Cristin Schmitz
The Lawyers Weekly (Canada)
14 October 1994

Costs in criminal cases

By John Rowan, Barrister of Wanganui

In this article the author points out the difficulties in the way of claiming costs on behalf of a successful defendant in a criminal case. In particular he considers the situation that now exists in respect of the judgment of the Court of Appeal in Harrington v R. *The judgment was delivered on 30 June 1994. In that case it was held that at least in a case of a legally aided appellant where there has been no personal contribution costs cannot be obtained against the Crown for the benefit of the legal services bought. After considering the approaches in England and Australia the author considers that the decision in* Harrington v R *should be reconsidered; and that in any event the rates of remuneration as provided in the Regulations are well out of date.*

Introduction

Any defendant in criminal proceedings who has been successful in the sense that the proceedings have been dismissed or he or she has been acquitted faces a real obstacle course in obtaining costs against the Crown. There is first the hurdle of the Costs in Criminal Cases Act 1967. Next there is the water jump of persuading the Judge that the costs to be awarded should exceed the totally inadequate scales in the Regulations or the exercise of applying is completely uneconomic. At the same time it needs to be kept in mind that there is no point in applying if the accused is on legal aid unless he or she (or others) are contributing to the costs. In such case an application is still open but anything awarded may still be subject to attack by a Registrar applying the provisions of s 14 of the Legal Services Act 1991 after being notified of a change in financial circumstances under s 13. All this is unnecessarily difficult and needs comprehensive review followed by legislative change which should be initiated by the Law Commission.

The Costs in Criminal Cases Act 1967

In its report which preceded the Act the Committee on Costs in Criminal Cases (1966) said (at para 30):

> Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences.

Alongside that quotation should be placed s 25(e) of the New Zealand Bill of Rights Act which reminds us that everyone who is charged with an offence, has in relation to the determination of the charge as one of her or his *minimum* rights:

> (e) the right to be presumed innocent until proved guilty according to law.

Statistics of charges withdrawn or dismissed in New Zealand make worrisome reading. In the publication *Conviction and Sentencing of Offenders In New Zealand 1982 to 1991* (Department of Justice, November 1992) conviction is the outcome in prosecutions for all offences except traffic offences for around 70% of all charges.[1] In 1991 42,896 cases (out of a total of 155,782) or 27.5% were in the "not proved" category which includes charges withdrawn, dismissed, discharged, struck out, not proceeded with, or acquitted.

The writer has been supplied with *Criminal Summary Defended Hearing Management Information for the Central Region for the 12 months ended 31.12.93* which shows that for all District Courts in the Central region of the North Island of a total of 27,048 prosecutions where pleas of not guilty were entered convictions resulted in only 75% of the cases. A total of 25% were dismissed or withdrawn.

Such a high level of charges withdrawn or dismissed surely not only justifies the provision of an adequate legal aid system but also demonstrates the need for a much more accountable prosecution service. As involvement with civil proceedings should teach us the threat of awards of realistic costs against unsuccessful parties is a real means of accountability.

While s 5(3) of the Costs in Criminal Cases Act 1967 says that there shall be no presumption for or against the granting of costs in any case and this approach is echoed in judgments[2] the reality experienced by practitioners is that they need to establish that the prosecution is at fault in one or more of the respects set out in s 5(2)(a) to (d) of the Act and that the dismissal of the charge was not because of a technical point (s 5(2)(e)) or defence evidence (s 5(2)(f)) and that there was no disentitling behaviour (s 5(2)(g)).

Applications for costs are treated almost personally by the Police and met by determined submissions.[3] The Courts in approaching them are very conservative.[4] Even if prosecution failure entitling an award under s 5(2)(a) to (d) is established a finding of disentitling behaviour under s 5(2)(g) can be used to reduce quantum.[5] As a further dampener the Court may only award the amount in the Regulations.[6].

This niggardly approach needs to be contrasted with that in England and Wales. There, as provided in the *Practice Note* [1991] 2 All ER 924, costs are normally granted unless the defendant is somehow to blame or he or she is successful only on a technicality. If the defendant is on legal aid the approach of the Court is normally to order repayment of

contributions. In Australia a majority of the High Court in *Latoudis v Casey* (1990) 170 CLR 534 has held that in ordinary circumstances an order for costs should be made in favour of a defendant against whom a prosecution has failed. The reasonableness of the prosecution's conduct in instituting the proceedings is not a basis for refusing an order. However, the conduct of the defendant may be relevant.

Comment on *Davidson & Ors v R*[7] *(Application for costs by Four Former Workers at the Christchurch Civil Creche)*

This comprehensively argued application[8] is an interesting example of both an unsuccessful application under the Act, in circumstances where an outside observer might have thought it had a reasonable chance of success, and an early encounter potentially involving the question of entitlement of legally aided persons to costs.

Following their discharge four former workers at the Christchurch Civic Creche sought costs. They had each been committed to the High Court for trial following depositions (except for one charge of doing an indecent act in a public place laid against one of the four). A month after committal one accused was discharged by the High Court after the Crown had advised the Court that the complainant was no longer available to give evidence. Nearly a month later the remaining three were similarly discharged for a combination of the following reasons:

1 The evidence was of insufficient weight to justify a trial.
2 The potential for prejudice was so great that they might have been convicted for the wrong reasons.
3 The unavoidable delay in their trial may result in hardship to the seven year old child complainant who would have to give evidence twice and to the Accused who would have had to wait until the trial of Peter Ellis was completed.

The four applicants were each granted legal aid subject to their paying contributions ranging from $1,250.00 to $12,500.00 and totalling $25,250.00. The District Legal Services Subcommittee fixed remuneration for the applicants' Counsel up to the end of depositions pursuant to s 11(3) of the Legal Services Act 1991 in the sum of $43,220.00. Later the Committee approved the applicants' Counsel charging a further $40,000. This approval was on the basis that the applicants obtained a significant order for costs against the Police or received an indemnity from their former employer the Christchurch City Council.

For the preliminary applications in the High Court which resulted in the applicants' discharge a total sum of $14,909.00 was sought by the applicants' Counsel. In respect of that the District Legal Services Sub-committee paid $11,446.00 but they also approved Counsel charging the balance of $3,463.00 to the applicants. There was also some legal work not within the grant of aid totalling $1,575.00 in respect of which the applicants agreed to be liable for $393.75 each. In summary total legal fees payable were $101,074.00 of which $55,275.00 was met by the legal aid fund. The balance in varying proportions remained a liability of the applicants.

The application was strongly contested by the Crown and in summary the principal objections were:

1 A co-worker, Ellis, had now been convicted of acts of sexual abuse of children who attended the creche.
2 The principal child witness against three of the applicants was accepted by the jury at Ellis' trial as essentially truthful, though his evidence was not accepted as sufficient in respect of one incident.
3 The applicants' evidence at the trial of Ellis to the effect that Ellis did not have the opportunity to commit the offences was rejected by the jury.

Williamson J approached the matter in the standard way, stating the general principles and then considering the criteria in s 5 of the Costs in Criminal Cases Act 1967. He came to the conclusion that the prosecution acted in good faith (s 5(2)(a)). Drawing in particular on his knowledge obtained at presiding over the trial of Ellis and after viewing some additional videotapes not shown at that trial but relating particularly to one worker (who deserved separate consideration) he concluded that the prosecution did have sufficient evidence to commence the proceedings (s 5(2)(b)). He did not uphold defence submissions relating to the proper conduct of the investigation (s 5(2)(c) and (d)).

As to the disentitling criteria it was common ground that s 5(2)(e) (technical defence) did not apply and that there was nothing in the applicants' behaviour to disentitle them (s 5(2)(g)). The Judge held that s 5(2)(e) (defence cross examination and evidence) was not strictly applicable.

However in the end Williamson J after eschewing any invitation to conduct an enquiry into the whole case and stressing the totally opposite starting points of the participants; exercised his discretion against the applicants. He said simply:

> As has been said in a number of the reported decisions the answers to the two questions and to the seven criteria do not finally dispose of the matter. The Judge must ultimately exercise his or her discretion. I do so having regard to the combined effect of all the matters which I have heard and observed. After weighing them carefully I am of the view that this is not a case for an award of costs.

This conclusion avoided the need for him to make a decision on the difficult questions of whether at law such legally aided applicants were entitled to costs and if so on what basis.

While it may appear presumptuous to criticise this decision where the Judge had such a close familiarity with the factual background, an outsider is entitled to ask "where is the level playing field, and what of the presumption of innocence?" The applicants faced serious charges. They were discharged prior to trial. The applicants did not succeed in their endeavours to find fault with the prosecution but there was no suggestion of any conduct disentitling. There is no criticism of the quantum of their solicitors' costs which in any event had the fiat of the District Legal Services Sub-Committee. It should have been possible to award them costs without undermining the verdict in the Ellis trial, particularly given the Judge's comment that this application related to costs and he was not prepared to embark on a wider enquiry.

The real danger of this decision is the result; that it reinforces in the

public mind that to succeed in such an application the defence must find some fault with the prosecution. This ignores the so important principle that the prosecution always wins when it presents the case on the part of the community. Costs should be seen as compensatory not punitive: see *Latoudis v Casey* (1990) 170 CLR 534.

Costs in favour of legally aided defendants and *Harrington v R*

In *Davidson & Others v R* Williamson J said at p 16:

> If an applicant has been in receipt of a grant of legal aid for trial, then it would not usually be appropriate to make any award for costs under the Costs in Criminal Cases Act 1967. (See *R v Rosson* 724/90 Dunedin Registry, Holland J, 19th March 1991 and *R v Accused* 7 CRNZ 686 at 693). A number of issues may arise in relation to legal aid such as the effect which receipt of legal aid should have upon the appropriateness of any award; the party to be subject to any award (s 7(2)); the varying levels of remuneration under the Legal Services Act 1991; whether a conditional agreement to pay would amount to an "additional payment" in terms of s 11(3); and the propriety of arrangements made between Counsel and the Legal Services Sub-Committee as to differing levels of adequacy of payment. Because of the overall conclusion I have reached I do not consider that it is necessary for me to deal with those questions in this judgment.

In *R v Accused* 7 CRNZ 686 the applicant charged with sexual violation of a male child had legal aid for depositions but retained Counsel privately for trial. He was successful in a s 347 application and the Court held that the Police investigation was not conducted in a reasonable and proper manner. However Penlington J held that otherwise the case was not out of the ordinary and awarded costs in accordance with the Regulations at $226 per half day for four half days (a total of $904).

In *Harrington v R* (CA 494/93 judgment delivered 30 June 1994) the Court of Appeal has now held that at least in a case of a legally aided appellant where there has been no personal contribution, costs cannot be obtained against the Crown under s 8(1) of the Costs in Criminal Cases Act 1967. The reasoning of the Court will equally apply in any case where costs are sought by a legally aided defendant in respect of whose case there is no personal or vicarious contribution.

Harrington faced trial in the District Court at Nelson. He challenged the validity of a search warrant and the matter was the subject of a s 344A application. A District Court Judge held that the warrant was valid. Harrington appealed. The appeal was set down to be heard in the Court of Appeal on 14 March 1994. On 9 March the Crown advised the appellant's Counsel that it would not be opposing the appeal. Subsequently the Crown did not oppose a s 347 discharge with costs being reserved for argument. Harrington was on legal aid for the appeal. He had made no personal contribution to the grant and neither had anyone else on his behalf. The Wellington District Legal Services Committee instructed Counsel to apply for costs under s 8(1) of the Costs in Criminal Cases Act 1967. The matter was dealt with by memoranda, an affidavit from the Executive Director of the Legal Services Board and argument.

After reviewing succinctly the purpose of the Legal Services Act and the relevant provisions relating to criminal legal aid the Court said (judgment, p 4):

> From this summary it is clear that when aid is granted the amount paid by the Legal Services Board to the solicitor or counsel is an expense incurred by the Board, not by the defendant. The Registrar selects and assigns the practitioner to act for him or her and, along with the District Subcommittee, exercises supervision over the level of remuneration to be charged, and determines the amount to be paid on the practitioner's claims. Harrington had nothing to do with these arrangements.
>
> Once he was granted aid the responsibility for his representation rested solely with those administering the Act, and the Board is directly liable for payment of the approved costs to the practioner assigned. There is no room for any suggestion that Harrington is responsible for those costs and that the Board merely indemnifies or finances him.

The English Court of Appeal took a different view in dealing with a legally-aided defendant's application for costs against the prosecution in *R v Arron,* in a note reported in [1973] 2 All ER 1221. Scarman LJ said that an order would be made "irrespective of the financing of his appeal, whether it be public or private". That situation in England has been altered by the Prosecution of Offences Act 1985, whereby the costs recoverable by an accused against a prosecutor do not include any legal aid expenses incurred on his behalf. We, however, must approach the matter in the light of our own statutory provisions which are quite specific and do not allow for the expansive view adopted in *R v Arron.*

Counsel did not refer us to any case in New Zealand in which a legally-aided defendant had obtained costs against the prosecution, although Mr Zindel mentioned two cases in which it had been assumed that costs should not be awarded – *MOT v Noort* [1993] 2 NZLR 260, where Cooke P said at p 275 that "nothing would be gained" by awarding costs to a legally-aided appellant; and *R v Accused* (1991) 7 CRNZ 686, in which Penlington J made an order only in respect of non legally-aided costs. Mr Smith said in his affidavit that he was unaware of payments into the Board's account in relation to any significant award of costs in favour of a legally-aided defendant.

The Board's wish to have the ability to recover legal aid costs against the Crown is understandable, given its status as a Crown entity under the Public Finance Act 1989, subjecting it to financial disciplines including capping of its funding through monies appropriated by Parliament under the general Justice vote. Income it derives from other sources goes into its own account and would be available to maintain or enhance its legal aid services, and any amounts recovered under the Costs in Criminal Cases Act would be added to that account. In the end, however, what it might receive from the Crown by way of costs will come from the same public

funds which support its statutory obligations. The desirability of reflecting the Board's autonomous status and of ensuring transparency in the public accounts may justify claims for recovery against the Crown. Whether they would add anything significant to the Board's resources may be open to debate. However, this is not a matter for the Court.

As the legislation stands, legal aid costs are not recoverable, but other costs properly incurred by a party in making an appeal could be. Since there was no contribution by Harrington, nor any claim on him by his counsel for additional payments authorised under the Act, no question of their recovery against the Crown can arise in this case.

And further (at p 6):

> If a defendant recovers costs against the Crown in respect of expenses incurred by him in addition to those met by legal aid, the Registrar may be able to exercise the right under s 14 of the Legal Services Act to modify or cancel the grant, but we find it difficult to envisage a situation in which this would be appropriate.

Comment on *Harrington v R*

While it is difficult to cavil with the strict approach of the Court of Appeal after considering the technical definition of "costs" in s 2 of the Costs in Criminal Cases Act and the provisions of the Legal Services Act 1991, the decision leads to a number of undesirable consequences, namely:

1 Part of the underlying philosophy of the new Legal Services Act is to bring together under one umbrella the previously disparate Civil and Criminal Legal Aid Schemes. There have been a number of steps taken to put criminal and civil legal aid on the same footing and while there are differences (counsel of choice is one example and ability to appeal the amount of remuneration fixed another), the decision will emphasise the separateness of criminal legal aid and work against equality in the long run.
2 It creates an artificial distinction between those cases (like *Harrington v R*) where the applicant does not make any contribution and those cases where a contribution towards legal aid is ordered under s 8 or approval is granted for an additional payment under s 11(3) of the Legal Services Act. *Harrington v R* does not bar claims against the Crown in such circumstances. If granted should such awards be liable for attack under the reassessment provisions of s 14 of the Act after notification to the Registrar of change in the capital position of an applicant under s 13? Should awards be limited to the amount of the contribution?
3 It will create a situation where non-contributing legally aided persons will not seek costs. The result is that an opportunity for scrutiny of the prosecution using the provisions of the Costs in Criminal Cases Act 1967 as a type of audit of the prosecution has been lost.
4 It takes no account of the increased complexity of many types of criminal proceedings. Nor does it allow the statutory abandonment of the corroboration rule in cases of a sexual nature with the result that often decisions of the prosecution to proceed are made relying only on the evidence of complainant.

Further the rationale of the Court of Appeal that:

> In the end, however, what it (the Legal Services Board) might receive from the Crown by way of costs will come from the same public funds which support its statutory obligations

needs further scrutiny.

For the purposes of this issue the Legal Services Board has not one but three sources of funds:

1 Moneys appropriated by Parliament, and
2 Contributions by legally aided persons, both civil and criminal, and
3 Interest earned from the investment of the moneys in 1 and 2 not yet paid out.

The Board treats all legal aid as coming from the same pool of funds. It budgets allocations to District Committees which then allocate their funds to criminal and civil aid.

While the Court of Appeal is right in saying that one source is common it is not the only source and over time the position could well change. The Board should be treated as completely autonomous[9] and its ability to seek costs from the Crown preserved. Given the decision in *Harrington v R* this can now only be cured by legislative intervention.

What should now be done?

No one would seriously argue that the rates of remuneration in the Regulations under the Costs in Criminal Cases Act are not well out of date.

It is suggested that the provisions of the Costs in Criminal Cases Act have generally been approached in such a conservative way by our Courts that they too urgently need review. The approaches in England and Wales and Australia have much to commend them. Few, if any, would argue that costs should be awarded where a defendant succeeds in a technical defence or where he or she has behaved in such a way as to disentitle relief. The entitlement of the Legal Services Board to claim costs needs to be reconsidered following the decision in *Harrington v R*. These tasks should be approached by the Law Commission. □

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1 Refer Table 1 at p 20 and following commentary at pp 20 and 21.
2 See for example the approach of Hardie Boys J in *R v Margaritis* (High Court, Christchurch T 66/88 14 July 1989) and Tipping J in *R v Tavendale* (High Court, Christchurch T 54/91 14 February 1992).
3 For example in *Police v H* (District Court Wanganui CRN) the Solicitor for the Region 3 Headquarters New Zealand Police filed a ten page submission in opposition, accompanied by a substantial bundle of reported and unreported cases.
4 See for example *R v Geiringer* (High Court Wellington T 3/76 Beattie J 20 August 1976); *R v Morgan* (1990) 6 CRNZ 130.
5 For an example where this was done see *R v Brunton* (New Plymouth T 14/91 Barker J 27 April 1992).
6 For examples see *R v Gregg* (unreported Doogue J 5 May 1989 High Court Hamilton T 22/88) and *R v Accused* (T 30/91 7 CRNZ 686 Penlington J).
7 High Court Christchurch T 9/93 Williamson J 15 December 1993.
8 Attached to the decision of Williamson J is a comprehensive list of 21 reported and unreported cases where issues relating to Costs in Criminal Cases have been argued.
9 As it is at law as a Crown entity under the Public Finance Act (as amended).

Share buy-backs and the disclosure requirements of the Companies and Securities Acts

By P D McKenzie, Barrister and Chairman of the Securities Commission

Disclosure of relevant information is a basic principle in many areas of the law. The new provisions of the Companies Act 1993 regarding the power of a company to buy back its own shares makes this particularly important since the directors and executives of a company can be expected to have inside knowledge that a shareholder would not normally have. The Securities Act 1978 can also be relevant. In this article the Chairman of the Securities Commission outlines the disclosure requirements of the legislation and its implications.

One of the significant innovations brought about by the Companies Act 1993 is the ability it confers on companies registered under that Act to purchase their own shares. The introduction of these buy-back provisions represents a departure from the long-established principles relating to capital maintenance which derive from *Trevor v Whitworth* (1887) 12 App Cas 409 and their replacement by a solvency test on the North American model. At the same time the new Companies Act introduces a number of safeguards for the protection of minority shareholders and creditors. The ability to buy back its own shares puts into the hands of the company board a power which could, if unregulated, be used to advantage the existing directors or their friends at the expense of other parties or to maintain or secure the position of the board as against a predator, possibly by the use of what the North Americans call "green mail" (the purchase back from a predator of the company's own shares at an inflated price).

This article is directed to one of the safeguards provided by the Companies Act 1993, namely the requirement for disclosure of information by the company to shareholders to whom it makes an offer for the purchase of their shares.

The disclosure requirements in relation to share buy-backs in the Companies Act 1993

The Companies Act 1993 deals differently with three types of share buy-back, each of which has different disclosure obligations:

(a) *Proportionate buy-backs under s 60(1)(a)* — in this case the company makes an offer to all shareholders to acquire a proportion of their shares from each shareholder. Because each shareholder is entitled to participate rateably the offer would leave unaffected the relative voting and distribution rights. Provision is, however, made by s 60(2) for the company to take up additional shares from the shareholder to the extent that another shareholder declines the proportionate offer or accepts part only of the proportionate offer. Any additional shares taken up by the company must be taken up rateably among those shareholders who make their shares available.

In the case of a proportionate offer the Act makes a negative disclosure requirement. The directors are required to resolve that the acquisition in question is in the best interests of the company and that the terms of the offer and the consideration offered for the shares are fair and reasonable to the company. In addition, the directors must resolve that they are not aware of any information that will not be disclosed to shareholders –

(i) which is "*material to the assessment of the value of the shares*"; and
(ii) as a result of which the terms of the offer and consideration offered for the shares are unfair to shareholders accepting the offer.

The directors are required under s 60(5) to sign a certificate as to these matters.

The directors are prohibited from making an offer if, after the passing of the resolution and before the making of the offer to acquire the shares, circumstances have changed. In particular, no offer may be made if the Board becomes aware of any information that will not be disclosed to shareholders which is material to an assessment of the value of the shares or as a result of which the terms of the offer and consideration offered for the shares would be unfair to shareholders accepting the offer.

It follows, that although the Act places no positive disclosure requirements on the board of a company which makes a proportionate offer, the board will find itself in a position where it will be precluded from making an offer unless appropriate disclosure is made

which will give shareholders the information referred to in s 60(3)(c), namely all information "*material to an assessment of the value of the shares*". In many cases, therefore, the company will only be able to proceed with a proportionate buy-back if additional disclosure is made to shareholders.

(b) *Selective buy-backs* – under s 60(1)(b) a company may make an offer to acquire shares from some only of its shareholders if all of the shareholders consent in writing or in accordance with the procedure set out in s 61. That procedure requires the company to send to each shareholder a disclosure document setting out the matters provided for in s 62. This statement is required to cover:

(i) the nature and terms of the offer;
(ii) the nature and extent of any relevant interest of any director in any shares the subject of the offer; and
(iii) the text of the directors' resolution together with "*such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition*".

It is important to note that the disclosure document must be sent to *all* shareholders not only to those to whom the offer is made. The offer must be made not less than 10 working days and not more than 12 months after the disclosure document has been sent to each shareholder.

(c) *Stockmarket buy-backs* – where a selective acquisition is made through an offer on the Stock Exchange. Once again the directors are required to resolve that the terms of the offer and consideration offered for the shares are fair and reasonable to the company and its shareholders and that they are not aware of any information that will not be disclosed to shareholders –

(i) which is "*material to an assessment of the value of shares*"; and
(ii) as a result of which the terms of offer and consideration offered for the shares are unfair to shareholders accepting the offer.

The same provisions as to change of circumstances apply as in the case of proportionate buy-backs and selective buy-backs.

In addition s 63(6) requires that before the offer is made the company must send to each shareholder a disclosure document complying with s 64. These requirements are similar in scope to those under s 62 relating to selective buy-backs. The nature and terms of the offer must be stated. The text of the directors' resolution must be given "*with such further information as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition*".

If, however, the number of shares to be acquired on the Exchange together with any other shares acquired under this section in the preceding 12 months does not exceed 5% of the shares prior notice need not be sent to the shareholders and it will be sufficient if within 10 working days after the shares are acquired the company sends to each shareholder a notice setting out certain limited matters which are provided for in s 65(2).

Stock Exchange Listing Rules – the Stock Exchange listing rules which came into force on 1 September 1994 set out certain additional requirements on a company which proposes to purchase its own securities. The following are of particular significance:

(a) Under rule 7.5 any person or group of Associated Persons already having the right to exercise not less than 1% of the votes on the company's shares who materially increases their ability to exercise effective control of the company must obtain the approval of an ordinary resolution of the company to the terms and conditions on which the shares are acquired. The text of the resolution to be put before the meeting for approval must comply with Rule 6.2.1. In particular the notice must be approved by the Exchange and is required to contain the precise terms and conditions of the specific proposal to acquire the securities in question and may not authorise any acquisition which varies in any material respect from the description in the notice. Rule 6.2.1 sets out certain minimum matters of information which must be included in or accompany the notice. Rule 6.2.2 requires an appraisal report to be included with the notice and must, in accordance with Rule 6.2.3, contain or be accompanied by sufficient explanation to enable a reasonable person to understand the effect of the resolutions proposed in the notice of meeting.

(b) All other buy-backs by a listed company must comply with Rules 7.6.1 and 7.6.2. In addition to complying with the statutory requirements of s 60(1)(a) and 60(2) prior notice of the acquisition must be given to the Exchange specifying the period of time within which the shares will be acquired, the maximum number and the class of the shares to be acquired, and the maximum price at which the shares will be acquired. The acquisition must be made by way of offers through the Exchange's order matching market, or through the order matching market of a Recognised Stock Exchange. Provision is, however, made for approval of an acquisition in some other way by separate resolutions (passed by a simple majority of votes) of holders of each class of quoted equity securities whose rights or entitlements could be affected by the acquisition. The precise terms and conditions of the specific proposal to acquire the securities must be set out in the resolution.

(d) *Repurchase of shares pursuant to a unanimous shareholder resolution*

Under s 107(1)(c) if all entitled persons have agreed or concur shares in a company may be acquired otherwise than in accordance with ss 58 to 65 of the Act. The agreement must be in writing. (s 107(4).) In the case of a share repurchase the entitled persons will be all of the shareholders of the company and accordingly all the shareholders must agree in writing if the benefit of this provision is to be obtained.

No formalities are prescribed for the repurchase of shares with

unanimous assent. However, the Fair Trading Act 1986 may apply to provide a remedy in relation to conduct with respect to the purchase and sale of shares which is misleading or deceptive.[1]

Treasury shares

The Companies Act provides that once shares are acquired by the company pursuant to the Act the shares are deemed to be cancelled on acquisition. This deeming provision applies both to shares which are acquired pursuant to the buy-back procedures set out in ss 59 to 66 and the minority buyout right under ss 110 to 112.[2]

On the cancellation of a share the rights and privileges attached to the share expire but the share may be reissued under ss 41 to 51 of the Companies Act (s 66(3)). If shares are issued by way of an offer to the public then the disclosure provisions of the Securities Act will apply which will require the issue of a prospectus.

The effect of these provisions is to preclude the holding of treasury shares. These are shares which, upon acquisition, are retained by the directors "*in treasury*" pending reissue by the company. Their prohibition by the Companies Act was no doubt designed to prevent the warehousing of the shares with a nominee holder who could use the votes on those shares to support the existing Board.

The Companies Act 1993 Amendment (No 2) Act 1994 creates an exception to the requirement that all repurchased shares are deemed to be cancelled. Sections 67A to 67C permit a company to hold up to 5% of the issued shares of any class as treasury shares. The Stock Exchange Listing Rules have anticipated the possibility that a company may be able to hold treasury shares by providing in clause 7.3.9 that the transfer, by an issuer which is a company registered under the Companies Act 1993, of treasury stock of that issuer shall for the purposes of Rule 7.3 [which deals with the issue of new equity securities] be deemed to constitute the issue of equity securities. The effect of this provision is that when treasury stock is transferred by the company all the provisions governing the issue of equity securities will apply including the need to obtain the approval by resolution of the class of shareholders whose rights are affected unless one of the exceptions provided for in the Listing Requirements applies.

The transfer by the company of treasury stock will bring into operation the provisions of ss 6 and 6A of the Securities Act which govern the transfer of previous allotted securities. In particular s 6(3) will apply because the company itself will necessarily be encouraging or knowingly assisting with the offer or sale of the shares. If the shares are offered to the public then the prospectus provisions of the Securities Act will apply. Because the offer is confined to existing shareholders a short-form prospectus can be used (Securities Regulations 1983, reg 4). If for any reason s 6(3) does not apply and the offer is made to the public then s 6A will apply and it will be an implied term of the offer that the company offering the shares has no information that is not publicly available and that would, or would be likely to, affect materially the price of the shares if it were publicly available.

The disclosure requirements in relation to the various forms of buy-back can be summarised in the following tabulation:

DISCLOSURE REQUIREMENTS

ALL COMPANIES	LISTED COMPANIES
Proportionate Buy-Backs	**Proportionate Buy-Backs**
(a) Prior board resolution required that there is no undisclosed information material to an assessment of value.	(a) Prior notice to the Exchange.
(b) If (a) satisfied no disclosure document required (s 60(1)(a) and (2).	(b) Prior notice by way of a disclosure statement to shareholders unless less than 5% of shares in same class being acquired over preceding 12 months (ss 64 and 65).
	(c) Offers must be effected through order matching market.
	(d) If any person or associated person likely to increase control an ordinary resolution of shareholders required. Appraisal report to be provided.
Selective Buy-Backs	**Selective Buy-Backs**
Disclosure document required in all cases (ss 61 and 62).	Proposed acquisition approved by ordinary resolution of separate class meetings of all affected quoted equity securities. Precise terms of specific proposal to be given in notice of meeting.
Purchase Pursuant to Unanimous Shareholder Resolution	NA
No formal requirements	
Sale of Treasury Shares	**Sale of Treasury Shares**
Disclosure required under s 6(3) [prospectus] or possibly s 6A of Securities Act if offered to the public.	Under LR 7.3.9 treated as issue of equity securities. If offered to the public s 6(3) [prospectus] or possibly s 6A of Securities Act applies.

The nature of the disclosure requirements on the repurchase of shares

It will be apparent from the preceding discussion that there are significant disclosure obligations on a company which embarks on the purchase of its own shares. On even the most straightforward repurchase, namely the proportionate buy-back the board will have to be satisfied that all the information which is material to an assessment of the value of the shares has been disclosed. This is a similar requirement to that under s 6A of the Securities Act which introduces an implied term into every offer to the public of a security that has previously been allotted, namely that "the offeror has no information in relation to the original allotter that is not publicly available and that would, or would be likely to, affect materially the price of the security if it were publicly available". A parallel provision is the general disclosure requirement in clause 40 of the First Schedule to the Securities Regulations in relation to equity prospectuses. That clause requires disclosure of:

> Particulars of any material matters relating to the offer of securities (other than matters elsewhere set out in the registered prospectus and contracts entered into in the ordinary course of business of a member of the issuing group).

Material information

What is "material" information for the purposes of these provisions? The Courts have in a number of cases treated it as being material information which is required for the purposes of making an informed judgment on the matter in question. (*Darvall v North Sydney Brick & Tile Co Ltd* (1989) 7 ACLC 81, 81; *ANZ Nominees Pty Ltd v Wormald International Ltd* (1988) 6 ACLC 780, 788.) A frequently cited statement in relation to market information is that of the United States Federal Court in *Basic Inc v Levinson* 485 US 244, 238 (1988):

> To fulfill the materiality requirement there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

It is therefore difficult to escape the width of the general disclosure requirement now contained in s 1022 of the Australian Corporations Law with regard to prospectuses. The prospectus is required to:

> Contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:
>
> (a) the assets and liabilities, financial position, profits and losses, and prospects of the corporation:
> (b) the rights attaching to the securities.

The United Kingdom Financial Services Act contains a similar provision setting out a general duty of disclosure in relation to prospectuses. (Financial Services Act 1986, s 163.)

If a shareholder who is invited to sell his or her shares to the company is to make an informed investment decision on whether or not to sell, then the financial information and information about the prospects of the company would need to be provided and the disclosure required would be comparable to that of a short form prospectus. Securities Regulations 1983, Reg 4, provides for a short form prospectus to be issued where an offer of equity securities or convertible securities is made to persons who already hold equity securities or convertible securities of the issuer, or where an offer of debt securities is made to persons who already hold equity securities, convertible securities or debt securities of the issuer. A short form prospectus need not include the financial statements of the issuer which would in the ordinary course have already been made available to security holders but requires disclosure to be made of:

(a) the main terms of the offer;
(b) statement as to the trading prospects of the issuing group including a description of all special trade factors and risk not likely to be known or anticipated by the general public which could materially affect the prospects of the issuing group;
(c) particulars of any issue expenses;
(d) all other terms of the offer and terms of the securities being offered;
(e) a statement by the directors of the issuer whether after due enquiry there have in their opinion not arisen any circumstances that materially adversely affect the trading or profitability of the issuing group or borrowing group or the value of its assets or the ability of the group to pay its liabilities due within the next 12 months.

All of those matters other than (d) and (e) would appear to be relevant and material to an offer by the company of its own shares.

It is difficult to see that anything less demanding is required by the general disclosure obligations which are set out in the Act.

Stock Exchange acquisitions

Those Stock Exchange acquisitions (s 65(1)(b)) which are subject to prior notice, namely those cases the number of shares to be acquired together with any other shares acquired during the preceding 12 months exceeds 5% of the shares in the same class are subject to in essential respects the same disclosure requirements as with the proportionate buy-back or selective buy-back. Under s 63(1)(d) directors must be able to certify that they are not aware of any information that will not be disclosed to shareholders which is material to an assessment of the value of the shares and as a result of which the terms of the offer and consideration for the shares are unfair to shareholders accepting the offer. The disclosure document under s 64 requires the text of the directors' resolution to be provided together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition. Once again, therefore, comparable information to that provided in a short form prospectus will need to be made available.

In addition, the Stock Exchange Listing Rules require that if a person or associated person will be entitled as a result of the acquisition to materially increase their control then the approval of an ordinary resolution will be required which will involve the

presentation of an appraisal report.

Even in those cases where prior notice of a Stock Exchange acquisition is not required it will not be possible to escape the need to provide to each shareholder information which is comparable to that in a short form prospectus unless the directors are able to certify that they are not aware of any information that is not available to shareholders that is material to an assessment of the value of the shares and as a result of which the terms of and consideration for the acquisition are unfair to shareholders already have comparable information to that provided by a short form prospectus they will have to make prior disclosure of that information to shareholders before any acquisition can take place.

It would seem that the only prudent course for directors of a listed company to follow where they propose to buy back the company's share is to conduct the buy-back immediately after current financial statements have been provided to shareholders accompanied by a statement along the lines of those referred to which are required in the short form prospectus.

Buy-backs and insider trading

In addition to ensuring that there is compliance with the disclosure obligations of the Companies and Securities Acts, directors of a company which proposes to purchase its own shares must also have regard to the provisions of Part I of the Securities Amendment Act 1988 which deals with insider trading. The public issuer itself can be an "insider" within the meaning of s 3 of the Act. Accordingly if the public issuer is involved in the purchase or sale of its own shares it may be liable as an insider under s 7 if at the time of the purchase or sale it has inside information about the public issuer. "Inside information" defined in s 2 as meaning information which –

(a) is not publicly available; and
(b) would, or would be likely to, affect materially the price of the securities of the public issuer if it was publicly available.

It has been held by the Court of Appeal that the test for determining whether information is not publicly available is not the subjective belief of the insider but the "objective possession of information". If considered objectively the company itself has information which would be likely to affect materially the price of its securities, were it publicly available then liability may arise for insider trading. (*CML v Wilson Neill Limited* [1994] 2 NZLR 152, 161.) There must, however, be a real substantial risk amounting to more than a bare possibility that the price of the shares would be affected for the information to come within the description of "insider information". (ibid, at 161.)

The risk a company through its directors faces in purchasing its own shares is colourfully described in comments of Mahoney JA in *Glandon Pty Ltd v Strata Consolidated Pty Ltd* (1993) 11 ACLC 895, 899:

> This is an issue of some practical importance. It is not necessary to see every management buyout as an assault by "barbarians at the gate". But it is clear that, because of their position as such, directors have or may have a substantial advantage over the shareholders with whom they deal. They have this advantage by reason of, as it has been described, "insider knowledge". They know things about the company, its assets and their potential, which (special cases apart) are not shown by the company's published accounts or documents or otherwise and which would not be known by an ordinary diligent shareholder. They are apt to know of opportunities for profit which the company may take which are not known to the shareholders and (special cases apart) cannot be discovered by them ... And such insider knowledge is gained, in a practical sense, at the expense of the shareholders: it is gained because they hold the office of directors and it is the company which pays them to hold that office.

Conclusion

This survey of the provisions of the Companies Act and Listing Requirements indicates that unless a company proposes to acquire shares pursuant to a unanimous resolution from a restricted group of shareholders in circumstances which do not amount to an offer to the public, significant disclosure obligations rest on the directors of the company. These obligations both by virtue of disclosure requirements in the buy-back provisions of the Companies Act and by virtue of s 6A of the Securities Act are comparable to those required from a company which issues a short form prospectus.

A lesser level of disclosure may be thought to be available when a company makes a proportionate buy-back or purchases the shares on the Stock Exchange. However, in order to satisfy the certifying obligations resting on the directors under s 60(3)(c) and s 65(1)(a)(iii) it would appear that the directors must be able to certify that shareholders already have information which is comparable to that required under a short form prospectus. There are likely, in the case of a listed company, to be few circumstances in which directors will be in a position to make such a certificate unless the offer to acquire shares is made contemporaneously with the publication to shareholders of the company's current financial statements together with statements as to the company's trading prospects which is comparable to the information required of a short form prospectus by clause 9(1) and (20) of the First Schedule to the Securities Regulations.

The failure to comply with these disclosure requirements could lead to a listed company, which purchases its own shares or sells treasury shares, being held liable for insider trading. This liability arises if the information in possession of the company is likely to materially affect the price of the company's shares were it to be publicly available. □

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1 Fair Trading Act 1986, s 9. *Fox v Douglas* (1988) 4 NZCLC 64287; *CPB Industries Ltd v Bowker Holdings* (1987) 3 NZCLC 10035 and the recent judgment of Gummow J in the Australian Federal Court, 13 October 1994 involving the prospectus issued by the National Roads and Motorists Association: *Fraser v NRMA Holdings Ltd* (1994) 12 ACLC 855.

2 Section 66(1). Shares acquired otherwise than in accordance with these provisions are also deemed to be cancelled: Section 58(2). Shares acquired "otherwise" than pursuant to ss 59 to 66 and 110 to 112 would include shares acquired pursuant to a unanimous resolution of shareholders or acquired pursuant to an order of the Court under s 174.

Robes

By A K Grant of Christchurch

The other day, in one of her rare idle moments, my fiancee was testing my general knowledge out of an admirably entertaining work, *The Penguin Ultimate Trivia Quiz Game Book*. I learned many things I did not know: among them that the man who rode Woodcock to victory in the Newmarket Plate in 1671 and 1674 was Charles II, and that Lord Nelson's statue in Trafalgar Square weighs 18 tons, excluding the column. But the fact that particularly intrigued me was that we barristers dress in black because we are in mourning for Queen Mary, (of William and Mary), who died in 1694.

Maybe I am the only barrister who did not already know this. But leaving aside the question of how widely disseminated this poignant fact is among the profession, it seems to me that 1994, the 300th anniversary of the late Queen's demise, is the ideal year to review the practice of wearing black robes. I am not suggesting, Heaven forbid, that we as a profession should cease to mourn one of the last Stuart monarchs to sit on the throne of England, even if she had to share it with a Dutchman. I mourn her to this day. But 300 years is a long time to actually *wear* mourning. By all means let us try to be worthy of Queen Mary in the way we go about our professional duties; let our features be suitably solemn as we internalise our grief. But I suspect, without ever having known her personally, that the late sovereign would not have expected to receive such an extended tribute. I have little doubt that the six years between 1694 and 1700 would have seemed more than adequate to her, had she been able to express an opinion on the subject. But by 1700, of course, everybody was robed up and unwilling to forgo their investment in the sable garments which, as much as wigs, have come to symbolise our profession.

I don't suggest that we should do away with gowns as such; merely that we should do away with black ones. After all, plenty of monarchs have died since Queen Mary, and if they are all to receive a mourning period of 300 years, then the line of black robes will stretch on to the crack of doom. I think the time has come, literally, to lighten up. Let us, throughout Anglo-Saxon common law jurisdictions, pay our final respects, once and for all, to Queen Mary, and then look for the sort of innovation, and *meaning* in robe design that one seeks in the work of great fashion designers like Christian La Croix and Versace.

They make vivid use of panels: coloured panels and transparent panels. I don't see much point in transparent panels in a barrister's gown, because one will still, unless my reforms get somewhat out of hand, be wearing a suit beneath it. The bodies of most barristers are unlikely to be enhanced by the peekaboo effect of transparent panels. But coloured panels are a different matter. They could signify, more particularly perhaps in the case of defence counsel, what sort of case you were engaged in: white, if it was company fraud; red, if your client was accused of a crime of violence; brown for blood/alcohols, (because the majority of clients in this area come to grief through the consumption of beer); and green, for anything to do with marijuana. The principle cannot be extended too far: no particular colour seems suitable for treason, and anyway there are so few treason cases nowadays that the crime scarcely warrants a colour of its own. (Why *is* this, by the way? In Good Queen Mary's Golden Days, treason cases were as fashionable as sexual abuse cases now. Why has treason become so antiquated a crime? Are we so sunk in apathy that we no longer believe the Queen has enemies, who can be lent aid and comfort by disaffected elements from within? And is this linked in any way with the decline of the All Blacks as a force in world rugby?)

I realise that our profession is distinguished by its adherence to tradition and resistance to change for change's sake. And yet, when the merit of a reform is clear and compelling, we can be in the forefront of change. Look, for example, at the speed and enthusiasm with which we adopted the six-minute time-costing unit. On the matter of robe design, I believe the Law Society should be looked to for a lead, perhaps by sponsoring an annual equivalent of the Benson & Hedges Fashion Awards, with models parading dashing and stylish robes which would lift a client's spirits and dazzle a jury. Not to mention suitable attire for the pregnant lady barrister, and designer denimwear for the District Court. The possibilities are endless.

The one possibility that I think should be sealed off is sponsors' logos on gowns. To take the All Blacks again, look what has happened to them since they started wearing Steinlager labels. (For that matter, look what has happened to Steinlager since it started sponsoring the All Blacks: everybody I know these days drinks Corona or Heineken.) In this area, at least, I think we should respect what we can assume would have been Queen Mary's wishes.

I don't know, though. The idea of a handsomely-embroidered BMW badge on the back of my gown is rather attractive. Not that I own a BMW, nor am ever likely to, but being first in the field with a badge might be one way of getting one. And wearing the badge couldn't affect my obligations to my client, unless they happened to be Mercedes or Alfa Romeo. Shall we say, for the moment, that the jury is still out on that one? □

Lawyers slip up on the catwalk

By Evlynne Gilvarry

Reprinted, with permission, from the Law Society Gazette, *7 October 1994.*

Oh dear, the image consultant is not impressed. Solicitors rate practically nil in the style stakes, according to Mary Spillane, grooming guru. The men tend to look like "John Major – everybody's boring middle-aged uncle", and the women look like "pseudo-policewomen", so attached are they to dark, militaristic gear.

"So what?" many solicitors might say. My clients want legal advice, not a fashion show. But Ms Spillane believes that clients are very significantly influenced by image. They recognise what is sharp, up to date and professional and will be put off if a solicitor presents as circa 1982.

The importance of image is heightened where solicitors are competing for international work, Ms Spillane believes. "To many of their European counterparts, the British solicitor looks like yesterday."

Ms Spillane, managing director of the international style consultancy CMB Image Consulants, has done a refurb job on countless politicians, business and media people. She arrives at people's houses with a bin liner to dump the fashion no-no's and will advise on everything from skin tone to sock choice, from spectacle frame shape to nostril hair removal. This week she takes her message to the Law Society's national conference [1994].

Many hundreds of solicitors have already sought out her services privately. And a number have been sent by their firms to have their rough edges smoothed. Recently she has been commissioned by a large firm in the City (she will not be drawn on the name) to test the concept of image improvement on a team of people.

Ms Spillane sympathises with solicitors – particularly women – who play it safe when it comes to clothes for fear of not being taken seriously. But, she points out, there is a balance to be struck. For women there are other "authoritative" colours besides black and navy which, in any case, can leave the fair-skinned looking in need of a blood transfusion. Ms Spillane suggests chocolate brown, spruce green or deep aubergine as alternatives. And she is all for trouser suits, provided they are well tailored.

The fact that some firms still outlaw trousers for women makes her impatient. "I wonder how the senior partner would feel at the end of the day if he had to wear a tight skirt, tights and high heels."

The other mistake women solicitors make is not bothering with make-up." They look well-scrubbed but not polished," she says. Again, she points out that there is a happy medium between bare flesh and chorus line pan stick. And any woman who still has doubts should be aware of research showing that women who wear makeup get paid more and promoted more often.

Ms Spillane acknowledges that male solicitors must look sober. But, she insists, they can safely stop well short of sombre. She would rule out, for example, one those loden green suits – much favoured by advertising executives – with a "wow" personality tie. Nonetheless, relief can be had from the regulatory grey and navy without losing clients.

She also believes that solicitors with rural practices should dump the forbidding pinstripes and look as if they fit in – as though they would be able to cross a field with a client if needs be. For men this would mean a smart sports jacket and trousers with a pair of Timberlands instead of brogues. □

Recent Admissions

Barristers and Solicitors

Barbour ND	Hamilton	16 September 1994	Hillda SE	Hamilton	16 September 1994
Bartlett SJ	Hamilton	16 September 1994	Jansen BR	Hamilton	16 September 1994
Blackford IM	Hamilton	16 September 1994	Leicester VA	Hastings	16 September 1994
Cairncross BJ	Hamilton	16 September 1994	Lethbridge CA	Hamilton	16 September 1994
Christie NC	Hamilton	16 September 1994	McAdie NMcL	Hamilton	16 September 1994
Clark TV	Hamilton	16 September 1994	Miller WM	Hamilton	16 September 1994
Dare PJ	Hamilton	16 September 1994	Papuni-Ball MA	Hamilton	16 September 1994
Dennis SM	Hamilton	16 September 1994	Parlane AME	Hamilton	16 September 1994
Ellice-Harris TL	Hamilton	16 September 1994	Peters CA	Hamilton	16 September 1994
Ellison DR	Hamilton	16 September 1994	Philip RB	Hamilton	16 September 1994
Falconer JM	Hamilton	16 September 1994	Spry GM	Hamilton	16 September 1994
Frew LD	Hamilton	16 September 1994	Stephens RD	Hamilton	16 September 1994
Green CA	Hamilton	16 September 1994	Tikaram AM	Hamilton	16 September 1994
Harris TJ	Hamilton	16 September 1994	Todd MD	Hamilton	16 September 1994

Parliament, the Treaty and Freedom : millennial hopes and speculations

By F M Brookfield, Emeritus Professor of Law, Auckland University

This article is the valedictory lecture given by Professor F M Brookfield on his retirement as a law professor at the end of 1993. The issue the article covers is the Parliamentary claim as a constitutional institution to absolute sovereignty. The hope the author expresses is for a written constitution that would protect Treaty of Waitangi rights to the extent he discusses, and would also ensure individual rights and freedoms for all New Zealand citizens.

In the film made a few years ago about the career of the French revolutionary leader Danton there is a scene in which – I tell of it from memory – on his way to be guillotined for having allegedly turned against the revolution, he is asked if there is anything he wants to say before he steps into history. I thought of that when I was asked if I wished to give a valedictory lecture. I admit of course that there are few similarities between Danton and me and his position then and mine now. For one thing my life expectancy is greater. For another the history into which he stepped is on a rather vaster scale than that of even a distinguished University, in which one may have played in any event a modest part only. However, there are two similarities. We were both at one time practising lawyers – not at the same time though – and I can claim with him a shared interest in revolution, one to be discussed perhaps when I join him in, so to speak, Ultimate Retirement – if my French is good enough that is. Anyway, having been asked if I had anything to say before I step into the history of the Faculty and the University, I though there was indeed something, something which in part touches on the revolutionary origins, as I continue to see them, of the New Zealand constitution.

However the ultimate focus of this valedictory lecture is not so much on those revolutionary origins, which I have written on and taught about over the last few years, as on the present day powers of the New Zealand Parliament, powers which it claims both over the Treaty of Waitangi and over the individual rights and freedoms of the citizen. Our Parliament claims an absolute sovereignty over us, Maori and Pakeha alike, unlimited by any written constitution. The justification for or legitimacy of its claims, the possibility that its powers may in some respects be legally limited after all, and the future limiting of those powers securely and effectively by a written constitution – these things I want to consider under the title "Parliament, the Treaty and Freedom : millennial hopes and speculations".

To take Parliament and the Treaty first and here I traverse what to many is now familiar territory; though I hope I may also extend it a little nevertheless. In 1840 by the Treaty of Waitangi, in the Maori version, over five hundred chiefs ceded kawanatanga or governance to Queen Victoria in article 1, reserved to themselves by article 2 the highest chieftainship, te tino rangatiratanga, and by article 3 acquired the rights and duties of British subjects.

That however was not a proposition acceptable to the Imperial government to whom it was conveyed. In rejecting it the Under Secretary for the Colonies simply asserted the Acts of State by which the Crown had purported to establish government of the whole of New Zealand. And he added "Mr Swainson may think this unjust or impolitic or inconsistent with the former Acts. But still it is *done*."

One should note those last words. Revolution rests upon what is *done* not what is legal, or necessarily moral or just. In effect the Under Secretary was asserting for the Crown a revolutionary seizure of power over the whole of New Zealand, in which the customary legal orders of the Maori were to be effectively overthrown and replaced. And of course the assertion would stand not only against the non-signatory iwi but against any claim that something less than sovereignty had been ceded by those who had signed. No matter that in most of New Zealand the Queen's writ did not run; and indeed it would not run throughout the whole country until about the end of the century (or a little later) when the revolutionary acquisition of power was complete. Much was to happen before the customary legal orders that operated among Maori, both within iwi and hapu and between iwi, were completely superseded in fact by the imperial-colonial legal order of which Swainson was an officer. In what came to be called the King Country, the customary legal orders, undeveloped in that they lacked centralized organs of government, gave way to the central government of the Maori King over what the historian James Belich describes as "an independent Maori state nearly two thirds the size of Belgium". But there too and in the other areas of Maori autonomy such as Parihaka, the power of the colonial government became in the end effective. The British Crown made effective its claim to sovereignty over the whole country, when less than that had been ceded to it, on any understanding of the matter. This of course is the sovereignty which has devolved on the present New Zealand Parliament

wielding power in what has become a separate realm of the Queen and wielding it, or claiming to wield it, over the Treaty itself.

How far does the Treaty legitimate the claims of Parliament to be sovereign? That of course depends on how much was ceded, on what was included in kawanatanga. Professor Sir Hugh Kawharu's recent reference, in his 1992 Elsdon Best Memorial Lecture, to "the grand quid pro quo in the treaty, viz, the ceding of sovereignty in exchange for the Crown's protection of rangatiratanga" is to be read, I think, with an earlier and fuller explanation which he made in 1984 before the Waitangi Tribunal, describing the content of kawanatanga:

> . . . [w]hat the chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death.

In other words what was ceded was less than sovereignty. Further, it was qualified by the rangatiratanga, the tribal autonomy, reserved to the chiefs. On the other hand, the rangatiratanga, though described as "the highest rangatiratanga", was, on this view, in fact modified in the ways Sir Hugh describes.

Sharply opposed to Sir Hugh's view is that recently expressed by a leading Maori lawyer, Mr Moana Jackson:

> So what Maori people did, in Article One, was grant to the Crown the right of kawanatanga over the Crown's own people, over what Maori called "nga tangata whai muri", that is, those who came to Aotearoa after the Treaty. The Crown could then exercise its kawanatanga over all European settlers, but the authority to control and exercise power over Maori stayed where it had always been, with the iwi.

Diffidently, one may guess that the understanding of what was ceded may have varied among the chiefs. For example, the Waikato chief in the 1840s, referred to by Sir Keith Sinclair in *Kinds of Peace* as exhorting Governor Grey to assist him in maintaining his chiefly authority over his slaves, must have supposed that in some form slavery would, under the Treaty, continue in Maori society. But whatever the chiefs individually intended, it is impossible to believe that any of them consented to the claims of absolute and unlimited power, even over the Treaty itself, which, under the doctrine of parliamentary sovereignty, were made by Queen Victoria's Parliament and are made today by the New Zealand Parliament as its successor. For how could the chiefs have possibly intended under article 1 to cede power to destroy the tribal autonomy, whatever its extent, which was reserved to them under article 2? Yet over the years the powers of Parliament have been effectively exercised over all Maori, sometimes in gross derogation of Treaty rights, as in the New Zealand Settlements Act 1863 (authorizing the confiscations after the New Zealand wars) or in the Tohunga Suppression Act 1908; and of course sometimes in partial giving of effect to such rights (as in the Treaty of Waitangi Act 1975, setting up the Waitangi Tribunal, and in other recent legislation). And always without any necessary differentiation between signatory and non-signatory iwi. It is hard to deny in law the validity of what Parliament has done. That original assertion of power in 1840, to which the Under Secretary of State referred in his rebuke of Attorney-General Swainson, has been made effective in law and in fact, so that, when we look today to better performance by the government of its obligations ot Maori, we depend to a large extent on action by a parliament which is itself the product of a partly revolutionary seizure of power.

It will be seen that the Treaty party justifies or legitimates Parliament's claims to power, though on Moana Jackson's view it does so only in respect of Pakeha. Even on Sir Hugh Kawharu's explanation of the matter the legitimation must be partial only. When treaty justification runs out, as it does when we consider Parliament's claim to sovereign and unlimited power, unlimited by the rangatiratanga secured by the second article, the basis for that claim is effectiveness and durability. In short, the revolution begun in 1840 in the Crown's assumption of sovereignty succeeded and it has lasted.

In Queensland the Court of Criminal Appeal has in a recent (1989) case had to consider this problem in a context where there is, notoriously, no equivalent of the Treaty of Waitangi. Mr Walker, an aboriginal of the Nunukel people living on Stradbroke Island, was prosecuted for minor property damage. He defended the case by claiming that he was subject only to the laws of the Nunukel people who had never consented to the imposition of British rule and that he was not subject to Queensland law. In rejecting this argument, McPherson J recognised as revolutionary the imperial assumption of power, begun in Australia at the founding of New South Wales in 1788, and manifested today in the Commonwealth and State constitutions and legal systems. He accepted in effect, correctly I think, that he should explain why he was legally and morally required to enforce Queensland law against Mr Walker. He invoked not only the effectiveness of the Queensland legal order but the legitimacy which it had, in his view, acquired through its having lasted, through its durability. Thus he gave the view of Professor R W M Dias about the Court's role in the revolutionary overthrow of a legal order, that (in his Honour's words):

> elements of durability and morality enter, or ought to enter, into the question of the efficacy of the legal order and the processes followed by courts in deciding whether or not to recognize a new legal order. On this view what is sometimes called "legitimacy" as well as efficacy has a place in the processes of recognition.

And then the Judge continued

> If notions of the foregoing kind are invoked, it may be said that the Nunukel legal system was at some unspecified time after 1788 overthrown by a revolution which introduced a new legal order for Stradbroke Island. The appellant obviously contests the legitimacy of that event, but the efficacy and durability of the regime, which displaced it and which now prevails, is not open to question.

The Judge then is putting forward revolutionary success and legitimacy as the basis for the Queensland legal order and for its Parliament and other institutions of Government. I had argued that in New Zealand one has

to do the same to the extent that Parliament claims powers in excess of what was ceded under the Treaty.

This argument of revolutionary success, applied to New Zealand, is not one which appeals to everyone. I discern that for some Pakeha, including Pakeha judicial opinion, it may be unacceptable because it casts an embarrassing aura of illegality over the origins of the present constitutional order and legal system. For some radical opinion, on the other hand, the notion that time to any extent legitimates what was originally in part done illegally is certainly unacceptable. Thus Mr Moana Jackson wrote recently that —

> . . . the Crown pouts and claims, "I have asserted my sovereignty, so of course I am sovereign." Alternatively, in a slightly more refined petulance, it claims that because it now exercises de facto sovereignty, the Pakeha rule of law requires the rejection of any other sovereign claim. The validity of a Maori rule of law is, of course, lost in the petulance. However, the mere assertion of authority or the passage of time can neither justify an imposed power, nor render meaningless the rights of those who have been subjected.

There are two comments to make on this.

First, I have to say, I hope in my case without petulance even of the refined sort, that effective assertion of power (whether by conquest or internal revolution) and the passage of time have in countless instances through history legitimated the constitutions and legal orders which have been based upon them. In so far as Mr Jackson is denying that general truth he is, with respect, wrong; and indeed his own account of Maori customary legal orders shows that that general truth applied to them also. Rightly emphasising that legal systems or orders existed among Maori, he has discerned what is really a kind of miniature international legal order reguating the relationships between iwi; between the "many small principalities", in Joseph Banks' words quoted by Professor Anne Salmond in *Two Worlds*, into which Banks observed that the country was "certainly divided". In this miniature international legal order, Mr Jackson shows that the keeping of treaties or pacts was of basic importance — as indeed it has long been in international law. Breach of treaty was, he writes, a frequent cause of tribal warfare. I comment that in many such cases the treaty breakers must have triumphed in the ensuing war and, contrary to Mr Jackson's general proposition but to adopt his language, the rights of those aggrieved by the treaty breach rendered even meaningless by subjection to the imposed power of their conquerors.

To that it may be answered that within Maori culture as in most cultures, this principle of legitimation of the successful assertion of force did apply; but that there is no reason for applying the principle as between cultures where (and this perhaps is what Mr Jackson means) the subjection of one culture by another is a lasting wrong, and one that remains entirely unmodified and unlessened by the passage of time; so that the people of the now dominant culture can have gained no rights from the effective assertion of power by their forebears. But it would be strange if a principle which applies within cultures had no application between them. Again history appears to be against Mr Jackson. I cite two instances but there are many, many others. First there is a case from the much wider world than his corner of the Pacific, that of Spain, of the succession of cultures in that country that began, to go no further back, in the eighth century. Last year 1992, one may recall, was not only the quincentennial of Christopher Columbus's arrival in America, which initiated the western colonialist oppression of non-western cultures against which Mr Jackson's view, if it were generalised, would be primarily perhaps solely directed. 1992 was the quincentennial also of the completion, with the fall of Granada, of the Christian re-conquest of Spain, in which the several centuries of Arab rule came finally and completely to an end. Of course the Arab, Islamic, conquest in the 8th century of Christian Spain, of the Kingdom of the Visigoths, was ideologically justified in the eyes of those who carried it out; but the Islamic rule that followed must have depended also on a legitimacy, not based on Islamic ideology, but brought about by effectiveness and durability over several centuries. The Christian re-conquest shows the same processes: ideological justification from a Christian point of view but also a legitimacy gained from effectiveness and durability, from the passage of time. Today who even among the most committed anti-colonialists would urge that Spain should be returned to Islamic rule? Some Islamic fundamentalists, for ideological reasons, might urge that of course; but surely no one else. Though if fundamentalists holding that view *were* to have their way, the process of legitimation through effectiveness and durability would start all over again.

The other instance is much closer to home: it concerns the invasion of the Chatham Islands in 1835-36 by Maori who had themselves been expelled from their Taranaki lands, in tribal warfare. Moriori culture and custom, including customary law, were superseded by Maori, through the effective assertion of the power of the invaders. If colonialism is the subjection of one culture to another, then this was colonialism. For Moriori culture had, it appears, developed or existed separately in isolation from mainland Aotearoa since about 1400 or earlier. But of course Maori culture and custom were in turn superseded when the Chathams were incorporated into the British colony of New Zealand in 1842 and by the effective exercise of British power in the following years.

The British revolutionary seizure of power over New Zealand; the Taranaki Maori revolutionary seizure of power over the Chathams. I think the comparison, despite differences in scale, has in honesty to be made, whatever slight comfort it may bring to the people called rednecks — I say slight because the comparison does not absolve the Crown from obligations under the Treaty, albeit these obligations have now to be understood and performed within the political and legal order established by the revolution begun in 1840.

Any such comparison has also to be made in firm disregard of inhibiting canons of political correctness which (to adapt a recent phrase of the art historian Robert Hughes) tend to dictate that oppression is what is done by the west whereas what is done by others is simply part of their culture.

All that is by way of comment — a first comment, largely adverse — on Moana Jackson's assertion that "the passage of time can neither justify an

imposed power nor render meaningless the rights of those who have been subjected". To the contrary, I suggest that the passage of time has again and again justified or legitimated, at least in some measure, imposed powers both within cultures and between them; and in the result the rights of the subjected, though not necessarily rendered meaningless, are inevitably modified. For us that means that the dual Maori-Pakeha New Zealand, which would have accorded with the Treaty and in fact existed last century when the areas of Maori autonomy such as the King Country existed, is no longer possible because no longer geographically possible. But the giving of some effect to the Treaty within a unitary New Zealand goes on in the work of the Courts, of the Waitangi Tribunal and in the government's often tardy handling of Maori claims; with much more still to be done. The rights of Maori then, are far from rendered "meaningless"; but they have been greatly modified by the facts of revolutionary power and the partly legitimating effect on those facts of passage of time.

A second and briefer comment on Mr Jackson's statement is more favourable. When he says that the mere assertion of authority or the passage of time cannot justify an imposed power he may not intend to state a general truth but simply to make an ideologically based statement about the Pakeha dominated New Zealand state. Of course the ideologically-driven revolutionary may be quite unimpressed by the long establishment – the durability – of the existing order which he or she wishes to see overthrown or replaced. In this connection the possibility of a revolutionary assertion of Maori claims has been discussed by my colleague Dr Jane Kelsey in a paper to the Commonwealth Law Conference in 1990, in which she admonished her legal audience to begin the process of constitutional reform which would establish a Pakeha state and a Maori state as "co-existing constitutional entities within one nation", or to face the possibility that such a change would come about by force. Writing in similar vein very recently in *Rolling Back the State*, she says of the early 'nineties that

> . . .[f]or an increasing number of Maori, the time had arrived for Iwi and Hapu unilaterally to exercise tino rangatiratanga as a pre-existing right which was never given away – with or without the agreement of the Crown.

This prediction of an apparently revolutionary assertion of Maori claims is set in the longer term, the short term need being in her view to prevent control over economic resources and political decisions passing out of the hands of the New Zealand nation state into those of private capital or of regional or international power blocs. There I share her concerns. But what of the coming dual New Zealand that she visualises, of two co-existing constitutional entities or even (as she contemplates in *Rolling Back the State*) the alternative of two, apparently separate, nation states? Such changes are likely to come about by no other means than by the actual overthrowing of the present constitutional order: that is, successful revolution, of course ideologically justified in the eyes of those who bring it about; and then, if it works, made acceptable – legitimate – for everyone not sharing their ideology, by its effectiveness and durability.

I infer from Dr Kelsey's 1989 writing on "Rogernomics and the Treaty of Waitangi" that the ideology of the new constitutional order or rather dual orders would be that of radical Maori on the one hand and radical Pakeha women and workers on the other; though she left uncertain whether Maori would wish to join in an actual alliance. Putting that aside, these groups would, in the neo-Marxist terminology she uses, build the counter hegemonies that would by revolution replace the present hegemony of Pakeha capital. Such a dual New Zealand if it were viable might, in many ways be better governed than the present one. There might well be less social distress. The question remains for the constitutional theorist whether the new hegemonies would be limited by the rule of law administered in independent courts. To that question I return, briefly, later.

In *Rolling Back the State* Dr Kelsey divides present day Maori critics of the present constitutional order between those who actively "challenging the colonial state" work for the kind of radical – I would say necessarily revolutionary – constitutional change I have just been discussing and those she describes as "comparatively passive reformers" who focus their energies on – again in her words – "securing change through policy reforms, the Courts and the Waitangi Tribunal". I think one might place among the "comparatively passive reformers" Professor Whatarangi Winiata of the Victoria University of Wellington who, at the 1993 New Zealand Law Conference, gave a paper entitled "Revolution by Lawful Means". In it he criticises the Courts for not giving direct effect to the Treaty as the founding document of the country and exhorts them to remedy that failure.

He places the responsibility for the failure squarely on them and exonerates the Crown. But in that, with respect, he is far too hard on the Judges. Though Judges have a function independent of the other organs of government they are still part of the established constitutional order which they must uphold as long as it functions and is effective. In New Zealand the United Kingdom Parliament set up a constitutional order not based on the Treaty, of which the judiciary have been part and which they have had to uphold as their judicial oaths have required. That they should have received the Treaty into the law when the constitution was not based upon it seems to me an unreasonable expectation. Nevertheless, though, Professor Winiata is partly right. There is a case for the Judges to modify the rule laid down by the Privy Council in *Te Heuheu Tukino's* case in 1941 that the Treaty is not part of the law unless given effect on legislation. In the *New Zealand Maori Council* case (1987) the President of the Court of Appeal remarked of the Privy Council decision that it

> represented wholly orthodox legal thinking, at any rate from a 1941 standpoint.

There is a clear hint here that the position of the Treaty may be reconsidered by the Courts and the President, not always with the support of his colleagues on that Court, has shown clear signs that he himself is reconsidering that position. Most recently in the "Sealord" case, late in 1992, the Court itself has stated expressly that

> fundamental questions of the place of the Treaty in the New Zealand constitutional system

remain open.

Those words would leave open the possibility of complete judicial recognition of the Treaty as apparently urged by Professor Winiata. But what is more likely, I think, having regard to the traditional position and to opinions expressed in many of the cases, is that a much more modest measure of recognition may occur. The Courts may — I hope they will — accept a general principle that, except where Parliament expressly legislates to the contrary, all Acts of Parliament are in relevant contexts to be interpreted against the background of the Treaty; so that its principles are always to be taken into account, for example when an official exercises statutory powers in matters where Maori values or interests are involved.

There is not time even to sketch out an argument for this modification of the hitherto orthodox view. It would rest largely, however, on New Zealand's changed status since 1941. Back then the Privy Council was able to regard the Treaty as just another treaty of cession by which the Imperial Crown had added to the British Empire, so that the Privy Council applied the rule applicable to treaties generally. At the time New Zealand had not adopted the Statute of Westminster and it had only limited powers to amend its constitution. It was certainly not generally perceived as in law a separate realm, an independent nation state. Today in law and in political reality it is those things and the Treaty is more easily seen as unique and as the foundation upon which, ultimately, the nation state is founded. The Treaty, in Chilwell J's valuable phrase in the *Huakina* case is "perceivable, whether or not enforceable, in law".

This modification of the orthodox view would amount to a limited constitutionalising of the Treaty. It is I think as far as the Courts can be expected to go in an unwritten constitution in which Parliament has long claimed and exercised supremacy over the Treaty. A more complete constitutionalising would have to await what is in my view needed for other reasons as well: the establishment of a written constitution in which the Treaty would have its place and Treaty rights be protected and put generally beyond the powers of the legislature to abridge, in much the same way as in Canada indigenous peoples' rights are protected by the Constitution Act 1982. But this will occur, one may predict, as a matter of political reality, within the present unitary New Zealand state and not the revolutionised dual nation of the radical advocates. It may well occur at the inception of a New Zealand republic in which Maori could properly stipulate for protection of Treaty rights in the new constitution, in return for losing what are seen to be the monarch's personal obligations under the Treaty. Whether in a continuing monarchy or a republic, the Treaty rights themselves would continue to be worked out; as they are worked out at present by the Waitangi Tribunal and, where statute allows them to, by the Courts: as rights modified by the passage of time but far from rendered meaningless.

And Parliament would have given up, through the constitutional processes necessary to create the new written constitution, the power over the Treaty that it has for so long claimed and exercised. Even then all would not be sweetness. Disagreement as to whether justice has been done to Maori, especially in particular cases (as for example in the "Sealord" matter), would be likely to continue and continue for a long time. But that is the price to pay for the manner in which this nation state has been established.

I come to the other part of tonight's topic, Parliament and Freedom. In saying something of that as well as the Treaty tonight, I am trying to give a balanced constitutional picture, taking account on the one hand of the generally communal rights of Maori under the Treaty; and, on the other, the rights and freedoms of the individual which New Zealand as a party to the International Covenant on Civil and Political Rights is committed to protect.

The problem here, as again in relation to the Treaty, is the theory of Parliamentary sovereignty or supremacy which in its orthodox form allows Parliament to make laws which, no matter how unjust, harsh or even cruel, would be beyond the power of any Court to declare invalid. The absoluteness of Parliament's claim has been emphasised recently in s 4 of the New Zealand Bill of Rights Act 1990. That Act was passed expressly, as its long title shows, to affirm New Zealand's commitment to the International Covenant to which I have referred. But it was passed as an ordinary Act of Parliament, repealable like any other. And fearful, apparently, that activist Courts would assume some measure of jurisdiction to strike down legislation that contravened the Bill of Rights Act, the legislature included s 4 which specifically denies the Courts any such power. This was an extraordinary, even bizarre, provision to include. If one reads s 4 with s 9, which among other things, declares that everyone has the right not to be subjected to torture, Parliament is really saying that if it wishes to impose torture, it will do so and let no Court intervene by holding the legislation void.

I shall return to say a little more about the Bill of Rights before I close. For the moment I am concerned with Parliament's claim to have power to do away, should it see fit, with the individual rights and freedoms which the common law in effect allows us and many if not most of which have now the protection, such as it is, of the Bill of Rights Act.

The principle, to quote Professor Leslie Zines' recent statement of it, that "any legislative act . . . is law no matter how evil or horrendous its provisions" is part of the modern doctrine of the sovereignty of Parliament, often associated with the name of A V Dicey, which has arisen largely because the Courts have long accepted a general duty of obedience to Parliament. Any idea that they could hold acts of Parliament void is said to have become obsolete in England after the Revolution of 1688. And New Zealand has, so to speak inherited this sovereignty from its United Kingdom parent. However in recent times the doctrine has been challenged, notably in the 1980s in the New Zealand Courts by statements of Cooke J, now President of the Court of Appeal. His Honour has revived in a number of dicta a much older view that there are common law limits to the powers of Parliament, and in particular that there are common law rights that lie so deep that even Parliament could not override them, such as the right not to be subjected to torture; and the right to resort to the ordinary Courts for the

determination of one's rights. And he has also suggested that Parliament could not abdicate its legislative powers to the executive: that is, it could not, to take an extreme example I suggest myself, by statute confer full and unlimited power on the executive government to rule by regulation and decree while Parliament itself goes into indefinite recess.

The great difficulty about a Parliament claiming sovereign or plenary powers is that we know what it can do from what it has in fact successfully and effectively done in the past; but that does not mean logically it has power to do perhaps horrendously evil things such as authorising the extraction of confessions by means of torture when it has not done this in the past. It appears that torture was always unlawful at common law except where the Crown, under its emergency prerogative, used it to extract information; hence the thumbscrews and the rack in the Tower of London. The imposition of torture so authorised appears to have ceased about 1640. There is no doubt it could not now be revived unless an Act of Parliament could revive it. At present of course in New Zealand we have seen the imposition of torture is forbidden by s 9 of the New Zealand Bill of Rights Act and it is also expressly made criminal by provisions in the Crimes of Torture Act 1989. There is no doubt an Act of Parliament could repeal all those provisions. But could it positively authorise the imposition of torture? If Sir Robin Cooke is correct, the citizen's original common law right not to be tortured which in the old days in England has to yield to the Crown's emergency prerogative, has since become so basic a right that Parliament could not override it. It appears that Parliament, whether in England as a separate realm, in the United Kingdom or here, has never attempted to override it. For Parliament to do so would be morally outrageous. I do not myself know why, at least in these circumstances, the morally outrageous should not translate into a legal limitation. Sir Robin Cooke in short is in my respectful view right in supposing that there is a common law right not to be tortured (whatever is done about the matter in a formal Bill of Rights or other legislation). And, as he has suggested, there may be other common law rights of the same basic class, lying so deep that Parliament cannot override them.

On the other hand, other rights that might be thought to be basic have been successfully overridden by Parliament in the past and must be seen to be similarly vulnerable now. As I have suggested, Maori communal rights under the Treaty of Waitangi are in the overridden class, so that the only secure place for Treaty rights, however difficult it may be to define them, is in a written constitution where they are beyond the power of Parliament to abridge. And then there is the right to freedom of religion. One would think of that as a basic right today; and it is a right that has the protection, again such as it is, of the Bill of Rights Act 1990. But, as a South Australian Court has shown in a 1984 case, one cannot claim a basic common law status for it that can be suggested for the right not to be tortured, simply because of the restrictions on freedom of religion (including civil disabilities to which one was subject if of a particular faith) which have existed under parliamentary authorisation until well into the last century. It would be too soon for a New Zealand Court to discover that any such basic right has arisen in our separate constitutional existence, more especially since one particular religious civil disability, inherited from the United Kingdom by way of the Act of Settlement 1700, still exists here as in the Queen's other realms: a Roman Catholic cannot succeed to the throne, because that statute forbids it.

Sir Robin Cooke's statements that there are basic common law rights which Parliament cannot override have not gone uncriticised. There has been strong criticism from Australian jurists, in particular from Justice Michael Kirby, President of the New South Wales Court of Appeal, and from Professor Leslie Zines of the Australian National University. The Kirby-Zines criticism is that, if the Courts assert a common law jurisdiction to hold any acts of Parliament void, no logical limits could be placed on the exercise of the power.

Professor Zines warns against the Judges being "given, [or] . . . grab[bing], a blank cheque", so that they attempt to create a "full" Bill of Rights, at common law. But I take the point of Sir Robin Cooke to have been not that the common law could provide a "full" Bill of Rights but simply that constitutional theory does not require the Courts to accept the principle that (in words already quoted) "any legislative act . . . is law no matter how evil or horrendous its provisions". One could hope for the common law limitations to be applied in the most extreme cases only.

Yet when I defend the notion that there are ultimate limits upon the powers of Parliament of the kinds suggested by Sir Robin Cooke so that, to add to the list of possible instances, Parliament could not abolish freedom of speech or the representative democracy that has now long existed in New Zealand and in its United Kingdom parent, I am conscious of our constitutional vulnerability and of the great strength of the traditional doctrine of unlimited parliamentary sovereignty. Just as Treaty rights should not be at the mercy of Parliament neither should our individual rights and freedoms arguably be at its mercy. The constitutional settlement that we need will entail a written constitution in which not only will the Treaty or its principles be protected but the New Zealand Bill of Rights have its status changed from that of an ordinary statute to an entrenched constitutional instrument. I am aware of the arguments against this kind of basic constitutional change such as the possible politicising of the judiciary. But I think that the need to find a constitutional solution to the Treaty and the moves towards an inevitable republic, will push us towards a wider consideration of the kind of constitution the country should have; and I doubt whether it will simply be a continuation of the present one, with its overpowerful parliament dominated by what is as a result an overpowerful executive.

For the present we have a Bill of Rights Act passed as an ordinary statute. The Courts have been able, with the acknowledged help of the writings of my colleague Paul Rishworth, to make it far more effective than anyone thought they could; but of course its abiding vulnerability to legislation inconsistent with it remains. Here, if I may refer briefly to detail which there is no time to amplify, the Courts' role in the interrelationship of ss 4, 5 and 6 of the Act remains doubtful. My millennial hope here is that the Court will see its proper role as being (at least in an appropriate case) first to see whether, making use

of s 6, the other legislation it is considering is inconsistent with any of the rights and freedoms affirmed in the Act; and if it is inconsistent, to declare whether or not it is nevertheless saved by s 5 as a limitation justified in a free and democratic society. That seems to me a proper role for the Court to adopt, even though, owing to the inconsistency first discerned, it is forbidden by s 4 mentioned earlier from holding the offending legislation void or inoperative.

It has been commented by the President (in *Temese's* case) that the approach I suggest may have

> the drawback that, if the Court were to say that the limitation was unjustified yet overridden by the enactment, the Court could be seen by some to be gratuitously criticizing Parliament by intruding an advisory opinion.

But I respectfully press the suggestion nevertheless.

The New Zealand Bill of Rights Act was after all enacted to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. Now that New Zealand has ratified the Optional Protocol to the Convenant, citizens who allege that their rights have been infringed by the State have the international remedy of taking their complaints to the Human Rights Committee. It would be anomalous if they could not first have the issue dealt with fully by a New Zealand Court in the way I have described, even though the Court is barred from holding the legislation void or inoperative.

My millennial hope in any case, in terms of the title of this lecture, is for a written constitution protecting both the Treaty rights as discussed and the individual rights and freedoms; in which the Courts will have power of judicial review, to strike down unconstitutional legislation. In this I am expressing a confidence in the suitability of Judges for this kind of task which some do not share; though I point out that the kind of high constitutional Court that would deal with these matters need not necessarily be the preserve of lawyers. It could have a lay component (in accordance with German and French precedents) and provision for Maori representation on it might be thought essential. But the basic question, when there is talk of revolutionary change, is whether or not one accepts the need for the power of the government, whatever its political nature, to be limited by law, by the rule of law administered in independent Courts. The British Marxist historian, the late E P Thompson, in studying the rule of law as a weapon of class domination in 18th century England concluded that, despite the numerous occasions of its gross abuse, the rule of law remains a necessary check on arbitrary power. He termed it a "cultural achievement of universal significance" and an "unqualified good". To the law student of revolutions, or at least to this one who strongly agrees with Thompson, it will remain a necessity in the New Zealand of the third millennium whether or not constitutional revolutions are ahead and whatever the nature of the future regimes; as it has indeed remained in Fiji after the successful revolutions of the indigenous people in 1987, under the country's new republican constitution. I will have made it clear that constitutional revolutions are not part of my millennial hopes for Aotearoa-New Zealand. But vigorous reform within the present unitary state, under which (to develop a thought from Professor Winiata) Maori would enjoy both better kawanatanga and more rangatiratanga, certainly is within those hopes and indeed within one's expectations.

I have essayed a fairly wide survey, no doubt over-generalising and over-simplifying. Some matters have been treated more fully in work already published; others await fuller treatment in the published version of this lecture. I have written elsewhere about the likely New Zealand republic and have not tried to cover that now; though it must be among one's speculations. I hope I have not strayed too perilously far from the things I know about best. I may have occasionally trailed a coat and I have wondered if it might be prudent not to wait about for a snack and drink but to leave hastily now, waving a valedictory hand.

Anyway, I would not do that without making some due acknowledgements. Since this is a University as well as a Faculty occasion, it's an appropriate one on which to thank people from across the departments and the administration and services of the University, who have given help and friendship over the years.

In academic matters and often for personal support and friendship also, I owe a great debt to a large number of lawyers in this and other Universities, in the judiciary and in the practising profession and the government service; to scholars in other disciplines only a few of whom have I mentioned tonight. Two people on whose profound and also exciting interdisciplinary scholarship I have much relied, not so far mentioned, are Drs Andrew Sharp and Paul McHugh. But there are others also. And I would not wish to forget my students whom I'm glad to see represented here tonight.

I ought to mention separately, for they have posed a special challenge, the lawyers of the radical left (if I may so call them) two of whom I have referred to quite a lot tonight. A tribute here would be prudent since, after all my talk of the revolution, it might come in my lifetime. I would wish to avoid even the faint risk of sharing the fate of poor Danton. But my acknowledgment to the radical lawyers is a serious one: to able, vigorous, wide-ranging, polemical writing, some of it on lines of traditional scholarship, some of it clearsightedly directed to political ends from a perspective, not mine, in which law appears largely as a part of politics. Not the least exciting thing about working in the University in these last very exciting years has been learning from and arguing with the radical left and trying, as I am now, to learn a little of its manifestations in other disciplines as well as the law. I hope to go on learning and arguing; and also writing, in non-controversial as well as controversial fields: perhaps in that quiet field (mentioned by the Dean this evening) where surface waters softly flow. Though, whatever I write about anything may just be deconstructed anyway.

My thanks, as I go then, to the University and to many people whether within it, – or if outside the University, still of it nevertheless.

Tena koutou tena koutou
tena koutou katoa

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