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Extending the duty of care – or *Anns* redivivus?

The judicial saga of the extent of the duty of care continues to trouble the Law Lords. In 1990 Lord Bridge, in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, referred to what he called the modern approach to the question of the duty of care as having been a search for a single general principle which could be applied in all circumstances to determine whether such a duty existed or not. At p 573 Lord Bridge summed up the unsatisfactory history of the issue to that date. He said:

> The most comprehensive attempt to articulate a single general principle is reached in the well-known passage from the speech of Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER 492 at 498, [1978] AC 728 at 751-752:
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> > Through the trilogy of cases in this House, *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, and *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise (see the *Dorset Yacht* case [1970] 2 All ER 294 at 297-298, [1970] AC 1004 at 1027 per Lord Reid).

But since *Anns*'s case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 533-534, [1985] AC 210 at 239-241, *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705 at 709-712, [1988] AC 175 at 190-194, *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 at 172, [1988] AC 473 at 501 and *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 at 241, [1989] AC 53 at 60. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43-44, where he said:

> It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established

> categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".

One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss.

The relevant New Zealand cases are of course well-known. More recently they include *Balfour v Attorney-General* [1991] NZLR 519, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigators Ltd* [1992] 2 NZLR 252, *Bell Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, and *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295; 1993 1 NZLR 513 (PC). These New Zealand cases were referred to in the House of Lords decision of *Spring v Guardian Assurance plc* [1994] 3 All ER 129. An editorial on *Spring* was published at [1994] NZLJ 273 and two articles on it at [1994] NZLJ 320 and [1995] NZLJ 61. Earlier editorial comments on the shifting law regarding the duty of care are at [1992] NZLJ 113, [1992] NZLJ 77, [1990] NZLJ 257 and [1988] NZLJ 293. An analysis of the development of the law of negligence and the duty of care in New Zealand and its divergence from English law is to be found in the newly published title "Negligence" in *The Laws of New Zealand*, more particularly in paragraphs 8, 9 and 67.

There has now been a further development of the law in the House of Lords decision in *White v Jones* (Lord Keith, Lord Goff, Lord Browne-Wilkinson, Lord Mustill and Lord Nolan; 16 February 1995) with the Court dividing three to two in upholding the majority decision of the Court of Appeal.

Lord Keith in *Spring* and now in *White* was in the minority. From this it would appear he is not now as influential as he was when referred to by Lord Bridge in *Caparo* in the extract quoted above. The majority of the Law Lords in *Spring* and in *White* were ready to extend the scope of the duty of care. In *Spring v Guardian Assurance* this applied to a negligently prepared personal reference concerning an employee. In *White v Jones* it related to a solicitor's failure to prepare a will in time so that two intended beneficiaries would receive their bequests. Obviously this latter case has strong similarities with the New Zealand decision of *Gartside v Sheffield Young and Ellis* [1983] NZLR 37, and indeed the New Zealand case is mentioned, and an extract from the judgment of Cooke P is quoted, in the principal judgment in *White*, that of Lord Goff.

In his very short judgment in the case of *White v Jones* Lord Keith had this to say:

> I am unable to reconcile the allowance of the plaintiff's claim with principle, or to accept that to do so would represent an appropriate advance on the incremental basis from decided cases. The position is that the defendant Mr Jones contracted with the testator, Mr Barratt, to perform a particular service for him, namely to take the appropriate steps to enable Mr Barratt's revised testamentary intentions to receive effect. He negligently failed to take these steps with due expedition with the result that upon Mr Barratt's death the plaintiffs did not become entitled to the testamentary provisions which but for that failure they would have been taken.
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> The contractual duty which Mr Jones owed to the testator was to secure that his testamentary intention was put into effective legal form promptly. The plaintiffs' case is that precisely the same duty was owed to them by Mr Jones in tort. If the intended effect of the contract between Mr Jones and the testator had been that an immediate benefit, provided by Mr Jones, should be conferred on the plaintiffs, and by reason of Mr Jones's deliberate act or his negligence the plaintiffs had failed to obtain the benefit, the plaintiffs would have had no cause of action against Mr Jones for breach of contract, because English law does not admit of jus quaesitum tertio. Nor would they have had any cause of action against him in tort, for the law would not, I think, allow the rule against jus quaesitum tertio to be circumvented in that way. To admit the plaintiffs' claim in the present case would in substance, in my opinion, be to give them the benefit of a contract to which they were not parties . . ..
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> Upon the whole matter I have found the conceptual difficulties involved in the plaintiff's claim, which are fully recognised by all your Lordships, to be too formidable to be resolved by any process of reasoning compatible with existing principles of law.
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> I would therefore allow the appeal.

The factual situation was rather more complex than indicated by Lord Keith. It involved two sisters, daughters of the deceased, who had previously been cut out of his estate by their father. He was subsequently reconciled with them and gave instructions for a new will with a specific bequest of about one third of the estate to go to each of them. Even under the earlier will all of the estate, a relatively small one of nearly £30,000, remained with family members, mainly grandchildren. This was a matter that caused some concern to Lord Nolan who noted that the family would retain all of that money under the existing will and in addition the two daughters would get an additional £18,000 between them by way of damages from the solicitors, or their insurers. Lord Nolan wondered how the deceased might have wished to divide up an estate thus augmented; but he decided that question could not count in deciding whether the daughters were to be entitled to a remedy against the solicitors. If they were so entitled then they should receive damages in accordance with their loss.

The very substantial decision of Lord Goff concentrated particularly on the cases of *Ross v Caunters* [1980] Ch 297 and *Hedley Byrne v Heller* [1964] AC 465, [1963] 2 All ER 575; but also covered a wide range of authority and the views of text-book writers. Particularly interesting is his Honour's reference to German works and legal principles including a doctrine known as Drittschadensliquidation. Lord Goff acknowledges frankly that the Court is making new law in this majority decision in *White*. He expresses his final conclusion as follows:

For the reasons I have already given, an ordinary action in tortious negligence on the lines proposed by Sir Robert Megarry V.-C. in *Ross v Caunters* [1980] Ch 297 must, with the greatest respect, be regarded as inappropriate, because it does not meet any of the conceptual problems which have been raised. Furthermore, for the reasons I have previously given, the *Hedley Byrne* principle cannot, in the absence of special circumstances, give rise on ordinary principles to an assumption of responsibility by the testator's solicitor towards an intended beneficiary. Even so it seems to me that it is open to your Lordships' House, as in the *Lenesta Sludge* case [1994] AC 85, to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present. In the *Lenesta Sludge* case [1994] AC 85, as I have said, the House made available a remedy as a matter of law to solve the problem of transferred loss in the case before them. The present case is, if anything, a fortiori, since the nature of the transaction was such that, if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit. I only wish to add that, with the benefit of experience during the fifteen years in which *Ross v Caunters* has been regularly applied, we can say with some confidence that a direct remedy by the intended beneficiary against the solicitor appears to create no problems in practice.

Lord Browne-Wilkinson in his judgment also takes the view that the special relationship giving rise to a duty of care should be extended to include a situation such as had occurred here. His Lordship said:

> Let me now seek to bring together these various strands so far as is necessary for the purposes of this case: I am not purporting to give any comprehensive statement of this aspect of the law. The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationship can be held to exist are not closed, as yet only two categories have been identified, viz (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice . . . .
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> However, it is clear that the law in this area has not ossified. Both Viscount Haldane LC (in the passage I have quoted [1914] AC 932, 948) and Lord Devlin (in *Hedley Byrne* [1964] AC 465, 530-531) envisage that there might be other sets of circumstances in which it would be appropriate to find a special relationship giving rise to a duty of care. In *Caparo* Lord Bridge of Harwich [1990] 2 AC 605, 618, recognised that the law will develop novel categories of negligence "incrementally and by analogy with established categories". In my judgment, this is a case where such development should take place since there is a close analogy with existing categories of special relationship giving rise to a duty of care to prevent economic loss.

Lord Nolan in a short judgment agreed with the views expressed by Lord Goff and Lord Brown-Wilkinson. He noted the facts of the case and commented that he did so to point out that they were relevant to what he called the pragmatic case-by-case approach that marks the present attitude of the law towards negligence claims. This was presumably to give formal acknowledgment to *Anns* having been overruled. Lord Nolan also took the view that once a duty of care is found to exist it is irrelevant whether a breach of that duty is by way of omission or of positive act.

The substantial dissenting opinion was that of Lord Mustill, with which Lord Keith said he fully agreed. In short, Lord Mustill's view was that the situation in this case was very different from that of *Hedley Byrne*. He considered that to allow a cause of action in the circumstances of the present case was not merely an "enlargement" of *Hedley Byrne* but the enunciation of something "quite different". He emphasised that while it was true that the drawing up of a will in accordance with the testator's instructions would have benefited two additional beneficiaries, the will would not have been drawn up *for* the beneficiaries, but for the testator. He went on to say that he saw a serious problem of where the present decision would lead. He said it was not just a matter of conjuring up a spectre of opening the floodgates. The point that troubled him was that he could not discern any principled reasoning that could lead to the recognition of such an extensive area of potential liability as he now foresaw.

Lord Mustill said that the majority decision rested on certain assumptions. He described the first assumption as being that there must be something wrong with the law if the daughters' claim did not succeed. This, he said

> itself embodies two distinct propositions – that the plaintiff's disappointment should be relieved by an award of money and that the money should, if the law permits, come from the solicitor. I am sceptical on both counts. I do not of course ascribe to those who support the plaintiffs' claim the contemporary perception that all financial and other misfortunes suffered by one person should be put right at the expense of someone else. Nobody argues for this.

Even under the most supportive of legal régimes there must be many situations in which the well-founded expectations of a potential beneficiary are defeated by an untoward turn of events and yet he or she is left without recourse. Nobody suggests otherwise. What is said to take the present case out of the ordinary is that the plaintiffs' disappointment resulted, and resulted foreseeably, from what is called "fault". I add the qualification "what is called", to underline what I believe to be the central feature of the case. An illustration may show why. Imagine that the solicitor prepared the will in good time, but that whilst the testator was on his way to execute it he was fatally injured by a careless motorist. Undoubtedly the motorist would be guilty of fault in the legal sense, but his carelessness would be characterised as such because he owed a duty towards the testator, as towards other members of the public, to drive with sufficient care to avoid causing him physical injury. To this duty the added feature that the victim was about to execute a will would be wholly irrelevant. It is conceivable, although no doubt rather improbable, that the driver also committed an actionable fault vis-à-vis those who would have benefitted under the will if the testator had lived long enough to execute it. If this were so, it would simply be that the law recognised the relationship between the driver and the beneficiaries as satisfying the requirements of a duty of care. The fact that the relationship between driver and testator also satisfied those requirements would add nothing, for each relationship has to be looked at on its own merits. If the driver incurred liability to both, the act which constituted the breach would in each case be the same, but the duties themselves, although existing at the same time would have different origins, and one would not depend on the existence of the other.

Finally, it is worthy of note that the judgments also referred to the recent decision of *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506. The Court that decided that case consisted of the same five Law Lords as considered *White v Jones*. The *Henderson* case was the claim by a group of Lloyd's names against underwriting agents. In that case the House of Lords found unanimously for the names on the basis of the *Hedley Byrne* principle of a duty of care arising where a person assumed responsibility to perform professional or quasi-professional services for another who relied on those services. This factual situation however was recognised by all the Law Lords in *White v Jones* to be a different issue from the one then facing them, for the simple reason that it was the testator, not the beneficiaries, who relied on the solicitor to carry out his instructions.

Whether *White v Jones* will be as far-reaching in establishing a broad principle based solely on economic loss for new claims for a breach of a duty of care as Lord Mustill, and Lord Keith fear, remains to be seen. To date at least *Gartside v Sheffield Young and Ellis* does not seem to have had that effect here in New Zealand.

P J Downey

Tort or contract?

As a profession we are in the firing line. Our mistakes are usually obvious and we are under an obligation wherever we suspect we might have made one to advise the client to take independent advice. From then onwards it can become a very painful process for the recipient of the claim as well as a long and expensive process for the claimant. The question that has always puzzled academic lawyers is whether a claim for damages can be brought in contract and tort and whether it makes any difference. . . .

In *Henderson v Merrett Syndicate* [1994] 3 WLR 761 the House of Lords answered a question which had been causing problems particularly for defenders of professional advisers.

Henderson was one of the many reported cases elucidating the law of contract and the tort of negligence in the context of claims brought by names at Lloyd's against agents who placed them on various syndicates and against the agents who managed those syndicates. . . .

It mattered whether there was concurrent liability in tort as well as contract because of the limitation period. Under the Statute of Limitations 1980 a claim for damages for breach of contract is barred if not brought within six years of the date of the breach unless the defendant deliberately or fraudulently misled the plaintiff. Establishing deliberate misleading or fraud is not easy and in the context of these particular claims, probably impossible. The Latent Damage Act 1986 was intended to cure the weakness in the statute that a plaintiff may not know that it had a claim until it was too late. But it only applies to the tort of negligence and not to contractual obligations. It was therefore vital to some of the names, who had left bringing their claims late, to establish that they had a right to do so in tort as well as contract. Otherwise they would be statute barred.

Lord Goff pointed out in *Henderson* that unless the contract specifically excludes the right to bring a claim for damages in tort by applying a different standard of care there is a concurrent right to bring a claim for damages in the tort of negligence. This permits the plaintiff to rely upon any extension of time available to it for doing so under the Latent Damage Act. It also allows the defendant to argue in defence contributory negligence.

What then is required to exclude tort? Probably the same kind of words as were used in *Barclays Bank Plc v Fairclough Building Limited* ((1984) *The Times*, 11 May) where the duty was strict. What has not yet been decided (in one of the Lloyd's cases judgment is pending) is whether in the event that a name can bring a claim for damages in tort against a managing agency its members agent is vicariously liable for the tort of the managing agency, thus making it liable in tort and not contract. This is a different test to whether the members agent is in contract liable for negligence perpetrated by the managing agents.

Clive Boxer
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Case and Comment

Arrest

Edwards v Police [1994] 2 NZLR 164 is an interesting case concerning the contentious subject of arrest. The facts were simple. Mr Edwards was riding home on his motorbike. A constable saw him across an intersection standing on the footpegs of the bike with no helmet on. When the motorbike turned left the constable activated the flashing lights and followed. The motorcycle went up the drive of the first property on the east of the street and as the rider turned to go up the drive he looked at the constable. The manner of the riding together with the absence of a helmet and a registration plate led the constable to suspect that the rider had stolen the motorcycle. The constable ran up the drive and caught up with the appellant who had collided with the edge of a narrow gate. The constable grabbed the bike's carrier, causing the rider to fall off. He jumped up and the constable grabbed him. The rider said it was his house. The constable marched him to the back door. Mr Edwards' wife answered the door and confirmed that the constable had her husband in his arms. He let him go and asked for his name and address, which Mr Edwards correctly gave.

By this time it was obvious to the constable that Mr Edwards was drunk. In fact he refused to accompany for breath and/or blood alcohol testing as he already knew he was drunk. The constable then formally arrested the appellant and, with the help of some neighbours, subdued and handcuffed him. At the station he refused breathtesting but consented to a blood test that revealed a level of 192 mg.

The District Court Judge found that the constable reasonably believed that the motorcycle might have been stolen. There was no question of the power of entry in s 66A of the Transport Act applying as the officer never suspected alcohol impaired riding until he was marching him to his back door. The Judge found that the officer had an implied right to enter the property and this was not revoked. The Judge accepted defence Counsel's submission that the restraint applied to Mr Edwards before formal arrest was an arrest but did not go on to address specifically the submission that it was unlawful. The Judge admitted the blood test results as "there was no unfair act by the constable".

On appeal Tipping J said that the appeal raised two questions about police powers; one relating to police powers of entry onto private property, the other to the ability of the police to detain a citizen short of formal arrest.

Police powers of entry are examined at greater length than restraint short of arrest; there is a discussion of necessitous entry, but in the end his Honour decided that Mr Edwards had not revoked the constable's implied licence to enter the property. Justice Tipping asked himself the question that Cooke P used in *Howden v Ministry of Transport* [1987] 2 NZLR (CA) 747, 751[1] and said (at 169):

> I consider it reasonable to say that most, if not all, New Zealand householders would agree that a constable who, on reasonable grounds, suspects that a person has entered their property following the commission of an imprisonable offence, has their implied authority to pursue that person onto their premises in order to investigate.

Restraint short of arrest

His Honour began his discussion under this heading by saying, at 172, "In the absence of express statutory authority . . . police officers are not permitted to stop, restrain or detain citizens in circumstances falling short of formal arrest or detention". The one thing Mr Edwards' detention was not was formal so it is not surprising that Tipping J finds that the arrest was unlawful. However arrest need not be formal. In *Fraser v Police* [1967] NZLR 441 McGregor J said, at 450:

> An arrest is not necessarily a formal act. "'Arrest' is when one is taken and restrained from one's liberty": Termes de la Ley, 1 Encyc 328-331. Mere touching may constitute an arrest (*Ganner v Sparks* (1704) 4 Mod 173).

In another *Edwards*, reported at [1991] 3 NZLR 463, Hillyer J said, at 466:

> It is settled law that an arrest can occur only where there has been physical seizure or touching of the person with a view to his detention (a mere touch will suffice, but presumably the intent must be made clear to the arrestee by words or otherwise) or the utterance of words of arrest, coupled with acquiescence or submission on the part of the arrestee (see Adams, *Criminal Law and Practice in New Zealand* (2nd ed) at para 2490).

The case concerned the meaning of arrest in s 23(1)(b) of the New Zealand Bill of Rights Act. Cooke P adopted that definition in *R v Kirifi* [1992] 2 NZLR 8, 11-12, (CA)

without determining whether it was exhaustive. In *R v Goodwin* [1993] 2 NZLR 153 (CA) Richardson J said at p 189 that arrest within s 23 of the Bill of Rights had its common law and Crimes Act meaning, and said.

> Detention by the police is not characterised as an arrest unless it is under warrant or where without warrant it is ostensibly justified as being on reasonable suspicion of having committed a breach of the peace or an offence punishable by imprisonment (s 315), or under other statutory arrest authority. The intention on the part of the officer to hold the person apprehended on suspicion of an offence or under other lawful authority may be manifested by words or conduct, eg by handcuffing to a fence a person apprehended in the vicinity of the scene of a crime (*R v Kirifi* [1992] 2 NZLR 8). And it is that objectively assessed expression of intention, rather than the purely subjective intention of the police officer concerned, which counts.

There is nothing particularly formal about handcuffing someone to a fence. The detention in *Kirifi* was more dramatic than in *Edwards* and Richardson J at p 190 cautions against "a ready assumption of the manifestation of a purely implied intention to so arrest" making it unclear whether Richardson J would have found a lawful arrest in *Edwards*. What is clear is that an arrest does not have to be formal to be lawful.

Tipping J accepted that the constable had the good cause to suspect that the appellant had committed an imprisonable offence that would have permitted his lawful arrest under s 315(2)(b) of the Crimes Act. His Honour cites *Blundell v Attorney-General* [1968] NZLR 341 (CA) as authority that unlawful detention amounts to the tort of false imprisonment. After the discussion of *Blundell* and a couple of other observations his Honour said at p 173, "It is therefore perfectly clear that Mr Edwards was subjected to a form of custodial restraint short of formal and lawful arrest". The want of formality appears to be the main reason for this, but analysis of what preceded that statement for other possible reasons leads to a list like; first, there was no compliance with s 316(1) of the Crimes Act; secondly, there was no intention to arrest; thirdly, no words of arrest were used; and fourthly, the arrest was for the purposes of questioning. While those topics could be usefully addressed individually, it may be easier to see if *Blundell v Attorney-General*, which Tipping J relied on, really supports the result in *Edwards*.

Blundell was an action for a false imprisonment that occurred when police officers restrained Blundell while they made inquiries about a warrant for his arrest. The police did not intend, in restraining Mr Blundell, to arrest him before executing any warrant for his arrest.

In *Blundell* Turner J held that if the constables had had the state of mind that would have brought them within ss 31 or 32 of the Crimes Act the detention would have been justified. Turner J said at p 354:

> When the statutory provisions are applied to the present case, it is readily seen that it would have been a defence in this case for the constable or constables restraining the appellant to have proved that though there was no warrant for his arrest they or he believed on reasonable and probable grounds that the appellant had committed an offence for which under the Crimes Act or some other enactment the constable had the power to arrest the offender without warrant. In my opinion the authority for arrest without warrant afforded by the sections which I have mentioned constitutes the only defence available in this country by way of justification for the purported arrest of a person without warrant by a constable on mere suspicion of a criminal charge against that person.

The phrase "believed on reasonable and probable grounds" used in the first sentence of that paragraph is derived from the common law defence of justification, see *Salmond on Torts* 14 ed (1965) at p 189, and the wording of s 32 of the Crimes Act. If s 32 would have justified that detention if the officers had had the belief it required, s 31 would have similarly justified it if the officers had had good cause to suspect that Blundell had committed an imprisonable offence.

Justice Tipping in no wise ignored the passage of Turner J's judgment quoted above: he himself quotes the second and final sentence of that paragraph.

McCarthy J in *Blundell* required a decision to arrest before any statutory power of arrest could be used to justify a detention. Tipping J quotes from all three judgments but mainly from McCarthy J's, whose judgment is the only one that clearly supports Justice Tipping's conclusion. At p 172 Tipping J said:

> At p 359 in a passage very relevant to the present case, McCarthy J said: "But, in any event, in my view such a defence would be open only if what was done by the Police could fairly be said to be an integral step in the process of making a formal arrest: *Kenlin v Gardiner* [1966] 3 All ER 931. There Winn LJ in a judgment concurred in by the Lord Chief Justice and Widgery J said recently: 'But on the assumption that he had a power to arrest, it is to my mind perfectly plain that neither of the respondents purported to arrest either of the appellants. What was done was not done as an integral step in the process of arresting, but was done to secure an opportunity, by detaining the appellants from escape, to put to them or either of them the question . . .'".

Macarthur J, the third member of the *Blundell* Court said, p 361:

> . . . the only ground upon which a Police constable may justify detaining a person is that he is acting in the process of arresting that person. The arrest may be under warrant, or it may be a case of arrest without warrant. In the latter event the case must fall within the provisions of the Crimes Act 1961 or, as stated in s 315 of that Act, some other enactment expressly giving the power to arrest without warrant. In the present case there was no warrant for the arrest of the appellant. But it would have been a defence (in terms of the foregoing provisions) if there had been proof of a belief on the part

> of the constable or constables concerned, on reasonable and probable grounds, that the appellant had committed an offence for which a constable had the power to arrest him without warrant.

As in Turner J's judgment, the phrase "reasonable and probable grounds" in the last sentence of that quotation comes from s 32 and the defence to false imprisonment of justification. Tipping J treats the two judgments similarly; his Honour's quotation from Macarthur J's judgment begins at the beginning of the above quote but ends before the final two sentences.

Tipping J uses *Blundell* to suggest that the detention in *Edwards* was a false imprisonment, and therefore a restraint short of arrest, when a majority in *Blundell* indicated that where a statutory justification for an arrest is satisfied, a detention is justified. On that analysis s 31 justified the detention in *Edwards* as the constable had good cause to suspect that Mr Edwards had committed an imprisonable offence.

The passages in *Blundell* that point in the opposite direction to the result in *Edwards* are obiter and have not stood out over time as one of the features of the case, nevertheless they are enough to prevent it being clear authority that the detention in *Edwards* was unlawful.

There were other omissions in *Edwards*. Section 66(5) of the Transport Act provides for the arrest of motorists who fail to stop when signalled to under s 66(1) or who when stopped fail to supply the information that the officer may demand under s 66(2). The appellant was liable to arrest under this section; and it would be surprising if wanting to exercise the statutory power to demand information is an irrelevant consideration when deciding to arrest for failing to stop. Additionally there is a power of detention to prevent the escape of a person fleeing to avoid arrest in s 40 of the Crimes Act that could have been useful on these facts.

Remedy

Counsel for the appellant said the false imprisonment was unfair. Tipping J saw the false imprisonment he found as arbitrary detention contra s 22 of the Bill of Rights Act. It was "a substantial breach of his civil rights", p 174. His Honour said there would have been no breach of the rights if Mr Edwards had been formally arrested but that is not what happened. This is exactly the situation where the inconsequentiality exception to the prima facie rule of exclusion of evidence for breach of the Bill of Rights Act applies. Justice McKay, the exception's foremost appellate exponent, said in *R v Jefferies* [1994] 1 NZLR 290, 317 (CA):

> The appellants knew that they had been stopped by the police. Even on their own evidence they did not positively refuse to allow a search, nor attempt to prevent a search. The police had a statutory right to search under s 60 of the Arms Act 1983, but inadvertently failed to comply with the conditions in that section. Compliance would have led to the same result, namely discovery of the cannabis. The police gained no advantage from non-compliance, and the appellants suffered no detriment. The appellants were not tricked into any course of action, and the non-compliance had no effect on anything that they either did or refrained from doing. There is no casual connection between the breach of the Bill of Rights and the discovery of the evidence. Nor is it a case where there was a deliberate attempt by the police to act outside the law, such as might otherwise call for the exclusion of the evidence.

The reason for the "inadvertence" of the officers in *Jefferies* is that no-one thought of justifying the search by the Arms Act power to search until the case was due to go to the Court of Appeal. The constable in *Edwards* did not think of the statutory powers he had either and it is similarly difficult to see how the appellant suffered any prejudice from the breach of rights. If the size of the breach is determined by how far what happened fell short of being lawful, the breach of Edwards' rights was as large as the failure to say "you're under arrest",[2] as tautologous as that would have been. Justice McKay's explanation of the reasons why the breach was inconsequential in *Jefferies* is a sound basis for saying that any breach in *Edwards* was inconsequential. McKay J's analysis contrasts with Tipping J's conclusion, at 174:

> It is important in a case such as this that the Court vindicate and give tangible recognition to the substantial breach of rights that has occurred. The only way in which that can be done is by excluding the evidence which resulted in a direct and material way from the breach. That Mr Edwards will escape the consequences of a relatively minor drink-driving offence and a failure to accompany a law enforcement officer is a small price to pay for the recognition and enforcement of what is a very important civil right.

Conclusion

Other than that *Blundell* was apparently selectively quoted in *Edwards* and that arrest need not be formal to be lawful, my conclusion, and admittedly it is a conclusion for which *Edwards* is anecdotal evidence rather than proof, is that developing a considered and realistic approach to the Bill of Rights is currently hindered by the prima facie rule of exclusion of evidence for breach. The rule should be reconsidered for at least two reasons; first, it frequently has disproportionate results; secondly, and more importantly, it says that the number one goal of a Court hearing a criminal case is upholding individual rights. Traditional justice, that is attempting to convict the guilty and acquit the innocent, comes a distinct second. These are deep waters, but surely it is inappropriate to disregard the interests and expectations of the community when attempting to remedy breaches of the civil rights it has conferred.[3]

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1 The President there said "In my opinion it would not be reasonable to hold that an occupier gives any implied licence to police or traffic officers to enter for those purposes [random sobriety checks of drivers]. Most New Zealand householders, I suspect, if confronted with that question would answer

it No. Whether or not that suspicion is correct, it certainly could not be maintained that the answer Yes is required so clearly as to justify the Courts in asserting that such an implied licence exists."

2 Words of arrest are not necessary; see *Police v Thomson* [1969] NZLR 513. As noted above there are other reasons why the arrest might have been unlawful. The non-compliance with s 316(1) Crimes Act is venial given the constable substantially complied with its purpose when he allowed Edwards the opportunity to verify his story; see *Elder v Evans* [1951] NZLR 801. There may be an inviolable rule that arrest for questioning is unlawful, but that is unclear; see *Keenan v Attorney-General* [1986] 1 NZLR 241, 246 (CA). In any event, as noted, s 66 of the Transport Act may be a limited exception to any rule prohibiting arrest for questioning.

3 Admittedly Tipping J said at p 174 "A balance must be struck between the interests of society in having offences prosecuted and the interests of citizens in having police observe the law", which is necessarily true, however the current solution simply avoids weighing the competing interests.

Abatement notices

Zdrahal v Wellington City Council (High Court, Wellington AP 99/93, 16 December 1994, Greig J).

This was an appeal to the High Court from a decision of the Planning Tribunal regarding abatement of offensive things. An article on the Planning Tribunal decision was published at [1993] NZLJ 373. This comment on the decision of Greig J has also been published in Butterworths Resource Management Bulletin at 1 BRMB 98.

The facts of this case may be familiar to those following the development of abatement notices and enforcement orders. It concerned a person's right to display swastikas on their property. The case, on appeal to the High Court from the Planning Tribunal, has now been determined and upholds the original decision of the Tribunal. The case is of interest because of the Court's observations on the Bill of Rights, and the finding of the Court that whether something is offensive or objectionable under s 322 of the RMA is an objective test to be assessed according to the view of the ordinary person, representative of the community at large. It is not necessary to adduce evidence that anyone in particular has been offended, as the Court can conceptualise the effect of activities on the ordinary person.

The Planning Tribunal had upheld an abatement notice issued by the respondent to remove swastikas under s 322(1)(a)(ii) of the RMA. Section 322 provides that:

> (1) An abatement notice may be served on any person by an enforcement officer –
>
> (a) requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, –
>
> (i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, or a resource consent; or
>
> (ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.

The abatement notice required the appellant to remove two swastikas, on the grounds that these were offensive and objectionable and therefore likely to have an adverse effect on the environment. The largest swastika was some three feet square in area. It was located between the ground floor and the first floor of the appellant's dwelling, some 6-8 feet from the roofline. This swastika was black on a cream background, and was lit at night with a spotlight. Above the large swastika was a smaller swastika painted on a window.

Two neighbours of the appellant complained. An officer of the respondent Council inspected the property and formed the opinion that the signs were offensive and objectionable and were likely to have an adverse effect on the environment. Accordingly an abatement notice was served on the appellant under s 322 RMA, requiring him to abate the display of the swastikas by removing them.

The appellant appealed to the Planning Tribunal under s 325 RMA. At the Tribunal hearing, both neighbours gave evidence that they were exposed to the swastikas on a daily basis. Both stated that they found that the swastikas were objectionable and offensive. In response, the appellant argued that the swastikas were peaceful signs expressing his own beliefs (although the appellant was not permitted by the Tribunal to give any evidence as to the nature of those beliefs).

In its decision, the Tribunal was critical of the failure on the part of the Council to act under subs (1)(a)(i) of s 322 rather than subs (1)(a)(ii) of s 322 on the basis that rules in the relevant transitional plan restricted certain signs in residential zones. In the Tribunal's view, this would have avoided any need to enter into a subjective assessment as to whether the swastikas were offensive.

The Tribunal had accepted the evidence of the neighbours that the appellant had shown aggression towards them, and that the swastikas and their appearance were associated with that behaviour. In addition, the Tribunal had concluded that, because of the larger swastika's visibility from a nearby cemetery, its prime function must have been to offend those in the surrounding environment. The Tribunal found that the neighbours were not hypersensitive, but rather their views were reflective of the opinions of a significant proportion of the public. The Tribunal concluded that the swastika sign (also known as a fylfot, an ancient symbol based on a Greek cross) was offensive, as any peacful connotations it may have had at one time were lost and submerged by reason of the activities of the Nazi movement during the Second World War. (The Court also considered it significant that of the two generally accepted forms of swastika, the appellant had chosen the one which was used as a symbol by the Nazi regime.)

On appeal to the High Court, the appellant raised five grounds of appeal. These were as follows:

(i) That an abatement notice can only be issued to stop something that is being done or to prohibit something from being commenced. As the swastikas had already been painted on the wall when the abatement notice was issued there was nothing "occurring" that the enforcement officer could require the appellant to cease.

(ii) That the New Zealand Bill of Rights Act 1990 ("Bill of Rights") gave the appellant freedom of religion and freedom to manifest that

religion in worship, observance and practice in public or in private. Consequently, the appellant had the right to display the swastikas as a part of his religion.

(iii) That the abatement notice was defective in that it did not comply with reg 27 of the Resource Management (Forms) Regulations 1991.

(iv) That the swastikas were not offensive or objectionable in terms of s 322 RMA.

(v) That if the swastikas were offensive or objectionable, they were not offensive or objectionable to such an extent that they had or were likely to have an adverse effect on the environment.

As to the first ground of appeal, the Court held that s 322 needs to be read together with s 17 RMA. Such a reading broadens the application of s 322 to include the power to require the cessation of an activity which is offensive to the extent that it may have an adverse effect. The Court held that the meaning of s 322 when read together with s 17 is plain, and that it is intended to apply to the continuing effects of continuing activities. In this case, the adverse effect (and what was therefore required to be abated) was the continuing display and visible appearance of the swastikas within the environment. The Court accepted the submission of counsel for the respondent that it was proper to take a purposive approach in interpreting the legislation with a view to giving effect to the legislative intention in the context of RMA.

As to the second ground, the Court held that the Bill of Rights clearly did have application in this case. The question was whether and to what extent ss 4, 5 and 6 of the Bill of Rights were relevant. In this regard, the Court considered that the objective of RMA warrants overriding the freedom of expression section in the Bill of Rights. The Court considered that the importance of the environment is paramount, and that the duty to avoid adverse effects requires that precedence should be given to people and the cultural, aesthetic and natural attributes of their neighbourhood, over the right to express opinions and beliefs which are offensive or objectionable. The Court considered that the abatement sought impaired only slightly the appellant's right to freedom of expression and opinion.

When this slight limitation was weighed against the objectives of RMA, it was clear that the restriction on the appellant's freedom of speech and religious expression was reasonable, and could be demonstrably justified in New Zealand society. Accordingly, the abatement notice could not be struck down as unlawful under the Bill of Rights.

As for the third ground of appeal, the Court held that the substance of the forms provided in the regulations to RMA is what is important. It is not necessary to "rigidly and pedantically" follow the exact form set out in the regulations. The regulations themselves permit forms to be "to the like effect", rather than identical to, the forms set out in the regulations. The third ground of appeal therefore failed.

Finally the Court dealt with the last two grounds of appeal, which it considered to be the essence of the appeal. The appellant had submitted that RMA was not the appropriate statute with which to deal with matters of this nature and scale. The Court rejected this argument. It held that RMA, and more specifically an abatement notice, clearly related to the individual and an individual's activities, as well as the activities of communities:

> In the end there can be no limit to the activities and the things . . . [that] . . . may be done or not done which come within the control and regulation of the Act so long as in the case of offensive or objectionable matters they have an adverse effect on the environment.

As to what is offensive or objectionable under RMA, the Court held that the test must be an objective one. The Court stated that the Tribunal in a case such as this must transpose itself into the mind of the ordinary person, representative of the community at large, in order to decide what is offensive or objectionable. It is not enough that a neighbour or some other person within the relevant environment considers an activity to be offensive or objectionable.

Once it has been determined whether an activity is objectively offensive or objectionable, it must then be decided whether it is offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.

In this case, the Court held that a reasonable person would be offended by the swastikas. Given this offensiveness, and the visible nature of the swastikas, the Court held that they could clearly have an adverse effect on those in the local environment who saw them, or were likely to see them. Accordingly, the Court held that the requirements of s 322 were met in this case. The appeal was therefore dismissed and the abatement notice left standing.

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Note

"Parliament, the Treaty and Freedom: millennial hopes and speculations" by F M Brookfield.

Professor Brookfield's valedictory lecture was published in this Journal ([1994] NZLJ 462) under a misunderstanding. It is to appear, revised and fully annotated, in *Essays on the Constitution* (ed Philip Joseph), to be published in mid-1995 under the double imprint of Brookers and The Law Book Company.

When is a bank liable for receipt in equity?

By C E F Rickett, Professor of Commercial Law, The University of Auckland

In this article Professor Rickett discusses the commercial issues for bankers in applying funds received, in reduction of overdrawn accounts. He argues that the rationale behind the present case law is unsatisfactory and that the matter of claims made in this area by third parties is best considered under the rubric of the law of restitution.

I Introduction

In a recent note in this Journal ([1994] NZLJ 275), Mr Palitha De Silva has alerted readers to three recent New Zealand decisions dealing with the equitable liability of banks in respect of funds received by them for crediting to the overdrawn accounts of their customers, where those funds are in equity the property of third parties. He contrasts the apparent readiness of New Zealand Courts to find such liability, with the reticence of the English Court of Appeal to do so in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340, with which latter approach he is in agreement.

It seems thus an opportune moment to outline my understanding of the circumstances in which a bank will be held liable in equity in respect of its *receipt* of funds. This matter of receipt must in my view be distinguished from and kept firmly separated from equitable liability for participation by a bank in breaches of fiduciary duty owed to third parties by the bank's customer. If the two types of liability are run together, the tendency is to require knowledge (as opposed to notice, or neither knowledge nor notice, ie, strict liability) in cases of receipt as well as participation (assistance). This conflation confuses matters which are fundamentally distinct in theory. Receipt-based liability has its focus on "property" and is concerned with restitution of a subtraction in wealth. Participatory liability is focused, on the other hand, on "behaviour" and is concerned essentially with compensation for loss, although it might in some circumstances generate restitution of any gain made as a result of the behaviour, such gain being said to be at the expense of the victim of the wrongdoing.

The conceptual distinction, articulated – but with reservations in respect of its practical import – in New Zealand by Thomas J in *Powell v Thompson* [1991] 1 NZLR 597, appears sadly to have been overlooked in most of the more recent airings that the subject has had in the Courts. This includes the case referred to by Mr De Silva. I have come round to the view that the entire matter of receipt-based claims, presently dealt with in a thoroughly confusing manner according to the historical accidents of their jurisdictional genesis (equity versus common law), is best organised under the rubric of the law of restitution. To sustain this argument requires an analysis of both the equitable and the common law positions, followed by their synthesis under modern restitutionary theory. That will be attempted elsewhere. This paper is an excerpt from that larger endeavour, and is intended merely to outline the present "equitable" situation, with, it must be admitted, occasional glimpses of the brave new world. Even if the brave new world does not materialise, there is nevertheless much to be gained from a better appreciation of equity's activities in the receipt arena.

II The range of equitable claims against receivers of property

A Inconsistent dealing with trust property

The types of liability, based on apparently similar circumstances, but in reality having very different foundations, can arise where a person has received trust property, and later deals inconsistently with it. In *Agip (Africa) Ltd v Jackson* [1989] 3 WLR 1367, at 1388, Millett J, as he then was, referred to the circumstance where:

> the person, usually an agent of the trustees, . . . receives the trust property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust.

It will be noted that there is no receipt in this case by the recipient *for his own benefit*. He receives only ministerially. There cannot thus be any liability in what is called "knowing receipt", as will be shown herein. There can, nevertheless, be one of two types of liability arising after receipt.

Acting on instructions

First, the recipient may, after receipt, act inconsistently with the trust, *on the instructions of the trustee*. The trustee is therefore in breach and primarily liable; the recipient may be liable in participatory or secondary liability (also known as "knowing assistance", the term given to liability which can arise in a wide range of fact situations, of which this is only one). The participatory liability will require knowledge that the property is trust property, and that the instructions are inconsistent with the terms of the trust. This is an obvious requirement, in that participatory liability will be fault based. It requires the wrongdoing of the stranger. The liability is *not*, it must be stressed, receipt based. (If a recipient acts inconsistently with the trust, but without the instructions of the trustee, he becomes a trustee de son tort, and is thus primarily liable.[1] As a trustee de son tort the recipient takes on the role and functions of an

express trustee. This is a special category of equitable "liability" which has nothing to do with constructive trusteeship or other receipt-based liability identified herein.)

Applying property for own benefit

The second type of liability is also hinted at in Millett J's dictum. If the recipient either receives in a ministerial capacity, or is perhaps merely an innocent volunteer, but then applies ("misappropriates") the property for his own benefit (where he knows that the property is trust property and that he is dealing with it inconsistently with the trust), he will be liable to make restitution to the equitable owner. This liability is clearly receipt based. In discussing this type of liability in a recent paper, Mr Harpum (Charles Harpum, "The Basis of Equitable Liability" in *Frontiers of Liability Vol 1* (ed Birks, OUP, 1994) 9, at 20) cites, inter alia, two cases where bankers might find themselves liable to make restitution. First, a banker might purport to set off a credit balance on what he knows or ought to know was a trust account held by his customer against an overdraft on that customer's personal account. (See *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567). Secondly, a banker might receive money for a customer in circumstances where he knows or ought to know that the customer is under a fiduciary obligation to apply it for a specific purpose, but then applies it in discharge of the customer's overdraft. (See *Lankshear v ANZ Banking Group (New Zealand) Ltd* [1993] 1 NZLR 481 at 496. In *Lankshear*, the prominent factor was that the bank was not acting purely in its capacity as agent, but was asserting a title of its own to the funds, having pressured the fiduciary to reduce his personal liability to the bank and then using the funds received specifically with the reduction of that liability in mind. This would differ from the case where there was no specific nor intended application to the bank's own benefit: see *Gray v Johnston* (1868) LR 3 HL 1).

In this second case, the remedy granted, although misleadingly called a constructive trust, is in essence a personal liability to account for the entire gain made (ie, the enrichment received) by the defendant (the bank) at the expense of the beneficiary third party (the plaintiff). That this response is clearly restitutionary leads in turn to the suggestion that the liability is also properly a restitutionary liability.

B Tracing in equity (and a proprietary remedy?)

It is possible for a plaintiff to trace in equity. As Professor Birks has stated (Peter Birks, *Restitution – The Future* (Federation Press, 1992), at 113): "Tracing is a process of identification preliminary or ancillary to the assertion of rights in respect of the value identified." Tracing thus aims to identify the location of value. Generally, a plaintiff will wish to trace to the value or enrichment surviving, and once that value is identified (using the relevant rules for identification), will seek a proprietary remedy (although a proprietary remedy does not invariably follow upon tracing in equity). It is at this point the question arises whether this category of equitable liability is distinct from liability for "knowing receipt". In *Polly Peck International v Nadir (No 2)* [1992] 4 All ER 769 at 776 and 781-782, Scott LJ attempted to maintain a distinction between liability following tracing, and liability for "knowing receipt", by centring the distinction on the proprietary claim usually associated with the former. His Lordship stated (at 776):

> Equitable tracing leads to a claim of a proprietary character. A fund is identified that, in equity, is regarded as a fund belonging to the claimant. The constructive trust claim, in this [knowing receipt] action at least, is not a claim to any fund in specie. It is a claim to monetary compensation.

His Lordship later (at 781) distinguished between "the proprietary tracing claim" and "the in personam constructive trust claim". The unfortunate abuse of trust language in respect of the latter, being the remedy for "knowing receipt", will be further referred to below. However, an attempted distinction based on whether the remedial response is proprietary or personal emerges clearly in this comment.

Mr Harpum ("The Basis of Equitable Liability", at 18-19) has pointed out that in respect of tracing in equity, fault appears to be relevant. Where tracing is pursued against a fiduciary who commits a breach of trust, the fault lies in the breach itself. Where tracing is pursued against a third party, that party must have notice of transfer in breach of trust. Where tracing is pursued against an innocent volunteer, there is some prospect of a change of position defence wherein issues of fault may be canvassed.

C "Knowing receipt" (and a personal remedy?)

Where property has been transferred in breach of trust, an equitable claim in personam can be brought against the recipient. In *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736 and 738, Millett J stated that this was "the counterpart in equity of the common law action for money had and received". Both the equitable and the common law claims "can be classified as receipt-based restitutionary claims". The receipt-based nature of the claim indicates that recovery is for the full value received. The language of "compensation" and "in personam constructive trust", as used by Scott LJ in *Polly Peck* (above) is at best simply misleading.

That tracing has a role to play in identifying the value received for the purposes of a "knowing receipt" claim (as opposed to the value surviving invariably necessary for a proprietary remedy) is clear from the second sentence of Hoffman LJ's judgment in the Court of Appeal in *El Ajou* [1994] BCLC 464 at 478:

> . . . [T]he plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and, thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.

Hoffman LJ agreed with Millett J's findings at first instance as to the traceability of the assets. Millett J had there simply applied the flexible rules of tracing in equity.

A point raised earlier must be revisited. Can any real distinction, in respect of matters other than remedy, be maintained between class B (Tracing in Equity) and class

C ("Knowing receipt") liability? If tracing serves the function of value identification, either value received or value surviving, and a personal remedy can be granted in both measures, but a proprietary remedy only in the second measure, why should there not be only *one* class of liability? (The combination of these classes of liability under a restitutionary umbrella appears to be the preferred view of Millett J: see *El Ajou*, above, at 739). This would remove many of the ambiguities about the foundations of liability in the area, and help to centre attention more constructively on the important issue of remedy.

The requirement of knowledge in "knowing receipt", as also referred to by Hoffman LJ, has been a matter of some dispute in the case law. The disagreement has been as to whether some element of knowledge is required, or whether constructive notice will suffice. (The debate about knowledge has, since 1983, largely been carried out in terms of the fivefold classification promoted by Peter Gibson J in *Baden Delvaux* (1983) [1993] 1 WLR 509 at 575-576). It is not necessary to pursue a full scale examination of the disparate authorities at this point. Such a review has been conducted recently by Mr Oakley and his conclusion is that while disagreement reigns in England and Australia, in New Zealand it is probably settled that constructive notice will suffice. (See A J Oakley, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments", Paper delivered at an International Conference on Equitable Doctrines and Principles, Queensland University of Technology, 6-8 July 1994. Mr De Silva assumes, on the other hand, that the English position is well settled against constructive notice in favour of actual or "Nelsonian" knowledge.)

The test of constructive notice

The justification for adopting a test of constructive notice is clearly expressed by Mr Harpum ("The Basis of Equitable Liability", at 19) when he argues that "it is necessarily unconscionable for a person to receive for his own benefit somebody else's property in circumstances in which he ought to have realised that it was transferred to him in breach of trust". He continues (at 19-20):

> It seems to be thought that the recipient is subjected to some special hardship in such circumstances because he must restore the value of property which he should never have received. This ignores the potential hardship that may be suffered by the beneficiary claimant whose property has been spirited away without his knowledge or consent. The caution that the courts rightly show [by requiring knowledge rather than merely notice] before holding a stranger accountable on principles of secondary liability [knowing assistance] in circumstances where he has never received any part of the trust property for his own benefit do not apply in cases of knowing receipt. The extent of an intermeddler's liability for knowing inducement or assistance is potentially open-ended [being for loss suffered by the plaintiff as opposed to an enrichment made by the defendant]. The liability of the knowing receipient is necessarily limited to the value of the property which he has received.

This reasoning alone justifies the continued existence of a class of equitable liability in "knowing receipt" independent of "knowing assistance", even prior to the presentation of any argument that such liability ought to be incorporated into an overarching restitutionary liability (as is ultimately now my favoured position, but which needs to be developed elsewhere). Were there to be neither a continued existence nor such incorporation, but merely a collapsing of "knowing receipt" into a scheme of fault-based participatory liability, as Mr De Silva appears to favour, a lacuna would effectively appear in respect of *receipt-based claims* in equity. A trust beneficiary would be unable to pursue a claim for value received; and would have to be content with a claim for any value surviving. However, when it is recalled that claims in both types of value require *tracing* of the value as a prerequisite to any remedy, what is the justification for permitting only traced value surviving to be restorable? This would be to penalise a potential plaintiff solely on the arbitrary point that the defendant recipient no longer retained value ascribable to the property originally received!

This conclusion is reinforced when it is recognised that as matters presently stand in equity, it is not *mere receipt* of someone else's property, but only a receipt *for the recipient's own benefit*, which is adequate to found "knowing receipt" liability. Again, it can be asked: why should a plaintiff succeed or fail on the chance matter whether the recipient *retains* the property or its value?

English authority

Perhaps the clearest judicial statement in England on this matter of beneficial receipt is found in Millett J's judgment in *Agip (Africa) Ltd v Jackson*, where his Lordship also commented by way of obiter on the normal position of a banker in this context (at 1388, with emphasis added):

> The ["knowing receipt" class] is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without such notice but subsequently discovered the facts. In either case he is liable to account for the property, in the first case from the time he received the property, and in the second as from the time he acquired notice . . . The *essential feature of [this] class is that the recipient must have received the property for his own use and benefit*. This is why neither the paying nor the collecting bank can normally be brought within it. In paying or collecting money for a customer the bank acts only as his agent. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. *In doing so it received the money for its own benefit*. This is not a technical or fanciful requirement. It is essential if receipt based liability is to be properly confined to those cases where the receipt is relevant to the loss . . ..

This reasoning was applied recently in New Zealand in *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218 (it is perhaps a little surprising that Mr De Silva did not refer to this case!), in respect of a

"knowing receipt" claim against a banker. Mr Nimmo approached an investment company wishing to convert a large amount of New Zealand currency into sterling. The funds were paid into the company's trust account and then transferred through various other accounts of the company at branches of the defendant bank in both New Zealand and Australia. A director of the company embezzled the funds in breach of fiduciary duty to Nimmo. Blanchard J declined to find in Nimmo's favour, on the basis that the bank had not "received". His Honour stated (at 224-226):

> . . . Westpac undoubtedly received the monies which were withdrawn from [the company's] trust account, for the [company's] cheque was made payable to Westpac and was credited to Westpac in the books of the bank. That credit existed only for a short time because Westpac immediately put [the defalcating director] in possession of bank cheques and travellers cheques and debited its books accordingly. The net result, disregarding the fees [perhaps discounted as being de minimis?], was that Westpac was in no better position as a result of the transaction. It had not been enriched . . . Westpac cannot be said to have "received" Mr Nimmo's money in the relevant sense of that word . . .

Other New Zealand cases

This decision can be contrasted with three other New Zealand cases where bankers *were* found liable in "knowing receipt" because they were personally benefiting, and were accordingly enriched by their "receipts". The first is the leading New Zealand Court of Appeal decision, *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41, which was distinguished by Blanchard J in *Nimmo* as a case where "knowing receipt" was made out in that the funds received were credited by the bank to its customer's overdrawn account, with the bank thereby "taking the benefit of the money" (at 224). In *Savin* the bank's branch manager was very concerned about the customer's account and detailed file notes and inter-office memoranda revealed a strong element of control by the bank over the account's operation. Furthermore, it was the bank itself which appointed a receiver and was thereby actively asserted title to the funds.

The very recent case of *Anderson v Chilton* (1993) 4 NZBLC 103,375, discussed by Mr De Silva, presented a remarkably similar fact situation to that in *Savin*. A company sold the plaintiff's boat on his behalf. The funds were deposited (in breach of fiduciary duty) in the company's overdrawn account with the Bank of New Zealand. The plaintiff's claim against the bank in "knowing receipt" was successful. Again, the bank had been closely monitoring the company's activities and delicate financial position (having gone as far as to commission a report from a leading accounting firm), and the funds received were applied to the bank's own benefit (by a reduction in the overdraft amount), with adequate knowledge or notice that they belonged to someone else. As in *Savin*, it was the bank which called in a receiver, frustrating any chance of payment to the plaintiff.

The circumstances in the third case, *Westpac Banking Corporation v Ancell* (1993) 4 NZBLC 103,259, also discussed by Mr De Silva, were in relevant respects consistent with both *Savin* and *Anderson*. A stockbroker customer of the bank had only one trading account through which all his personal and business transactions were put. The broker had a very large overdraft facility, and his account was closely monitored and controlled by the bank, which finally refused to extend further facilities, causing the broker to cease trading. Some of the broker's clients pursued the bank in a claim in "knowing receipt". Having established that the broker was in breach of his fiduciary duty to his clients, Richardson J, speaking for the Court of Appeal, stated (at 103,270):

> In accepting a cheque or other payment and crediting it against the customer's private overdraft, the bank is advancing its personal interest. Clearly it will not be permitted to profit in that way through a misapplication by a customer of funds entrusted by a third party to the customer if the bank has notice of the customer's breach of fiduciary duty.

His Honour went on to hold that the bank had adequate knowledge, and concluded that "[t]he inference that the bank was consciously benefiting from the resulting use of the funds of the broker's clients is inescapable" (at 103,272).

Bank difficulties

It should be noted that in an extra-judicial comment, Sir Peter Millett recognised the same distinction that has sought to be promoted in this discussion in the context of the banker's receipt liability in respect of overdrawn accounts. He stated (See "Tracing the Proceeds of Fraud", (1991) 107 LQR 71, at 83 (in fn 46)):

> The mere continuation of a running account in overdraft should not be sufficient to render the bank liable as recipient; there must probably be some conscious appropriation of the sum paid into the account in reduction of the overdraft.

This brings us back to our point of departure, Mr De Silva's examination of the apparent difficulties banks face in balancing their duties to their customers to act as agents in crediting funds to their customers' designated accounts, and their duties to third parties who might have equitable interests in those funds. Surely bankers are not unable to distinguish between circumstances where funds are applied in, to use Sir Peter Millett's words, "[t]he mere continuation of a running account in overdraft. . .", and those where the bankers are looking to their own personal benefit? Mere payment received in the ordinary course of business is not a personal benefit to the banker which he is liable in equity to restore to the equitable owner.

The ordinary course of business appears to include the standard operation of an account in overdraft, where the banker shows no especial concern about the overdraft. If, however, a banker begins to monitor the overdrawn account to a degree greater than is usual in banking practice, this will likely be enough to take the case out of the "ordinary course of business" category. In such circumstances, liability in "knowing assistance" may result if there is the relevant knowledge, as also may liability in "knowing receipt" even where there is only

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After the Privy Council: returning a compliment

By Bernard Brown, Associate Professor of Law, University of Auckland

What is likely to constitute the mechanism of "ultimate appeal" from the decision of our Courts when, almost certainly, the historic link to the Judicial Committee of the Privy Council is abolished? The writer examines alternatives to the Committee and marshals the arguments for and against the loss of the London connection.

He identifies the most probable alternative institution and urges it to adopt a valuable practice which the Judicial Committee itself initiated eighty years ago. That tribunal is the New Zealand Court of Appeal reconstituted as a Supreme Court. To the membership of the Court there should be added, for any appeal or number of appeals, a senior Judge drawn from any of the common law jurisdictions. That would be done in much the same fashion as, from time to time, "non-English" Judges have been invited to sit with the Judicial Committee. This "returned compliment", which could involve the participation during a year of, say, half-a-dozen "outside" Judges from different jurisdictions, might help sustain for New Zealand some of the listed benefits of the long association with Downing Street. None of the disadvantages, chiefly the lack of appellate autonomy, would be perpetuated.

Should this "new convention" prove worthwhile, it may come to commend itself to other common law jurisdictions.

I Alternatives

If our link with the Judicial Committee of the Privy Council is severed (and it now looks like *when* rather than *if*), New Zealand has to think about what institution should take its place.

The foremost candidate is the Court of Appeal, either as presently named and staffed, or renamed a Supreme Court. The second, a Commonwealth Court of Appeal, was first mooted in the 1940s by Sir Michael Myers, the Chief Justice of New Zealand. The proposition was revived by Lord Gardiner, the Lord Chancellor, in 1965 at a conference in Sydney. Our Attorney-General, Ralph Hanan, commended the idea but, due to differences among other governments about what individually they expected from such an institution, nothing came of it. Lastly, a dozen years ago some support was briefly mobilised for a kind of supreme appellate Court serving a number of south-west Pacific jurisdictions, including New Zealand and Australia. Its advocates envisaged it as being staffed by an amalgam of the participating countries' most senior Judges with appropriate weightings in favour of Australia and ourselves.

However inter-nationally romantic the Commonwealth and south-west Pacific tribunals concepts might be, they seem to have been discarded for their impracticability. For instance, England now looks, in many things, toward the EC rather than to the Commonwealth, and several of the larger jurisdictions who had already liberated themselves from the Privy Council would be unwhippable back to any kind of exterior tribunal. Very few of the older jurisdictions – and indeed probably fewer of the newer ones – would be keen to subject themselves to such an ultimate review, especially in issues concerning their own constitutional crises. (Several nations such as Australia, Malaysia, Fiji and Vanuatu who have experienced them could have greatly resented outside interference; and any such judicial interferers would have disrelished the task.) Some of the younger nations, eg the autochthonous Papua New Guinea, look to remove themselves from the legal shadow cast by their colonial past. Finally, it is no longer a self-evident proposition throughout the Commonwealth, or even the region, that uniformity of decision is of huge value.

Returning, predictably, to the first alternative – a New Zealand Supreme Court of last resort – one has to consider its strengths and weaknesses. Autonomy, or independence, needs to be viewed from both sides of the debating table. Compared with the English, Canadian and Australian law professions and judiciaries, we are very small and generally our Judges and counsel do not enjoy anywhere near the same luxury of specialisation. The scale of things means that often, before even our highest Courts, there is less depth of argument than, say before the High Court of Australia. Yet no one could seriously claim that jurisprudentially New Zealand has not come of age. The Judges who would constitute our new Court are as wise and

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constructive notice. There is no reason to doubt, however, in respect of "knowing receipt" liability, that a banker will be able successfully to assert that he has parted with funds received where those funds have been applied thus. □

1 See *DFC (New Zealand) Ltd v Goddard* [1991] 3 NZLR 581 (Gallen J); [1992] 2 NZLR 445 (CA). This case concerned an attempt to sheet home liability in trusteeship de son tort to a bank. The legal and commercial implications are discussed in CEF Rickett & PS Zohrab, "Trusteeship and Proprietary Remedies – Let the Banker Beware!" [1991] NZ Recent LR 202.

knowledgeable as most who now adorn the superior Courts of the common law jurisdictions around the world, and in some instances, wiser. For sure, it is time for our particular brand of bi-cultural (or multi-cultural) society to sort out its legal problems chiefly from the vantage point of deep, thoroughgoing local experience. (*Wallis v Solicitor-General* (1903)[1] is a largely faded memory of castigation by an external Court, the Judicial Committee, – a body which lacked the ethnical, educational and legal expertise to credibly admonish: most likely that humiliation would never occur again but the want of cultural empathy could, and has.)

In many important fields of law we have moved significantly and quite comfortably away from the "English" models. From the New Zealand taxpayers' point of view the Judicial Committee affords a strikingly economic service yet, for petitioners, the expense and inconvenience of taking a cause to it in Downing Street must be a deterrent to any but the most wealthy or heavily-subsidised.

II Some casualties

On the other side, the London-link has been regarded as valuable – and arguably still is in the following ways:

(a) Chiefly in some private law areas, eg contract and tort, traditionalist lawyers tout a preference for the Judicial Committee's judgments which apply and develop the law closer in accord with a formal "English" scheme of precedent than, over the past decade or so, has our Court of Appeal. The Court's more "activist" proclivities (not least in recent creative interpretation of the Employment Contracts Act) serve to accent the policy differences between the two tribunals. An example is the Court of Appeal's seeming unconcern about the insurance ramifications of its "going for the long pocket" when setting liability on public authorities and officials for negligence (see eg *Takaro Properties Ltd v Rowling* (1986)).[2]

Retention of the Judicial Committee link is strongly urged by some large financial and commercial organisations having connections to Britain. (It is fair to say that this support has weakened with the growth in United Kingdom adherence to EC business and legal institutions.)

(b) Emotional allegiances die hard and not only when they are sourced in the history of the legal profession. The New Zealand public, as well as its lawyers, still succour a characteristically "old world" perception of fair play. Any appearance of derogation from that standard raises the communal hackles. The demand that a transaction fairly concluded must also "look right" is typical of the close agrarian communities from which the country took many of its values. But try as one may, it is hard to find more than a couple of occasions where public rumour has questioned the impartiality of New Zealand appellate justice. And then the speculation was somewhat bizarrely founded. Nevertheless, New Zealanders took comfort from the existence of a Court of external reference – respectably distanced at Downing Street – as the guarantor of the *appearance*, beside the fact, of dispassionate adjudication. That reassurance-function will be missed and will be almost impossible to replicate.

(c) A politically sensitive aspect of that function is the Maori perception of no longer being able to appeal directly to a Treaty partner – one whose current authority may be perceived to stand above that of the New Zealand Government. That view obtains with various degrees of strength and persistence among conservative Maori thinkers. More radical "schools" within the intelligentsia see loss of the link in a different light. It should precipitate a wholesale rethinking of the Courts' responsibility and role in Aotearoa-New Zealand. The country would be jarred into the need to seriously debate the wider issue of an autonomous legal system for the tangata whenua.

(d) A further claim for retention may be based on the almost inevitable presence in a legal system of the occasional *idée fixe*. Like Lord Denman's "cantilena", an erroneous or only part-true concept may, by regular repetition, come to find uncritical acceptance as truth. Wrongly or rightly, as in *Wallis* (1903) or in *Lesa* (1983),[3] it may fall to the Judicial Committee to say to New Zealand "You have got into the habit of thinking slackly or fallaciously about this subject. Perhaps you are too close up against the side of the mountain to see its true shape. So stand back and look again".

(e) Some commentators claim that British Judges are sterner champions of the doctrine of parliamentary sovereignty than a number of our own. The Judicial Committee is viewed as having the same commitment to this basis of our kind of democratic governance. It is not, it is reasoned, for the Judges to rush in (ie to make, or remake, laws eg *MacKenzie* (1983)[4]) where Parliament fears, or neglects, to tread. The Court's function is to interpret legislative instruments and, where necessary, to demark the boundaries of power between the constituent parts of the state. In fact, the British judicial experience since European Community membership signals some departures from that *ideal-politik*: see the *Factortame Case* (1989)[5] and *EOC v Secretary of State for Employment* (1994).[6]

The President of our Court of Appeal, Sir Robin Cooke, has indicated in several judgments, and in published papers, that there are certain extreme situations where one would feel bound to impugn the legislation that produced them. However, as he makes clear, they would be inimical to enacted or unenacted tenets of "the constitution" so the debate takes on a cart-and-horse figuration.

Sir Robin also notes, in "Fundamentals" ([1988] NZLJ 158) a number of prominent English judicial dicta that reinforce his view of such "unconstitutional" legislative action. Yet, there is a staunch (rump) standpoint in the local legal profession, that Judges, however elevated or celebrated, should never compete with the legislative function of the elected representations of the people. Letters to the editor and occasional articles in law journals indicate a concern to maintain the Privy Council link, if chiefly to safeguard that old chimera, the separateness of powers.

(f) Lastly, note must be had of the breath-of-fresh-air type of Judicial Committee judgment, without which our law unquestionably would be poorer. One recollects a number of these that have found their way into our case law, our legislation, and our folk-consciousness. An example is Sir Clifford Richmond's embracement, in *Kerr* (1976),[7] of a long overdue lesson in psychologi-

cal realism in the law of self-defence. That came to New Zealand from the Committee's judgment in a Jamaica petition, *Palmer* (1971).[8] Sir Clifford drew our law reformers' attention to it and the robustly sensible rule was set firm in our statute law.

One acknowledges that for every such instance, critics of the London connection claim to furnish two or three more where the fresh air from the Privy Council has been the kind of wind that blows no good to New Zealand jurisprudence.

III Replacement and addition

Those are the cons and pros of the argument. Wherever the true strength lies, and there will always be disagreement, it seems certain that a replacement for the Judicial Committee will have to be found very soon. As signalled in this article it is most likely to be our Court of Appeal vamped as a Supreme Court. One additional feature needs to be seriously considered. For the legal-historical reasons already mentioned, a cogent case can be made for that new Court to invite the more or less regular participation, as ad hoc members, of senior Judges (one at a time) from other common law jurisdiction. By all accounts this practice has been a fecund and popular one at Downing Street. So, at the point of taking a new direction, a compliment (beginning for us, after tensions, with Sir Joshua Williams' appointment in 1914).

Whatever convictions might develop about such Judges' role on the Court (for instance, that it ought never to be a formally decisive one), New Zealand jurisprudence would be the chief beneficiary in several senses. The influence of, say, a Brennan or a Goff (albeit in recent retirement), especially in private pre-judgment deliberations, would be salutary whether as accelerant, or as gentle brake, upon the development of local doctrine. Such Judges, including occasional invitees from "younger" jurisdictions like Singapore and Papua New Guinea, may also bear some lessons back to their own legal systems. The participation of overseas women Judges might prove valuable too.

The shift to the MMP electoral regime could presage a degree of unpredictability in the governance of the country. A minority coalition partner could find itself positioned to demand the passage of extremist or wildly eccentric legislation. Undoubtedly New Zealand Judges of the Supreme Court would make their voice heard when called upon to enforce such an instrument. Their support, on such an occasion, by a senior non-New Zealand judicial invitee would add a significant, perhaps telling, dimension to the protest.

If New Zealand were to put the invited Judge concept into operation, it might find other common law jurisdictions following suit. We know something akin to an interchange has happened in minor key between New Zealand and New South Wales in the appointment of commissioners of inquiry. Judicial exchanges would help enrich not only the host jurisdictions but also, in the long term, the invitees too.

One relishes the prospect of Lord Woolf or Lord Bridge deliberating with a full bench of the National Court in Port Moresby, while say, Justice Kapi sits in Ottawa or Canberra. Chief Justice Mason of the High Court of Australia, delivers from Downing Street, the judgment of the Judicial Committee advising Her Majesty on the disposition of a petition from Jamaica or Hong Kong. For two or three months, the recently retired Madame Justice Bertha Wilson leaves Canada to serve the new Supreme Court at Wellington while a senior New Zealand Judge is welcomed at Changi Airport by Mr Justice Coomaraswamy of the Singapore High Court.

This interchange, even merely once or twice during a judicial career, would not suit all senior Judges. But a reluctance in some to travel would be compensated by the keenness of others like the buoyantly ubiquitous President of the New South Wales Court of Appeal, Michael Kirby.

The main purpose of such an arrangement would be to maintain informally a degree of judicial comity among the former and present client-jurisdictions of the Judicial Committee. That experience and goodwill could be extended to other states, eg Papua New Guinea, wishing to replenish their links with the common law heritage.

Implementation and administration of the interchange scheme would not require a complex, expensive apparatus. The Chief Justices of the participating countries could come together once a year to establish which Judges might be available to receive invitations to visit where, and, approximately, at what times. At such annual meetings, the Chief Justices might take the opportunity to discuss any number of other procedural and logistic items of shared interest. If the experience of past and ongoing *regional* conferences (of Chief Justices and, or, Attorneys-General) is anything to go on, that discussion "incidental" to an annual weekend of timetabling judicial visits would itself be two or three days very well spent.

A last word is necessary on the question of the invitee-Judge's position vis-à-vis an appellate hearing of a cause certainly or likely to raise issues of a politically sensitive nature before the host Court. This situation was adverted to earlier in this article in relation to constitutional crises. Obviously legal-political sensitivity runs more widely than those occasional upheavals. Except for the highly unusual situation where the host Court desires the invitee's presence on the bench and where he or she agrees to sit, one surmises that the host Chief Justice and the invitee-Judge would quietly agree that the latter would play no part. Where in the most extreme case, the crisis strikes at the very core of the Executive-Judiciary relationship (eg Malaysia, 1988) the next annual meeting of the Chief Justices might agree, equally quietly, to suspend judicial-interchange arrangements in regard to the particular jurisdiction until the relational status quo ante is restored.

One hesitates to end on that note derived from misfunction. It will be struck very rarely. It can be dealt with calmly and easily. It spells no danger to an arrangement that would yield substantial benefits to New Zealand, and to other legal systems. □

1 [1903] NZPCC 23, and see Appendix, p 730 for the protest of the New Zealand Bench and Bar.
2 [1986] 1 NZLR 22.
3 *Lesa v Attorney-General* [1982] 1 NZLR 169 (CA & PC).
4 *Civil Aviation Department v MacKenzie* [1983] NZLR 78.
5 *Factortame v Secretary of State for Transport (No 1)* [1989] 2 All ER 692 and *Factortame v Secretary of State for Transport (No 2) Case C – 213/89* [1991] 1 All ER 70.
6 *EOC v Secretary of State for Employment* [1994] 1 All ER 910.
7 *R v Kerr* [1976] 1 NZLR 335.
8 *Palmer v The Queen* [1971] AC 814 (PC).

A new set of rules for international sales

By Duncan Webb, Lecturer in International Trade Law at Massey University, Albany

International trade is the economic life blood of most countries, and particularly of course of New Zealand. There are many legal complications inherent in this fact. The most obvious and currently well-known are the GATT Agreement, and what is still left of the CER relationship with Australia. Mr D Webb draws attention to a statute passed last year but yet to come into force. This is the Sale of Goods (United Nations Convention) Act 1994 which incorporates the Vienna Convention in the International Sale of Goods 1980. This Convention is dealt with in The Laws of New Zealand *title "Sale of Goods" paragraphs 352 to 356, which has just been published. In this article Mr Webb explains the Convention, the criticisms that are made of it, and emphasises that it creates a distinctive legal structure, and is not an international version of our Sale of Goods Act 1908. Selling goods internationally will not be the same as selling them in Queen Street.*

The Sale of Goods (United Nations Convention) Act 1994 was assented to on 1 July last year. This was effected with little or no public discussion,[1] a fact which is surprising in light of the volume of transactions which are affected. The Act incorporates The Vienna Convention on the International Sale of Goods 1980 (The Convention) into New Zealand law. It is probably fair to say that its adoption and incorporation was inevitable in light of the fact that most of our trading partners have adopted the convention to varying degrees including Australia and the United States, as have many developing nations such as those of China and Russia. It appears likely that most of the Asia-Pacific nations will also adopt the Convention in the near future.

One of the most fundamental problems which faces any litigant of a contract which crosses national borders is the question of what law is applicable. The Convention was drafted by UNCITRAL (The United Nations Commission on International Trade Law) and seeks to provide a single set of rules for international sale transactions in order to provide a degree of certainty in international sale transactions which does not currently exist.[2] The Convention is intended to replace its unsuccessful predecessor; the 1964 Hague Sales Convention. It appears likely that the objects of the drafters of the Convention will be achieved in light of the cascade of nations which are now adopting it.

The effect of the Act is summed up in s 4 which provides that "The provisions of the [Vienna] Convention shall have the force of law in New Zealand". All that remains to be done is for the Governor-General to appoint a date for the commencement of the Act. The fact is that in an economy, like our own, which depends largely on external trade the Convention will govern many of those transactions to the exclusion of the rules found in the Sale of Goods Act which have become so familiar. This article seeks to give some guidance as to what kind of transactions will fall into the Convention's regime and what aspects of those transactions the Convention deals with.

Transactions governed by the Convention

The first and most fundamental aspect of the Convention is to determine what transactions will be governed by it. The operative article is Art1(1) which provides:

> This Convention applies to contracts for the sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of international law lead to the application of the law of a Contracting State.

Thus where both parties doing business are from States which are parties to the Convention then the Convention rules will apply. As soon as the Act commences, this will be the case in respect of all transactions between New Zealand and Australia (and any of the many other parties to the Convention).

There are a number of situations which fall within Art 1 which would not usually be considered to be international sales. For instance an ex works[3] contract is usually considered to be a domestic contract albeit that the goods are ultimately destined for export however under the Convention the fact that the buyer does business predominantly from another state means that the contract is governed not by domestic law but by the Convention. Conversely it is conceivable that a contract between two New Zealand businesses would be governed, not by New Zealand domestic law but by the Convention. This would be the case where a New Zealand company or citizen conducted their business from another state (as is the case with many subsidiaries of large New Zealand companies). If such an entity were to then enter into a contract for the sale of goods with a company doing business from New Zealand (such as the parent company) then it appears that contract will be governed by the Convention and not the Sale of Goods Act 1908 as one might expect. The objection that this

cannot be the intention of the drafters of the Convention is answered by Art 1(3) which expressly provides that the nationalities of the parties is not to be taken into account in determining the application of the Convention.

The Convention could also be the law of a particular contract by the express inclusion of the parties. This is the effect of Art 1(2) which states that the Convention will apply wherever the rules of international law lead to the application of a law of a contracting State. Thus a choice of law clause (as is commonly found in international sale contracts) may have the effect of invoking the provisions of the Convention. This could be at odds with the actual intent of the parties if the clause is badly drafted. For example a clause which provides that the domestic law of New Zealand is the applicable law would invoke the provisions of the Convention provided the parties are conducting their business in different States. This is the case because the Convention will be part of our domestic law and apply to all international sales which come within the ambit of New Zealand law. If the parties intended the contract to be dealt with under the Sale of Goods Act 1908 then this would have to be expressly provided, or alternatively the Convention expressly excluded.

Place of business

One of the central concepts in establishing whether or not the Convention is applicable to a given contract is the places of business of the parties. In some instances this will not be entirely clear. Many organisations conduct their business from multiple sites. Article 10 seeks to address this problem by saying that in such circumstances the place of business which "has the closest relationship to the contract and its performance"[4] will be the place of business. However often the contract and its performance will be spread across national boundaries. Consider for example a situation where the sales division of a company is situated in Australia whilst the manufacturing and despatch of the goods will occur in New Zealand. Which place of business has the closest relationship in such a situation is not clear and will probably have to wait judicial determination.

A further question is what will amount to a place of business. It appears clear that an itinerant sales person will not constitute a place of business in the locality of operation. However what of the situation where a temporary office is set up, or there is an employee situated in another country to receive and refer enquiries? Other than the general guides as to interpretation found in Art 7 there is no assistance to be found in the text of the Convention.

It is unlikely that it is necessary for the party to be incorporated or domiciled in a particular country for it to constitute its place of business. This is apparent from Art 1(3) which provides that the nationality of the parties is not a relevant factor in determining the application of the Convention. Where it is not apparent from the contract or the dealings between the parties that they have their places of business in different states then they will be deemed to have their places of business in the same state. This avoids the situation where a party enters into a contract with a buyer without realising that the goods are intended for export, or the buyer is acting for a foreign principal, thereby unexpectedly invoking the Convention.

Excluded transactions

One thing that the Convention arguably lacks is a clear focus as to what kinds of transactions will fall within its ambit. Importantly the concept of a "sale of goods" is not really defined. An important omission is whether or not it is necessary for there to be a "money consideration called the price" (s 3, Sale of Goods Act 1908). Under the Sale of Goods Act this is a central concept to a contract for the sale of goods. Whether this will be the case under the Convention remains to be seen although it appears likely. This is important in light of the growth in counter trade whereby payment is being made by reciprocal sale contracts or occasionally by straight barter arrangements. Whether a contract to manufacture and sell goods is a sale is not directly defined. Some guidance can be gleaned from Art 3 which provides that sales of goods to be manufactured will not be considered sales of goods within the terms of the Convention if the main obligations of the seller are the labour or services involved in manufacture.

It could be suggested that a further gap in the Convention is the lack of any clear guidance as to what will amount to goods under a contract of sale. There is a large amount of jurisprudence on this issue in the common law, but it may not be entirely appropriate to transpose this into a system which is intended to govern international transactions. However the gap is not as large as it may first appear as the scheme of the Convention does enable some clarification. Firstly the obligations which are placed on the parties such as packaging and delivery clearly show the intention that the goods be tangible personal property. Documentary intangibles such as shares, negotiable instruments, securities etc are excluded under Art 2(d). Intellectual property will be outside of the scope of the Convention, however the division between intellectual property and the goods in some products such as computers and high technology equipment is not a clear one. Some uncertainty does exist in respect of the division between real and personal property. This may become most apparent in respect of contracts for property yet to be separated from realty such as the sale of ore from a mine, or for standing timber.

Article 2 excludes some specific transactions. Firstly where goods are bought for domestic use, with the knowledge of the seller, the Convention will not apply. Thus the Convention seeks to govern only commercial sale contracts. Auction sales are also excluded, presumably because at the time of sale the auctioneer will not be aware of the nationality of potential buyers. Sales under execution are also excluded. Finally a number of kinds of property are excluded, namely documentary intangibles, vessels and aircraft, and electricity. As noted the documentary intangibles are probably not goods. It is similarly difficult to classify electricity as goods. The exclusion of vessels and aircraft was largely due to difficulties surrounding the registration of vessels and incorporating such requirements into the Convention.

Aspects of the contract governed by the Convention

It is important to recognise that the Convention is not an international

version of the Sale of Goods Act. It deals with some matters which are not dealt with by that Act and leaves out other aspects which are traditionally thought of as central to the sale transaction. The substantive provisions of the Convention deal with formation of the contract of sale, the rights and duties arising under the contract, and the remedies in the event of breach.

Significantly Art 4 expressly excludes questions of the passing of property and the validity of the contract (ie vitiating elements). Thus matters such as retention of title are left to be dealt with under the domestic law of the contract. The Convention emphasises the passing of risk in the goods and provides that it passes with the possession of the goods, a clear departure from the "risk goes with property" presumption under the Sale of Goods Act. This is a good example of the manner in which the Convention departs from the law governing domestic contracts. The only direct reference to property in the goods is found in Art 30 of the Convention which provides that the seller is obliged to deliver the goods and transfer the property in them as required by the contract and the Convention.

Important changes in respect of the rules of formation of contract are effected by those rules in the Convention. One major difference is the reversal of the postal rule that a contract is complete upon the posting of an acceptance. A further departure from common law orthodoxy is the fact that under the Convention offers cannot be withdrawn where they have been stated to be standing for a given period of time or expressed to be irrevocable, or where the offeree has reasonably relied on the offer. It is in these areas that it is most likely that parties will find themselves entering into contractual arrangements at variance with their intention and understanding unless they appraise themselves of the provisions of the Convention or make express alternate arrangements.

Contracting out

The Convention retains the concept of party autonomy which has been central to commercial sales since time immemorial. Article 6 provides that the parties are at liberty to exclude the application of the Convention or derogate from the effect of its provisions. The fact is that by far the majority of international sales are conducted using either standard terms and conditions, or subject to detailed arrangements between the parties. For example a contract which is expressed to be fob or cif (incoterms) will invoke a separate set of rules in respect of the obligations of delivery and the passing of risk in goods and will oust those provisions of the Convention. In this sense the Convention will usually act as little more than a backstop of rules which will operate in the absence of express agreement between the parties, albeit an important backstop.

It is also of note that the provisions of the Convention will be ousted by conflicting usages either in the trade or between the parties, which the parties have either expressly or impliedly adopted. What will amount to a trade usage capable of being incorporated will presumably be decided under domestic law. A useful statement of this can be found in *Woods v Ellingham and Co* [1977] 1 NZLR 218 which sets out five conditions; notoriety, certainty, reasonableness, proof, and the usage must not be excluded by the parties.

Interpreting the Convention

The Convention is drafted in a style which is distinctly different from that to which lawyers of common law jurisdictions have become accustomed. The drafting is more open textured and leaves much to the interpretation placed on it by the reader. This is more akin to the civilian approach of drafting which uses such materials as a basis from which to solve problems not directly dealt with by reasoning from such provisions by analogy. In this sense the gaps in the Convention need not be considered to be fatal to its workings.

Article 7 sets out guidelines for the interpretation of the Convention and the manner in which apparent gaps in its provisions ought to be approached. First of all a generous interpretation is to be placed on the Convention in accordance with the usual principles of international law.[5] In the event that the Convention does not directly deal with the question in issue although the subject area in general is governed by the Convention the question is to be settled "in conformity with the general principles on which [The Convention] is based". This is a concept foreign to statutory interpretation in common law jurisdictions but familiar in civilian law where it is commonplace to reason by analogy from statutes in the same manner as is done from cases in our own jurisprudence. Lastly where there is a clear gap in the Convention the domestic law of the appropriate nation according to the rules of conflict of law will apply.

Conclusion

As soon as a commencement date is given to the Sale of Goods (United Nations Convention) Act 1994 a new set of rules will apply to international sales governed by New Zealand law. The fact is that many international contracts involving New Zealand parties will already fall within the rules of the Convention if the law applicable to the contract is that of a nation which has adopted the Convention. The rules under the Convention differ in important respects from those of the law of sales of goods and general contract to which we have become accustomed. A working knowledge of these rules will be important to anyone negotiating or litigating sales contracts which cross national boundaries. □

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1 Except for the Law Commission's Report No 23; *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance*.

2 As set out in the preamble to the Convention which states that

> Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of barriers in international trade and promote the development of international trade.

3 That is to say a contract where the obligations of the seller are simply to make the goods available at their place of business and it is up to the buyer to arrange carriage and any other arrangements incidental to export.

4 It is of importance that that article also provides that the factors determining the place of business must be known to both parties to the contract.

5 The principles of interpretation of international treaties can be found in the Vienna Convention on The Law of Treaties (1969) (the Treaty Convention).

Euthanasia: Life Death and the Law

By P J Downey, Barrister, of Wellington

This article is the Presidential address given to the Wellington Medico-Legal Society on 16 February 1995. It is concerned with the related questions of assisted suicide and euthanasia, and the difficult legal, ethical and medical issues raised.

Life, death and the law raises interrelated questions of law, morality and medicine. Before an audience such as this I have no hesitation in including morality in the reckoning. To a very considerable extent, as the case law shows, medical ethics, reference to medical ethical committees and so on are very much taken into account in the developing of the law.

In this regard I refer to the third of the conditions stated in the declaration made by Justice Thomas in *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235, decided in August 1992. This case, which I will refer to briefly later on, concerned the withdrawal of artificial ventilatory support. The Judge explicitly required the consent of the patient's wife "and the Ethics Committee of the Auckland Area Health Board".

My focus in this paper will be much wider, and more general than that particular case. I want to look rather at suicide, or at least assisted suicide, and the related issues of euthanasia; and rather in terms of principle – as I see it – than of legal categories and medical technology, although both of these are very relevant. I say euthanasia and suicide are related for the obvious reason that euthanasia, in one sense at least, amounts to assisted suicide.

It was Thomas Hobbes who told us bluntly that the life of man is nasty, brutish and short. In a sense it can, I suppose, be said that the task of both the legal and the medical professions is to make it a little less of the first two, and for doctors the third also. Physically it is the task of the doctors, and socially it is the task of the lawyers – not that there aren't others involved too of course, writers, musicians, artists, even politicians I suppose all help to ameliorate the human condition. The law is not just positive in the sense of obliging us to do certain things and not to do other things. It is also normative in that most of us obey the law because it is the law, and the effect of this over time is to establish a pattern, a standard of what is considered to be socially respectable behaviour. In that sense it becomes a moral criterion – sometimes the only moral criterion – by which most people judge their own behaviour.

There is, or, at least historically there has been a close relationship between the concepts of crime and morality. This was illustrated a few years back – in 1958 – by the famous lecture series by Lord Devlin on *The Enforcement of Morals*. This series of lectures was replied to by Professor Hart in 1962 in *Law, Liberty and Morality* on the basis of what seems to me a rather crude utilitarianism. In practical terms however, the debate has been decided in favour of Professor Hart. For myself I think there is more to be said for Lord Devlin's views than is usually acknowledged. I want to start with a rather long quotation from Lord Devlin by way of background, and also by way of illustrating by some passing reference he makes, how far and how rapidly the law has moved regarding some of the matters he refers to, and certainly in directions contrary to his views.

> Subject to certain exceptions inherent in the nature of particular crimes, the criminal law has never permitted consent of the victim to be used as a defence. In rape, for example, consent negatives an essential element. But consent of the victim is no defence to a charge of murder. It is not a defence to any form of assault that the victim thought his punishment well deserved and submitted to it; to make a good defence the accused must prove that the law gave him the right to chastise and that he exercised it reasonably. Likewise, the victim may not forgive the aggressor and require the prosecution to desist; the right to enter a *nolle prosequi* belongs to the Attorney-General alone.
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> Now, if the law existed for the protection of the individual, there would be no reason why he should avail himself of it if he did not want it. The reason why a man may not consent to the commission of an offence against himself beforehand or forgive it afterwards is because it is an offence against society. It is not that society is physically injured; that would be impossible. Nor need any individual be shocked, corrupted, or exploited; everything may be done in private. Nor can it be explained on the practical ground that a violent man is a potential danger to others in the community who have therefore a direct interest in his apprehension and punishment as being necessary to their own protection. That would be true of a man whom the victim is prepared to forgive but not of one who gets his consent first; a murderer who acts only upon the consent, and maybe the request, of his victim is no menace to others, but he does threaten one of the great moral principles upon which society is based, that is, the sanctity of human life. There is only one explanation of what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them

is an offence not merely against the person who is injured but against society as a whole.

Thus, if the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve order and decency or to protect citizens (including the protection of youth from corruption), it would overturn a fundamental principle. It would also end a number of specific crimes. Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others. Many people think that the law on some of these subjects is in need of reform, but no one hitherto has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality. They can be brought within it only as a matter of moral principle.

That was how Lord Devlin saw things in 1958. But in 1961 suicide ceased to be a crime in England. It had never been a crime in New Zealand. But attempted suicide continued to be a crime here until 1961. It is perhaps not altogether logical that someone can be charged with a serious crime of aiding and abetting someone to commit suicide, and if it is unsuccessful the person attempting is not guilty of any offence but the person aiding and abetting the attempt is. But then as we all know the life of the law is not logic but experience, as Oliver Wendell Holmes told us.

Suicide has been variously described:

> Amid the miseries of our life on earth, suicide is God's best gift to man.
> **Pliny the Elder:** *Natural History*, II, 77

> It is very certain that, as to all persons who have killed themselves, the Devil put the cord round their necks, or the knife to their throats.
> **Martin Luther:** *Table-Talk*, DLXXXIX, 1569

> Who would bear the whips and scorns of time,
> The oppressor's wrong, the proud man's contumely,
> The pangs of dispriz'd love, the law's delay,
> The insolence of office, and the spurns
> That patient merit of the unworthy takes,
> When he himself might his quietus make
> With a bare bodkin?
> **Shakespeare:** *Hamlet*, III, c. 1601

> It is silliness to live when to live is torment.
> **Shakespeare:** *Othello*, I, 1604

> If suicide be supposed a crime, it is only cowardice can impel us to it. If it be no crime, both prudence and courage should engage us to rid ourselves at once of existence when it becomes a burden.
> **David Hume:** *Essays Moral and Political*, I, 1741

> Suicide is not abominable because God forbids it; God forbids it because it is abominable.
> **Immanuel Kant:** Lecture at Königsberg, 1775

> I have a hundred times wished that one could resign life as an officer resigns a commission.
> **Robert Burns:** *Letter to Mrs Dunlop*, Jan 21, 1788

> There is nothing in the world to which every man has a more unassailable title than to his own life and person.
> **Arthur Schopenhauer:** *On Suicide*, 1851

Having quoted Pliny the Elder, who was born in AD 23, I want to look briefly at the historical attitudes to suicide. I am indebted for much of this information to the book *Life and Death and the Law* (from which incidentally I borrowed the title of this paper), written by Norman St John Stevas (now Lord St John of Fawsley).

Stevas points out that even in those societies which have tolerated suicide, attempts have been made to confine it within fixed categories. He says that the sometimes sweeping assertion that is made, that suicide was generally approved in Greek or Roman law is a distortion of the real position. Both in Thebes and Athens suicides were denied funeral rites, and Attic law directed that the hand of a suicide should be cut off and buried away from the rest of the body. In general terms Plato condemned suicide although he did allow some exceptions. Suicides outside those excepted categories however were, in his view, to be buried alone. In *The Laws* he wrote that "they must have no companions whatsoever in the tomb; for they must be buried ignominiously in waste and nameless spots on the boundaries between the twelve districts, and the tomb be marked by neither headstone nor name." Aristotle too in the *Ethics* condemned suicide as being an act of cowardice and an offence against the state. The Greeks Stoics however gave a general approval to suicide which they saw as a reasonable exercise of human freedom. That however was a minority view.

The Romans had a more complex attitude, at least as reflected in their law. Ironically, a soldier who made an unsuccessful attempt to commit suicide was considered guilty of infamous conduct and was punished with death. Roman writers were divided over the question of suicide. In differings ways Virgil, Apuleius, Caesar and Ovid all condemned suicide. Cicero disapproved of it on both religious and social grounds. The Roman Stoics following their Greek predecessors extolled suicide. Seneca wrote: "Human affairs are in such a happy situation that no one need be wretched but by choice. Do you like to be wretched? Live. Do you like it or not? It is in your power to return from whence you came". Pliny I have already quoted to the effect that the power of dying when one pleased was God's best gift to man.

The Christian view as stated by the early Fathers of the Church, both Greek and Latin were summed up by St Augustine in *The City of God*. He condemned suicide on three grounds. The first that it violated the Commandment "Thou Shalt Not Kill" which he said applied to one's own life as much as to another's. He also considered that it precluded any opportunity for repentance, and finally that it was a cowardly act. St Augustine even condemned virgins and others who took their own lives to save their virtue. He pointed out that since chastity was a virtue of the

mind and will, it was not lost if one was compelled by force to yield physically to another.

These views of the early Church Fathers eventually found expression in Church Law as this developed over the centuries. In the 5th century the Council of Arles (in 452) denounced suicide as a diabolical inspiration. The Council of Braga in 563 denied full funeral rites to suicides and the Capitula of Theodor, Archbishop of Canterbury provided that Mass was not to be said for suicides but only prayers and alms be offered. Attempted suicide was punished by the Council of Toledo in 693 with exclusion from Church fellowship for two months, and in 1284 the Synod of Nimes refused burial in consecrated grounds to suicides.

These punishments and interdicts are quite severe; but, Stevas points out, that they are notable for the absence of such a barbarous custom as impaling with a stake. This had become established by popular custom towards the close of the Middle Ages and in the early years of the Reformation and then continued right through to the 19th century.

Suicide as I have already pointed out was a felony in England until 1961. In some ways this seems rather silly because if someone has committed suicide then they are dead and beyond the reach of the law one would think. This however is not quite so because the effect of this was reflected in other ways. There was the question of not being able to be buried according to the rites of the established church in an Anglican churchyard, there was the forfeiture of goods in some cases, and there was also the problem relating to collecting on insurance policies on the ground that no one should make a profit out of the commission of a crime and this applied to the estate of a suicide. I read a speech made by Lord Denning in the House of Lords when the 1961 Suicide Act was being debated in which he rather naively said that the passing of the Act would mean that insurance companies would have to pay out on the death of a suicide. He referred to a case in which he had been involved and had argued – unsuccessfully – right up to the House of Lords.

Historically the situation in New Zealand was different since 1893. The position was described by Ostler J in *Murdoch v British Israel World Federation* [1942] NZLR 600,634 as follows:

> Suicide was a felony at common law, and still is so in England. In more unenlightened times the punishment for suicide was forfeiture of goods and certain indignities inflicted upon the dead body of the deceased during burial. In New Zealand by the Criminal Code Act 1893, we abolished all common law felonies and misdemeanours, and . . . all common law crimes have been abolished. From the date of that Act all criminal offences must be statutory. No one can be charged criminally in New Zealand for any act, default, or omission unless it is declared to be a criminal offence by the Crimes Act 1908, or some other statute. Suicide is not declared to be a criminal offence by any statute in New Zealand. The old common law punishments for that crime had fallen into desuetude long before 1893, and as the suicide himself was beyond the reach of the law it was no doubt thought to be futile to provide that suicide should be a crime. But attempted suicide was made a crime punishable by two years' imprisonment: s 193; and counselling and procuring, or aiding and abetting, suicide was made a crime punishable by imprisonment for life: s 192.

In 1961 the Crimes Act was consolidated and the section relating to attempted suicide was simply deleted. The effect therefore was equivalent to a repeal, and attempted suicide as such ceased to be a criminal offence.

In New Zealand now as in most countries, despite its illogicality, it is still a crime to aid or abet anyone in the commission of suicide; or for that matter to incite, counsel or procure any person to commit suicide if that person does so or attempts to do so. Section 179 of the Crimes Act 1961 provides that the penalty for such a crime is imprisonment for a term not exceeding 14 years.

Now the relevance of all this to euthanasia is fairly obvious. Euthanasia in the normal sense of the term is in fact assisting someone to commit suicide. This can extend from placing some pills within reach of the person wishing to die, to administering a fatal injection at the request of the patient, or doing some other act intended to cause death.

This raises two quite separate issues. One is the medical one in terms of a doctor who is treating a patient actually taking a step that results in the patient's death. The other is that of a non-medical person who similarly takes some step.

Interestingly there have been some New Zealand cases where the question of sentence is very relevant to our understanding and appreciation of what would seem to be a change in judicial attitude and, therefore in effect, a change in the law in respect of euthanasia, at least in respect of the seriousness with which it is regarded in terms of penalty.

There are various ways in which euthanasia can be described. There is voluntary euthanasia which involves the intentional taking or the assistance in the taking of the life of a person at his or her request for compassionate motives. The action may be either by commission or omission. There is on the other hand what is called non-voluntary euthanasia. This is when a person is incompetent to make a request because of such things as immaturity, or confusion, or mental retardation, or coma, and that person is killed without his or her consent. So called "passive euthanasia" is sometimes used as a term in relation to the withholding or withdrawal of an unwanted or futile treatment from a terminally-ill person. In this case there is no intention to kill as the primary motive, although that may be the known inevitable result, and in the sense of motive at least, passive euthanasia is a misleading term. It should not be called euthanasia at all in my view. I will deal with the question of so-called passive euthanasia briefly later in respect of the well-known decision of Justice Thomas in the *Auckland Area Health Board* case; and even more briefly in the English case of *Bland* that went to the House of Lords.

There are two things that make euthanasia a current issue. The first is medical technology and the second is the greater life-span. The two are not necessarily directly related. Japan for instance has a

greater life-span compared to the medically more technologically-minded United States.

Euthanasia has an ancient history both as a philosophic idea, and in practice. Plato and Aristotle were well known for their view that defective children should be exposed to the elements and allowed to die. (This of course may be seen as the opposite of the meaning of the term "eu", meaning happy and "thanatos", death.) Seneca, with typical Roman pithiness said: "just as a long-drawn-out life does not necessarily mean a better one, so a long-drawn out death necessarily means a worse one".

Most talk about euthanasia is couched in terms of voluntary euthanasia. But there are really four different meanings and they do tend to get confused in popular discussion of the topic. There are those who favour euthanasia for the aged, the incurably diseased and the insane. Then there are those who support the idea for what are called monstrosities or defectives in the early stages of life. Both of these are usually put forward in compulsory terms – without any question of consent being in issue. Third are those who favour euthanasia for those in severe pain, and fourth those who advocate it being available for those who are terminally ill. The latter two are of course intended to apply on a voluntary request basis.

I merely pause at this stage to raise the question of the meaning of voluntary in that context. If someone is in severe pain, and heavily drugged say, it is surely a difficult question. It has led some people to make what have been described as living wills referring at least to being taken off life support systems if they are ever in that situation for any length of time.

Compulsory euthanasia was supported by some groups in England and America before the Second World War, but the identification of this with the Nazis discredited the idea. It is generally forgotten, because of the much greater debacle of the Holocaust in the death camps of Auschwitz, Belsen and others that the Jewish extermination programme followed some time after the Nazi policy of compulsory euthanasia of the incurably sick, deformed and insane. They, after all could not contribute to the war effort and the greater good of the German Reich. The order to give effect to the policy was signed by Hitler on 1 September 1939, and some 275,000 people perished in German euthanasia centres. These were "medical" establishments and were quite separate from the concentration camps.

In January of this year the issue of compulsory euthanasia made newspaper headlines in a suggestion in the newsletter of the Los Angeles Mensa Chapter that the mentally defective should be humanely dispatched. It was, I regret to say, a lawyer, according to the newspaper report, who wrote that "society must face the concept that we kill off the old, the weak, the stupid and the inefficient". And another article in the Mensa newsletter said that the homeless "should be done away with, like abandoned kittens" (*Evening Post*, 12 January 1995). In the State of Oregon last year voters approved a referendum proposal that a patient with a life expectancy of six months or less could ask for a doctor to provide a lethal dose of drugs. There is a particularly permissive proposal currently being debated in the Parliament of the Northern Territory in Australia. Carmen Lawrence, the Commonwealth Minister of Health has expressed her support for this proposal.

At almost the same time as the Oregon referendum, here in New Zealand a Morgan poll, reported in *Time* magazine of 14 November 1994, showed that 68% of those asked agreed that a doctor should give a lethal dose if a terminally ill person requested it. That word "should" of course contains a dangerous ambiguity. Does it mean "has an obligation to" and if so how soon would it be, if it were legal, before it was made part of medical ethics that a doctor who failed or refused to kill a patient when asked would be held to have acted unprofessionally and be struck off the medical register? There will be a conscience problem for at least some doctors because we must recognise that behind the soft sounding words "euthanasia" and "a lethal dose" is the reality that someone must kill someone – with the express intent to do that.

It is usual of course at present to draw a distinction between killing and letting die – a very proper distinction in my view. In many cases, probably in most cases, there is little difficulty in making this distinction, but not necessarily in all. In the 1989 Kennedy Elliott Memorial Lecture to this society Mr G R Gillett Senior Lecturer in Medical Ethics at the University of Otago dealt at length with the concept of intent in legal theory and in medical ethics: [1991] NZLJ 115. He postulated three rather simple scenarios:

> Dr C approaches Mr D with a heavy dose of opiate pain relief and says "Mr D, I think you know that we have discussed the risks of this medication and I have told you that at the dose we are now using there is a chance that it could interfere with your breathing and you might die. Are you happy for us still to use it?" Mr D replies "I understand perfectly doctor and all I am concerned about is keeping this pain under control the way you have been until now." Dr C injects the drugs she has brought and, forty minutes later, is called to certify Mr D's death.
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> Dr E approaches Mrs F and says "Here we are with your injections Mrs F, don't worry they will take the pain away". Mrs F mumbles something about feeling unhappy with morphine. She dies after a respiratory arrest some forty minutes later.
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> Dr G approaches Mr H and says "well, Mr H, we have discussed the fact that you want to put an end to your life and I have brought the drugs along to do that for you. Do you still feel the same?" Mr H responds "Yes, doctor" and she proceeds to give him a lethal injection of barbiturate and curare.

We have, traditionally, taken the stand that there is a vast difference in the actions of Dr C and Dr G, but we must ask whether we are right to take this stand. The attitude evinced clearly turns on the notion of intent as an important factor in medical decisions.

Doctor G committed what we would call "active voluntary euthanasia" – an intervention

which terminated the patient's life at the patient's request. In Holland it is done most commonly with an injection of barbiturate and curare. This is permitted where the patient requests it, the doctor believes the patient's condition to be helpless, another (designated) doctor concurs with the decision and the patient is considered competent to make a reasoned choice in the matter. I believe that a missing ingredient from many discussions of this practice is the matter of intent.

Not all cases will come within the scenarios of Mr Gillett as shown by three cases – not involving doctors – that have come before the Courts, and the very different sentences imposed on the basis of the differing factual situations. The first case is *R v Novis* in 1988. Unfortunately the penalty imposed, or rather the non-penalty imposed by Justice Anderson was not appealed so there is no report of the Judge's comments on sentencing.

R v Novis was a case in which a son, a mature man, shot his terminally ill father because he, the son, could not bear to see his father's sufferings. My recollection is that he was charged with murder but the jury brought in a verdict of manslaughter. This meant the sentence that could be imposed was discretionary, up to life imprisonment. The Judge convicted and discharged the son, according to the newspaper account, on the ground – extraordinary as it seemed to me – that no good purpose would be served in sending him to gaol as he was unlikely to offend again.

The most recent case is *R v Ruscoe* [1992] BCL 623. In this latest case Ruscoe pleaded guilty to aiding and abetting Gregory Nesbit in the commission of suicide. It is hard to see why he was not charged with murder, but perhaps there was some informal plea bargaining.

The facts are not in dispute. Gregory Nesbit suffered an accident at work that left him a permanent tetraplegic, suffering considerable pain. Ruscoe and Nesbit agreed on the heavy use of sedation and pain-killing pills that were readily available in Nesbit's room to cause his death. It was also agreed that after Nesbit became unconscious Ruscoe would make sure of his death, as the Court decision so delicately expresses it, "by putting a pillow over his face". Which is what he did.

Aiding others to commit suicide:
The Canadian situation

In 1993 a case was argued to authorise the use in Canada of a system of assisted suicide like that associated with the name of Dr Kevorkian ("Dr Death") in the United States. The Supreme Court of Canada, upholding two lower Courts, ruled against this. The case was Rodriguez v British Columbia, *(Supreme Court of Canada, 30 September 1993).* The Lawyers Weekly *for 22 October 1993 had an article on the case. The following is a description of the case from that article, and some extracts from the majority judgment delivered by Mr Justice Sopinka quoted in it.*

In one of the most difficult cases it has faced under the Canadian Charter of Rights and Freedoms, the top court split 5-4 in September to uphold the constitutionality of s 241(b) of the Criminal Code, a provision which has prohibited people from aiding others to commit suicide since the Code's inception in 1892.

Majority Justices Gerard La Forest, Charles Gonthier, Frank Iacobucci and John Major, speaking through Mr Justice John Sopinka, expressed their "deepest sympathy" for appellant Sue Rodriguez, a terminally ill and disabled BC woman.

But they said they could not grant Ms Rodriguez her request for a "constitutional exemption", an unprecedented Charter remedy which would have upheld the law but allowed Ms Rodriguez and other disabled and terminally ill people the legal option of committing suicide with a doctor's assistance.

Ms Rodriguez, 43, suffers from an incurable and degenerative disease of the motor neurons and spinal cord which does not impair her mind, but which has robbed her of almost all her control over her body.

Sopinka J:

> Regardless of one's personal views as to whether the distinctions drawn between withdrawal of treatment and palliative care, on the one hand, and assisted suicide on the other, are practically compelling, the fact remains these distinctions are maintained and can be persuasively defended.
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> To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it.
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> . . .the decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens.
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> Rather, the matter of suicide was seen to have its roots and its solutions in sciences outside the law, and for that reason not to mandate a legal remedy. Since that time, there have been some attempts to decriminalize assistance to suicide through private members' Bills, but none has been successful.
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> . . . before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered.
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> One cannot conclude that a particular limit is arbitrary because (in the words of my colleague, McLachlin J) "it bears no relation to, or is consistent with, the objective that lies behind" the legislation without considering the state interest and the societal concerns which it reflects. □

Now the Judge at first instance expressed his understanding of the motive of Mr Ruscoe as being solely one of compassion. The Judge went on to say despite this that "human life is sacred and that sanctity is recognised by the law". The Judge then imposed a term of imprisonment which he said need not be long. It was in fact nine months.

In the Court of Appeal this prison sentence was quashed and replaced by a sentence of supervision – of probation for one year. The Court said in reference to the passage I have just quoted:

> As we read the passage, the Judge is saying that, although this particular offending is at the least blameworthy level for this type of crime, it is his bounden duty to impose imprisonment in the interests of the sanctity principle and deterrence. In our opinion that goes too far. There are very exceptional cases where a non-custodial sentence is appropriate. From time to time Judges have recognised this.

The other case is *R v Stead* [1991] BCL 1251 which was dealt with in the Court of Appeal in June 1991. In that case a man of 31 stabbed his mother to death. She had tried unsuccessfully on previous occasions to commit suicide and told him often that she wanted to. She was greatly distressed by her marriage break-up. On the fatal night he tried to help her die by putting her in the front seat of a car, turning on the engine and closing the garage doors. But he went back too soon. With her apparent co-operation he tried other things and finally in desperation he stabbed her.

He was charged with murder, not with assisting suicide. The jury returned a verdict of manslaughter. So far, one would think a situation rather similar to *Novis*, but the Judge imposed a sentence of three and a half years imprisonment. In upholding that sentence the Court of Appeal said:

> The case is very significantly more than an aiding of suicide: it is more akin to a mercy killing with the unusual feature of persistence in the attempts.

Both *Stead* and *Ruscoe* are noteworthy for the passing reference in the judgments to mercy killing as though it were a separate category of law in itself. A so-called mercy killing is of course, as the law stands, either murder or manslaughter.

Finally I want to say a few words about an entirely different case, that of the *Auckland Area Health Board v Attorney-General* [1993] NZLR 235. It is a case that has to be considered along with the English case of *Airedale NHC Trust v Bland* [1993] 1 All ER 821. There is an article on the cases in the *New Zealand Law Journal* at [1994] NZLJ 246 by Dr David Collins who appeared as Counsel in the New Zealand case. In the New Zealand case the issue was of withdrawal of the use of a ventilator, and in the English case to cease nutrition by tube as well. In both cases the Courts decided that this could be done without the doctors who made the decision, and presumably the hospital staff involved in the procedures, being liable to criminal prosecution.

The New Zealand case concerned a patient called "L". It was decided by Thomas J in a very full and intellectually impressive judgment. Some of the credit for this should of course go to the various Counsel involved in the case. In effect these cases where what I earlier described as passive euthanasia although I suggest the term is a false and indeed misleading one. In both cases the Court finally accepted that the withdrawal of treatment, even though this meant that death was inevitable, did not amount to killing the patient, but rather to letting him die. That is a very compressed description of the actual decision and of the complex issues that were so carefully considered. In the Auckland case what is of particular interest is the conditional nature of the declaration that the Court finally made. There were three conditions beginning with the word "if". These conditions are based on the American 1976 decision *In the Matter of Quinlan* 355A 2nd (1976). In that case ironically, if my memory serves me right, when the ventilator was withdrawn the patient continued to breathe without it. But I am subject to correction on that. The declaration in the *Auckland Area Health Board* case read:

> If,
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> (i) the doctors responsible for the care of Mr L, taking into account a responsible body of medical opinion, conclude that there is no reasonable possibility of Mr L ever recovering from his present clinical condition; and if
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> (ii) there is no therapeutic or medical benefit to be gained by continuing to maintain Mr L on artificial ventilatory support, and to withdraw that support accords with good medical practice, as recognised and approved within the medical profession; and if
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> (iii) Mrs L and the Ethics Committee of the Auckland Area Health Board concur with the decision to withdraw the artificial ventilatory support,
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> then, ss 151 and/or 164 of the Crimes Act 1961 will not apply, and the withdrawal of the artificial ventilatory support from Mr L will not constitute culpable homicide for the purposes of that Act.

It is to be noted that this declaration contains a specific reference to the concurrence of the wife. In the *Bland* case in England the declaration did not contain a similar premise, but the Judge at first instance noted that the parents and the sister of Anthony Bland concurred in the making of the order, and this was accepted in the appeals.

I want to leave you with a final question about these references, but before doing so I would like to quote from a paper by Mr Russell Worth given at a Conference on "Care of the Dying" at Masterton in November 1992. Mr Worth had dealt at length with the *Auckland Area Health Board* case which had been decided only a short time earlier. The relevant section in Mr Worth's paper that he then went on to discuss was headed up, "The New Ethical Statement: Developing Guidelines for Decisions to forgo Life-Prolonging Medical Treatment". It read:

> Recently, this subject has been bandied around in the newspapers as [in] an article suggesting that doctors can legally use euthanasia. This is not so. There are sections which are related to euthanasia but much of it concerns medical practice relating to consent. The article has appeared

as a supplement to the *Journal of Medical Ethics* – September 1992, and is the papers produced by the Appleton International Conference. This is a project which began in 1987, involving internationally recognised conferences. The guidelines have been published at least twice before. The document is worthy of close study. Much of the paper is perfectly acceptable to the majority of New Zealand doctors.

However, there are terms which many of us will find [ourselves] uncomfortable with such as:

> *"Aid in Dying" – a medical service provided in person by a physician, that will end the life of a conscious and mentally qualified patient in a dignified, painless and humane manner.*

The section on the persistent vegetative state, to my mind, goes far and away beyond what we regard as the norm in New Zealand:

> *The patient who is reliably diagnosed as being in a PVS has no self-regarding interests. Consequently, unless a previously expressed advance directive requests it, there is no patient-based reason to continue life-sustaining treatments, including artificial hydration and nutrition. It is unkind to allow unrealistic optimism to be sustained and it is unfair to allow the prolonged consumption of societal resources in support of such patients beyond a period of education and adjustment for the family.*

Are we prepared to let a patient starve to death?

This is an example of a decision made by a group of distinguished international experts, that still has to be debated in New Zealand.

The Appleton Conference makes an interesting statement on the US health services –

> *with its lack of universal access to care, chronic cost containment ills, a litigious climate, and socioeconomic barriers to care.*

> I wonder whether [the New Zealand] Government has read that along with its US consultants' report.

In answer to a question Mr Worth commented on the problem starving a patient would raise for many nursing staff who had cared for and tended the patient for so long in terms of their professional commitment. He suggested it would be a psychological as well as a moral problem for some nurses to stand by and watch such a patient be starved to death.

Now the question I want to leave with you, as raised by the cases of Mr L and of Anthony Bland, is this: *If* the doctors conclude there is no reasonable possibility of recovery; and *if* withdrawal of ventilatory support is in accordance with good medical practice; and *if* the Ethics Committee concurs; and *if* the Manager of the CHE wants it withdrawn for economic reasons; BUT the spouse, or parent or child does not agree, can they exercise a veto, and if so for how long? In other words is it not just a medical decision; and what part can or should economics play in the decision?

We have had an aspect of this economics issue already recently in a different context, in the dialysis case of Mr McKeown. In that case the refusal of dialysis was determined apparently by economic factors in the first instance, but influenced perhaps subsequently by television. Where to now? In the legal system we undoubtedly have the risk of trial by television, are we also to have medical practice by television; and is this altogether a bad thing if economic issues and social policy are to be factors or even the final determinants?

I want to conclude with a quotation from the poet Arthur Hugh Clough in *The Latest Decalogue* (1862). He intended it to be satirical, but I would suggest that it fairly accurately sums up the position the law has hesitantly, with caution and still perhaps somewhat confusedly come to:

> Thou shall not kill; but needst not strive
> Officiously to keep alive. □

Correspondence

Dear Sir

I wish to comment on the article by Dr Ian Miller at [1995] NZLJ 29 in response to KB Evans' "Hypnotically Induced Testimony". I was involved as counsel in the *McFelin* case. Mr Evans was correct in saying, there has only been one precedent in New Zealand where hypnotically induced testimony has been tested in law.

While it is interesting to note that the New Zealand Police are adopting the correct guidelines, Mr Miller has missed the point Mr Evans was trying to make, which is that these guidelines should be codified into legislation. This was in fact suggested by the Court of Appeal in *McFelin*.

There is grave concern amongst the legal profession about the Repressed Memory Syndrome in sexual abuse cases and the same guidelines Mr Evans proposes may well be useful here also.

Lorraine O Smith
Barrister and Solicitor,
Auckland

LAWASIA:

Business Law Conference

Advice has been received of a LAWASIA Conference on the subject of Joint Ventures, Investment and Trade Law in the Asia Pacific region. The Conference is being held in combination with Dun & Bradstreet.

The Conference will be held in Auckland on July 3 and 4, 1995.

The Conference is supported by the government and various official organisations and bodies. Conference details can be obtained from the following:

Mr Andrew Lupton
Dun & Bradstreet (HK) Ltd
12/FK Wah Centre
191 Java Road, North Point
Hong Kong. Tel (852) 2516 1272
Fax (852) 2562 6978

A novel institution:
The first years of King's Counsel in New Zealand 1907-1915

By Jeremy Finn, University of Canterbury

The office of King's Counsel dates from the time of Sir Francis Bacon in the sixteenth century. It was instituted in New Zealand in the early years of this century more than 50 years after Australia. In this article Mr Jeremy Finn discusses the issues that were debated before the first silks were appointed here in 1907. The article is of considerable historical interest and particularly in relation to the questions it raised in respect of a fused legal profession.

The article is based in part on a paper on Queen's Counsel in Australasia delivered at the Australia and New Zealand Law in History Conference in Wellington in July 1994.

Two features of the early history of King's Counsel in New Zealand strike the researcher as rather remarkable. The first is the fact that there is little evidence of why the institution was introduced into New Zealand at all; the second that the first appointments were made only in 1907, more than 50 years after the first silk in Australia and more than 30 years after practitioners in all the Australian colonies had been honoured with the new rank.

In the absence of fresh material becoming available, any suggestions as to the motives for the conferral of silk in New Zealand must be speculation only.

It seems probable that the prime mover was the then Attorney-General J G Findlay, though the Chief Justice, Sir Robert Stout, must, at the least, have acquiesced to the change. It is possible that either or both of these men were affected by a desire to assert the merits of the New Zealand profession, and inferentially the bench which was drawn from it, in the face of the apparently dismissive attitude of both the English legal profession and the Privy Council. Other less honourable motives were on occasions suggested, most of which hinted at the granting of silk being the fulfilment of personal ambitions by Findlay personally. No evidence exists to support these views, except perhaps the apparent fact that the initiative came from Findlay himself without any evidence of demand for change by the profession, or indeed any real interest by Findlay in the views of the profession. Although Findlay circulated the draft regulations concerning the conduct of KCs to the District Law Societies prior to the regulations being gazetted, this was done several months after the rules for appointment of KCs had been gazetted, and only weeks before the first KCs were appointed. At most this allowed an opportunity for the District Law Societies to inform their members in case they wished to apply for silk.[1]

The Australian experience

The reasons for moving more slowly than the Australian colonies are perhaps less difficult to determine. It is clear that in Australia the institution became very much more a trophy of political success by lawyer-politicians who could then use it to buttress claims to judicial office in the face of competition from more recent immigrant lawyers from Britain. The role of lawyer-politicians in New Zealand in the critical years was distinctly different from that in the Australian colonies. On the one hand the dominant lawyer-politicians of the early years of self-government were essentially solicitors rather than barristers – as can be seen in the careers of two colonial premiers, Henry Sewell and Frederick Whitaker, as well as Whitaker's legal partner and political associate Thomas Russell.[2] More importantly, the office of Attorney-General was for the very important decade 1865-1875 held as a non-political position by James Prendergast. It is reasonable to assume that a securely-tenured and non-political Attorney-General was not likely to be subject to the same self-interested motives for establishing the office of Queen's Counsel that were so important in Australia.

This does not of course entirely explain the failure to institute the office later, but we must also remember that for the last quarter of the century, the dominant lawyer-politician was Robert Stout, one of the many liberal politicians who tended to dominate New Zealand politics in that era. In short, before 1875, the conservatives might have had the power to introduce QCs but lacked any impetus or motive from the upper echelons of the Bar; in later years where such an impetus might have come from the profession, the political climate was not one to encourage it. It is significant that it is only after the death of Seddon and the lurch to the right of the Liberal Government that the proposal for King's Counsel comes forward. Of the ten counsel first granted silk, only three had a political background – Findlay himself as Attorney-General, Josephus Tole, a former Minister of Justice, and F H D Bell, who was then in the ranks of the Parliamentary Opposition. It is also, perhaps, relevant to the perception of the status of KCs in New Zealand that there were parliamentary protests made about the inclusion of C B Morison's name which appeared in a list of silks granted in 1912, on the basis that he owed his patent to his services to the Reform party prior to the 1911 election; a claim refuted by government speakers who pointed to his extensive practice in Maori land cases and his recent textbook on

company law (see (1912) 161 NZPD pp 1359-1361).

New Zealand judicial appointments

It is probably also important that New Zealand saw a more speedy move to a practice whereby appointments to the bench were made solely from the practitioners at the local bar. The last Judge appointed direct from the English bar was George Arney in 1857; Henry Chapman's (re)appointment in 1864 was the last appointment of someone not in practice in New Zealand, and as he had been a Supreme Court Judge from 1844-52 his case may fairly be regarded as exceptional. It is pertinent to note that this reliance on local practitioners was not always considered desirable – Edward Stafford, a prominent non-lawyer politician actually moved, albeit unsuccessfully, in Parliament in 1862 that for the next ten years appointments of Judges should be made on the nomination of "some one of the Judges of the Superior Courts in England" nominated by the colonial government (see 1862 NZPD 591-594). It appears that New Zealand was among the first colonies to cease appointments from Britain. It may well also have been one of the first to appoint a lawyer who had qualified solely in the jurisdiction (Thomas Bannatyne Gillies in 1875).

Lastly it must be remembered that New Zealand differed from the Australian colonies in that there was no single centre which dominated the colony, and where leading counsel of the centre were, ipso facto, leading counsel for the colony. Indeed, even when King's Counsel were introduced in 1907, the Chief Justice, in a most unusual public statement of his views, said that he considered that New Zealand had a series of "local" bars, not a national one, a factor which he took into account in recommending ten counsel for silk, though on a simple population count, the number would have been lower.

His other stated criteria were the practitioner's "seniority and continuing service" to the bar – and, where seniority was roughly equal to the possession of a University degree. The ten counsel were: J G Findlay (Wellington), Attorney-General; Thomas Joynt (Christchurch); Martin Chapman (Wellington); Josephus Tole (Wellington); Francis Henry Dillon Bell (Wellington); John Horsley (Dunedin); Saul Solomon (Dunedin); Thomas Stringer (Christchurch); Charles Skerrett (Wellington) and Frederick Baume (Auckland).

Newspaper reactions

Public opinion about the new institution seems to have been mixed. Although the Wellington *Evening Post* (8th June 1907) editorialised that:

> This honour, as the Chief Justice explains, is a recognition of pre-eminence – seniority and long service – at the Bar, and it is stipulated that of the awards must be above suspicion of fear or favour . . . Compared with the Australian States, New Zealand has more than a proportionate share of King's Counsel, but the list remains so brief that some serving barristers had necessarily to be left out. Sir Robert Stout could not recommend more than ten names, however much he might have been inclined to enlarge the list of honours and therefore the disappointed ones should not take much philosophy to console them. The honour is not, of course, given for nothing. A King's Counsel is practically shut out of the lower courts, for he is not permitted to practise there without a special retainer of ten guineas, and he may not appear in the higher courts without a junior, a fact which limits him to fairly important cases. Just as every private in Napoleon's army was supposed to have a marshal's baton in his knapsack, the humblest barrister has a KC in his brief-bag, and the ambition of getting the letters out of that receptacle and tacking them to a name will doubtless stimulate legal practitioners throughout the country.

Other newspapers were more hostile. Christchurch's leading paper, the *Press*, put its views thus:

> We still think it was utterly unnecessary to create King's Counsel in New Zealand. The step was not asked for by the profession, so far as we are aware, and certainly it was not demanded by the public. It is doubtful whether it will be of any benefit to either. In England when a barrister takes "silk" he is not only entitled, but expected, to charge higher fees, which can hardly be regarded as benefiting his clients, but on the other hand he often gets fewer of them. . .

The *Press* was not alone in its opinion. The *New Zealand Herald*, an Auckland paper, also criticised the new institution, though not quite so forcefully. This division of public opinion appears not to have come to the notice of earlier historians of the New Zealand legal profession.

Nor have such historians reflected the degree to which the legal profession itself was split on the institution as it was introduced. The matter most in issue was that the regulations under which the first KCs were appointed permitted them to remain in practice as solicitors. This appears to have been deeply unpopular in many legal circles. Opposition both within and without the profession quite quickly forced abandonment of the possibility of dual practice by KCs. The events underlying this change are somewhat cursorily dealt with in *Portrait of a Profession*, (p 182) where it is stated only that:

> The early regulations did not preclude a King's Counsel from practising as a solicitor. They did require him in the Supreme Court to have a junior from another firm. The system proved unsatisfactory for various reasons, including alleged favouritism of particular juniors by particular King's Counsel; "freezing juniors" (the term applied to those called in at the last moment for form's sake and given nothing to do but sit); and the tendency of litigants desiring to brief a KC to instruct his firm for the solicitor's work. Dissatisfaction culminated in section 3 of the Law Practitioners Amendment Act 1915, prohibiting silks from practising as solicitors either alone or in partnership, with a proviso saving the rights of existing holders of the patent.

From this one might deduce a degree of minor dissatisfaction with the operation of the institution, remedied tidily by a minor piece of legislation. Such an impression would be quite wrong, though understandable if the authors relied on a superficial earlier account by O'Leary KC at [1936] 12 NZLJ 94.

Parliamentary intervention

The legislative limitation is important – this was the only instance where Parliament determined to intervene in an institution which had always operated as a part of the prerogative. More surprisingly still, the provisions of the amending Act affecting the practice of KCs were the work of the then leader of the Opposition, and were carried in the face of opposition from members of the Cabinet. What happened was this.

The first parliamentary expression of dissatisfaction came with the debate, in the closing hours of a legislative session, on the Law Practitioners Amendment Bill 1913. Under this bill the New Zealand Law Society was granted legislative authority to make a levy on its members for funds for the purposes of maintaining the Judges' library in Wellington. This bill provided an opportunity for Alfred Hindmarsh, a lawyer and leader of the Parliamentary Labour party to suggest reform of the KC system. Hindmarsh had already been instrumental in the convocation earlier that year of a meeting of practitioners in Wellington dissatisfied with the operation of the silk system, following which Hindmarsh had sought backing from the District Law Societies for a bill to abolish the office of KC entirely. It seems there was no institutional support for abolition,[3] and despite some backing from the Wellington profession, Hindmarsh did not introduce a bill for abolition (see (1913) 167 NZPD 1056). Hindmarsh's criticism of the operation of the office of King's Counsel drew varied reaction from other lawyers in the House of Representatives, including the comment from then Attorney-General that complaints he had received about the working of the institution had included those brought by a deputation of barristers: (1913) 167 NZPD 1060. Certainly the current system had few defenders. Particularly interesting is the reaction of one lawyer MHR, W H D Bell. Bell, who was both the son of a leading KC and one of his law partners in the firm of Bell Gully, perhaps then the leading law firm in the country, might have been expected to be a defender of the institution; instead he commented

> As to King's Counsel, I myself think it was a mistake to introduce the King's Counsel system at all, and I speak possibly with a certain amount of self-interest the other way. ((1913) 167 NZPD 1058.)

While no concrete result followed the 1913 debate, matters were different in 1915. Again the Law Society had promoted a bill to impose a levy on its members (this time to finance part of the cost of publication of the *New Zealand Law Reports*); again Hindmarsh took the opportunity to raise the issue of KCs. On this occasion he moved an amendment at the committee stage to prohibit KCs from practising as solicitors or being in partnership with solicitors.

The only available report is a sketchy one in the *Evening Post* and the *Press* of 28 August 1915. Hindmarsh's initial motion for a blanket ban on KCs acting as solicitors was lost by 18 votes to 31; but a subsequent motion which protected the position of existing King's Counsel was passed by 26 votes to 22. Herdman, the Attorney-General, spoke against the motion, suggesting it would abolish the institution of King's Counsel in New Zealand, a move which he thought would be a mistake. He, and all the other members of Cabinet in the lower house, voted against both motions. The matter then went to the (nominee) Legislative Council, where Hindmarsh's clause was struck out by 16 votes to 9, on the motion of F H D Bell KC, a Minister and the only KC in either house.

The matter then came back to the House of Representatives, which refused to consent to the deletion of the clause. Four lawyers in the House spoke strongly in favour of reform, indicating that there was very strong feeling among the solicitors against the then practice of King's Counsel. The principal objections raised were not concerned with the conditions under which junior counsel were engaged. The predominant concern expressed was that by being both a KC and a solicitor, the KCs had an unfair advantage in the competition for legal work, including the attraction of agency work from overseas clients.

W H Field, a lawyer and MHR for Otaki is reported in (1915) 174 NZPD 474 as saying that:

> He was one of those who was quite satisfied that King's Counsel in this country were never wanted at all. The King's Counsel system had been set up at the request of one or two individuals in Wellington City, and not by the general wish of the legal profession at all. But if they were to have them at all, then let them be confined to their own particular work, and conduct barristers' practice only.

In the face of this opposition – indeed no-one spoke in favour of the Legislative Council view save the Attorney-General and even he had to concede the strength of professional feeling against the rank in Wellington – instancing a meeting of the profession which had called for the abolition of the rank – but could only plead for further consultation with the lawyers in other regions. (If there was in fact concern in the regions, its extent is hard to measure. The debate, and its outcome, are not mentioned in the Minutes of the Canterbury District Law Society for 1915, but there was apparently more concern in Otago.[4]) It seems however that the Attorney-General felt that the Bill would be jeopardised if he did not concede on this issue, and eventually conceded the point. Following that lead, the Legislative Council reversed its stand.

The authors of *Portrait of a Profession* are not alone in giving a perhaps unreasonably dismissive account of the opposition to the solicitor-KCs. Michael Cullen's *Lawfully Occupied*, a generally informative and lively account of the Otago District Law Society, does give a marginally fuller account of the professional concern about the operation of the KC system than do other sources but it too rather misrepresents events by describing Hindmarsh's amendment as having:

> slipped through Parliament, seemingly unnoticed by the Otago Society or the New Zealand Law Society – it passed late in the session having been tacked on to a very brief bill to improve the finances of the New Zealand Council of Law Reporting.

This makes it seem as though the change was slipped through by stealth and without opportunity for

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The long and the short of statute law

By Nigel Jamieson, University of Otago

This article is a comment on the nature and form of legislation occasioned by an article by Francis Bennion criticising the Report of the Law Commission on The Format of Legislation *NZLC R 27. His article, as he explained, was intended to address three issues. These were first, what the intended audience for legislation is; second, whether a purpose clause should be substituted for the long title; and third, whether informative notes should be added to the text. Mr Jamieson considers the question in a broader context and in the light of his own experience as a law draftsman.*

The best value for money in these days of private consultants' reports has come, as usual, quite gratuitously. Francis Bennion, writing in a recent issue of the *Statute Law Review*, has warned the New Zealand Law Commission against tinkering with legislation. There are lots of different ways of tinkering with legislation, but what perturbs Bennion most are the Commission's proposals to amend legislation that already works quite well. This tinkering is being done by the Commission in ways that will bring no real benefit to the Statute Book.

Changing the law without righting any wrong is one of the worst signs of hyperactive law reform. The paradox lies in the fact that such legislative hyperactivity often emanates from people who have not enough to do. David Hull who was a parliamentary counsel experienced in several jurisdictions – he is now Chief Justice of Swaziland – used to say of such proposals that they came from public servants who could not find enough on their desks to occupy their minds. These officials would come back to empty inward trays from a long weekend, twiddle their thumbs for several hours, then come up with proposals to change the law.

My own experience as a parliamentary counsel in the seventies confirmed the existence of this phenomenon. It peculiarly afflicted the Department of Justice. The law of marriage, families, property, evidence was all irrevocably turned upside down. Nobody had noticed anything much the matter with these laws – but the bureaucrats left nothing alone. One of the last straws that broke my back as a draftsman was working for a year on criminal justice and penal reform bills which even on the department's own admission, were almost entirely verbal. The criminal law was being re-defined in terms of doublespeak. We are still left with a life sentence that is not a life sentence. Only criminals could be convinced by it. We used to be proud of our clearly drafted criminal code, but now our

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comment or reaction. However five weeks elapsed between Hindmarsh's two successes – at the committee stage and in disagreeing with the Legislative Council. Yet in the debate on the latter point, there is no evidence of any expression of professional support for the status quo, and yet there was significant support for change among the lawyers in the ranks of parliament. Even in wartime five weeks was surely long enough for some indication of opposition to emerge, if indeed there was anything to show that Hindmarsh was not reasonably representative of the profession. Certainly the evidence appears to be as consistent with an interpretation which says that many of the New Zealand solicitors considered that KCs were simply not needed in the fused profession; but if they were to exist, they should not have conditions more advantageous than would be the case in England.

Adopting the English tradition

The restrictions on the practice of silks certainly had considerable impact, both in practice and in the attitudes of senior legal figures. The first is shown by the fact that no barristers from the independent bar applied for silk until 1924 (though two Solicitors-General did take silk); apparently because successful barristers and solicitors believed the risk too great.[5] The latter may be seen by the insistence of Myers CJ that while those admitted direct to the bar as barristers could receive silk, but silk should be withheld from those who came to the bar by effluxion of time after admission as a solicitor (thus bypassing the academic requirements for admission as a barrister).[6] At that point the New Zealand profession may be said to have adopted the "English" traditions about the practice of silks which were conspicuously not present at their inception in the Dominion. □

1 See Minutebook of the Canterbury District Law Society, vol 2 (vii) p 286, 2nd May 1907. (McMillan Brown collection, University of Canterbury).

2 For Sewell's career, see W D McIntyre's introduction to his edition of *"The Journal of Henry Sewell" 1853-57* (Whitcoulls, Christchurch, 1980. Julia Millen *The Story of Bell Gully Buddle Weir 1840-1990* (Bell Gully Buddle Weir, Wellington 1990) pp 27-46 provides a sympathetic picture of the professional and political lives of Whitaker and Russell at this time.

3 See Canterbury District Law Society Minute Book, Vol 2 (viii) p 81, 18th April 1913.

4 See M Cullen *Lawfully Occupied: the Centennial History of the Otago District Law Society* (ODLS, Dunedin 1979) pp 76-77.

5 See Cooke (ed) *Portrait of a Profession*, pp 78-79 and 83.

6 Sir David Smith, in Cooke (ed) *Portrait of a Profession*, p 98.

statutory definition of rape is so complicated that our Minister of Justice is the last person to be entrusted to avoid controversy by commenting on it. This makes nonsense of our statute book.

The question, in terms of today's hyperactive law reform, is whether the Law Commission demonstrates the same syndrome of being ungainfully employed. In these days when every legal issue is decided by a Treasury Report, it might be good to get one. User pays, however, and former parliamentary counsel do not hold public service credit cards.

Too much legislation

One of the issues that all walks of life agree on is that we have too much legislation. If there is any point to law reform it must be to reduce the legislative overload. This does not mean passing the buck to the judiciary, far less the police force, or even the man in the street. The next worse thing to a hyperactive legislature is a hyperactive law commission. Tinkering with law that has nothing seriously wrong with it only increases rather than reduces the burden of legislation.

It is hard to renew ourselves by getting rid of what we have got, especially if we have worked hard for the measure of legislation by which we pride ourselves on democratic government. We are all made materialists from birth by the way in which our mothers equate doing well with putting on weight, so that it is hardly fair to criticise our Law Commission for delivering more of the same legislative goods by way of weighty reports and draft bills. In terms of its authority to survey our whole legal system the Commission takes a very literal interpretation of its own empowering statute so it will be interesting to record the judicial response when the Commission decides to rewrite Court judgments. Meanwhile, by drawing the second-fastest legislative gun in the west, and being armed and ready to do so under its own empowering statute, one wonders how far away and hidden from that statutory firepower one would need to be before sniping back. When Jason Calder wrote *The Man Who Shot Rob Muldoon* it happened on The Terrace. Bennion writes from Britain, but the common lawyer here feels less at ease in criticising the Commission than in attacking parliamentary sovereignty or promoting republicanism. What Bennion has to say to our Commission about its proposals to change the accustomed format of our legislation is "if it's not broke, don't fix it". We could not get plainer English for the law than that summation for amending legislation.

Long titles

Among other changes to our statute law, the Law Commission recommends getting rid of long titles. Thornton describes the Commission's views as muddled. Without Bennion's own day to day experience of drafting statutes in a parliamentary context, however, the ordinary reader may not realise just how radical the Commission's proposal is to get rid of long titles. How radical is it? Well, it would not be much more radical than saying, for example, that we should instead get rid of the Commission.

It is true that some lawyers already recommend getting rid of our Law Commission. They propose a return to the system of specific law reform committees that once operated on an ad hoc basis. These seemed to do a lot more practical work as a result of their members having far less time on their hands to wax academic. This is such a radical proposal, however, that we shall not ourselves treat it seriously until it is proposed by the Commission. After all, the ultimate authority for surveying the whole of our law now rests with the Commission.

Bennion's short article, of only six pages (as against the 82 pages of the Commission's Report) should be read for its own sake. When one compares the prodigiously paged output of the Commission (272 pages on privilege and 270 on police questioning for example) it becomes painfully clear that what our Law Commission needs to learn is succinct expression. The answer, as Bennion indicates, lies more in leaving well alone than it does in leaving out long titles. They serve a purpose, as outlined by Lord Simon of Glaisdale in *Black-Clawson*'s case [1975] AC 591 at 647 in serving as "the plainest of all guides to the general objectives of a statute". They have never done any demonstrable harm – certainly none to warrant their being outlawed from the statute book. Paramountly they are a part of our legislative heritage with a long history by which to explain their history and function.

Unfortunately the one thing that professional law reformers tend to undervalue and overlook, even when they have a sense of history, is heritage. History may repeat itself but, once gone, heritage cannot be recalled. The paradox of legal history is to find that it is usually the hard pressed practising lawyer, with one eye always on his digital clepsydra, that best knows the practical purpose of heritage in being the epitome of experience.

Short titles

The longest surviving heritage of constitutional law declares that one should rule a kingdom as delicately as one fries small fish. Having grown up in that nation of small shopkeepers who sell fried fish and chips as their national dish makes it as pointless for me to oppose economic jurisprudence as it would be to oppose the Rule of Law. Now that Uncle Albert's Fried Fish Emporium – the last little fish and chip shop on Charing Cross Road – has been taken over by Macdonalds however, what was once a big nation of small shopkeepers has become a small nation of big shopkeepers. There are those who say that in following suit we too have lost our culinary touch for constitutional law.

Big business proves that short titles sell well. The Bible is a classic example. Genesis, Exodus and Leviticus are not long titles. Some of these Books of the Law may be a little long-winded because Moses was nothing if not our first lawyer. Even the Ten Commandments could be still further codified by our foremost law reformer, Jesus Christ, from ten to two. All the best books – Matthew, Mark, Luke and John, have even shorter titles – a triumph for jurisprudence over the law.

Short titles operate like exclamation marks. They provoke the reader. The Hovercraft Act 1971, drafted overnight as an utterly urgent and utmost emergency measure, provoked so much righteous indignation over its wholesale delegation of legislative power that it wasn't brought into force until six years later. You can't beat a good book – nor a bad one either, apparently – unless by giving it a long title. That was foreseen by our Acts Interpretation Act 1925 which provides for only titles and short titles. We rely on this legalism to

make our legislation a best-seller. The law, rather than the fact of the matter is that we don't have any long titles in our legislation.

The bigger the book – and this advice is especially for blockbusters like the Income Tax Act 1976 which once hid behind the Land and Income Tax Act 1954 (and Annual Acts from 1923-76) – is to follow the Bible's example. Life is too short, and shorter still with the future shock of this new age, to gift-wrap rules of law in any highly aspirational language for long titles or their current equivalent of policy, purpose and object clauses. It is not long titles as such, but what is being done with long titles that ought to be the Commission's concern. And if unwrapping all these high hopes for our new look legislation discloses no rules of law at all then the life of the law has been still further shortened. As Bennion, whose own reforming zeal for legislation is every bit as much as that of Bentham, says, ". . . a very real problem . . . is the tendency for Acts to be all cutting edge".

General principles or recitals?

If one is going to legislate for policy without rules of law it would be better to return to the old conveyancing practice of drafting recitals. At least one would then know where politics stops and the law begins without wandering through the colloidal quicksands of resource management, health care and privacy principles. The political rather than legal status of such principles is amply demonstrated by the formulation and issue of Treaty principles by the executive arm of our government in 1989. This was done, as our government would argue, without the need for legislative action. In the Treaty case, our government might take a stand on the prerogative, even though the expression "principles of the Treaty" had been legislated on to become the province of the judiciary for interpretation; but the resulting open slather on principles in our statute book is not so much a sign of a strongly principled society as it is of disguising the fact that the legislators are unable to formulate rules of law.

By recording the statistical ratio of principles (more often merely statements of policy) and discretions (more often merely passing the buck to the judiciary) and delegated powers (more often merely passing the buck to the executive) to specifically formulated rules of law, we have our own inbuilt indicator as to the quality of our legislation. Instead of formulating legal rules, we often propose principles, or worse still, are content only to proclaim highly aspirational aims, as if politics were a transcendent form of law.

The Rule of Law requires us to govern the other way round. The result of turning the Rule of Law upside down is to politicise the legal system. What we emerge with from the enactment process is backed by little more in substantive content than are the shrieking headlines of the tabloid press. Were this only waffle we might ignore it, but the task of interpreting and enforcing propagandistic principles likewise turns Judges into legislators to formulate rules of law. The risk is that in the process of legislating, Judges are forced to become politicians, so that before we know it we have a Soviet-styled judiciary whose task is to propound policy rather than enforce rules of law.

Example of income tax

Referring back to our Income Tax Act 1976, we find that the whole history of our legal system is subconsciously summed up in short titles to statutes, marginal notes and other headings. It is common knowledge that generations of Englishmen relied on Prime Minister Pitt's promise that *the* income tax (as it was always called) was but a transient measure to recover the deficit of the Napoleonic Wars and the loss of the American Colonies. To have put that promise in a purpose, or even a sunset clause would not have made a whit of difference. We still have not recovered the deficit of the Napoleonic Wars, and it was the American War of Independence that provoked Hone Heke, who flew the stars and stripes, to start the Maori Wars.

We have our own legal history of income tax. It recapitulates the broken promises of English legislation. Since our own political bias of the late nineteenth century against the landed gentry the attack on incomes has been hidden by legislative land wars. The John Donald Macfarlane Estate Administration Empowering Act 1918 even went so far as to presume that landowner dead in order to distribute his landholding. The Land and Income Assessment Act 1891 became the precedent to disguise this class competition until the truth now stands revealed by our Income Tax Act 1976. The old war against the landed gentry can now be forgotten since none now recalls the broken promises with which *the* income tax was introduced. Income tax has come into its own. The short title to the Income Tax Act 1976 testifies to that in a way which its immediate predecessor, the Land and Income Tax Act 1956 did not.

Wider reading

Life is too short for any longer history of taxation. Chitty on *Contracts* and Salmond on *Torts* have got short titles right, just as it goes without saying that Blackstone's *Commentaries* are on the common law. Salmond on *Jurisprudence* is out of the running. The one word Jurisprudence is more than enough for a long title all by itself – as witnessed by what has happened to the subject over the last generation. Legal literature is a lot more like other literature than lawyers think – although for lawyers who read nothing but law it may be a shock to find out that other folk can nowadays also read and write – often a lot better than lawyers. Thus James Michener knows on which side of the page his bread is buttered when he sums up Africa under the short title of *The Covenant* and condenses North America into *Chesapeake Bay*. Obviously the secret of choosing successful short titles for big books lies in identifying the right microcosmic seed from which the book can sprout. It is this potential that is projected on the book-store browser to sell the book and grab the reader.

Legislators need to know what sells as well as what makes great literature no less than lawyers need to read a lot more than merely law. That said still does not mean that lawyers give up long titles when they can have the best of both worlds. We need not be as pessimistic of law reform as Eric Redman when writing of *The Dance of Legislation* as to equate it with "ploughing the sea". There still remains a good case, with right reason and in good season, for law reformers to plough the land. □