THE NEW ZEALAND
LAW JOURNAL
21 JUNE 1995

Royal prerogative, Ministers and Parliament

The Fire Brigades Union in England would seem to be as insistent on fair treatment for its members as similar bodies elsewhere – including New Zealand at present with the petition for a referendum against restructuring of the Fire Service. The House of Lords was faced recently with an interesting constitutional problem in an action brought by the Fire Brigades Union and ten other bodies including the Trades Union Congress. The issues arose in a case involving the relationships of the Judiciary, Parliament, the Executive and private citizens. The case is also of interest for us with its references to the prerogative powers of the Crown in relation to statutes. It has implications concerning the significance of Parliament under the MMP system; and also the possibly restricted powers of Ministers should the monarchy be abolished. The case is *R v Secretary of State for the Home Department, ex parte Fire Brigades Union and others* [1995] 2 All ER 244. The bodies which brought the action considered their members were more than usually exposed to possible injuries from criminal violence in the course of their work. The narrow point at issue involved compensation payable for such injuries.

The dissenting judgment of Lord Mustill, with which Lord Keith agreed, sets out at p 256 some relevant background including in particular the financial implications which he obviously considered very relevant.

> Thirty-one years ago the government of the day established a scheme to compensate out of public funds the victims of criminal violence. The scheme was brought into existence through the exercise of the royal prerogative, and the payments were made ex gratia; that is, there was no statutory authority for the scheme, although the necessary funds were voted annually by Parliament, and the victims had no right in law to claim payment. Compensation was given in the shape of a lump sum arrived at in the same way as a civil award of damages for personal injury caused by a tort, subject to an upper limit on the amount attributable to loss of earnings. The scheme was administered by the Criminal Injuries Compensation Board, comprising a chairman and a panel of Queen's Counsel and solicitors.
>
> At first, the scheme operated on a modest scale, but by 1978 the number of awards had increased twelvefold. In that year the Royal Commission on Civil Liability and Compensation for Personal Injury recommended, in ch 29 of its report (Cmnd 7054-I), that compensation for criminal injuries should continue to be based on tort damages, but that the scheme, which had originally been experimental, should now be put on a statutory basis. The government, however, preferred to wait until more experience had been gained. Although as the years passed some important changes were made, the scheme retained its original shape. But its scale and cost remorselessly increased. In its first year the board had paid out £400,000. By 1984 the annual amount had risen to more than £35m, and the backlog was approaching 50,000 claims.

What happened then was that the Government decided to put the scheme in statutory form. This was done in the Criminal Justice Act 1988 (ss 108 to 117). Among other things it was provided that victims would be compensated on the basis of civil damages as if arising from a tort. There was a provision in s 117 that the provisions would come into force on a date to be determined by the Secretary of State. This was never done in the ensuing seven years. The old scheme of gratuitous payments continued, but with ever-mounting costs.

Then, in December 1993, a White Paper was published giving details of a proposed new tariff scheme. In accordance with the White Paper this new tariff, still under a non-statutory scheme, was published on 9 March 1994 and became effective on 1 April 1994. Legal steps had already been taken by the applicants by

then. Two remedies were sought by way of declarations. The first was that the Home Secretary, by failing or refusing to bring into force ss 108 to 117 and Schs 6 and 7 to the Criminal Justice Act 1988, had acted unlawfully in breach of his duty under that Act. The second was that by implementing the Criminal Injuries Compensation Tariff Scheme to take effect from 1 April 1994 the Home Secretary had acted unlawfully in breach of his duty under the 1988 Act and breached his common law powers. The Court of Appeal granted the second declaration sought but refused the first.

The Law Lords were unanimous in dismissing the cross-appeal against the decision to refuse the first declaration; but they divided three to two in respect of the appeal itself regarding the introduction of a new scheme different from that set out in the statute but still not brought into force. Lord Browne-Wilkinson, Lord Lloyd and Lord Nicholls dismissed the appeal, while Lord Keith and Lord Mustill would have allowed it. The effect was that their Lordships held unanimously that the Home Secretary was under no legally enforceable duty to bring the relevant section of the 1988 Act into force; but, by a majority, that the Home Secretary's discretion was not unfettered. It was held that he had to keep the question of whether to bring the provisions into effect under review, and that it was unlawful as being an abuse or excess of power, for him to bring in the new tariff scheme instead.

Clearly the Home Secretary had presumed that he could tell Parliament what to do, and could proceed in the meantime as if Parliament had already done it. The point at issue is clearly stated by Lord Browne-Wilkinson at p 254 as follows:

> My Lords, it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme even though the old scheme has been abandoned. It is not for the executive, as the Lord Advocate accepted, to state as it did in the White Paper (para 38) that the provisions in the 1988 Act "will accordingly be repealed when a suitable legislative opportunity occurs". It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them. But under the principle in *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508; [1920] All ER Rep 80 if Parliament has conferred on the executive statutory powers to do a particular act, that act can only thereafter be done under the statutory powers so conferred: any pre-existing prerogative power to do the same act is pro tanto excluded.

Lord Lloyd in his judgment gave continuing life to that famous creature of the law, the reasonable man on his Clapham omnibus. As an aside I wonder if an omnibus does still run to and from Clapham, and if it does whether it has any reasonable men on it? At p 269 of his judgment Lord Lloyd states:

> It might cause surprise to the man on the Clapham omnibus that legislative provisions in an Act of Parliament, which have passed both Houses of Parliament and received the royal assent, can be set aside in this way by a member of the executive. It is, after all, the normal function of the executive to carry out the laws which Parliament has passed, just as it is the normal function of the judiciary to say what those laws mean.

Lord Lloyd then goes on at p 271 to deal with the submission concerning the purpose for which Parliament had conferred on the Home Secretary the power to bring the relevant sections into force. He refers to the fact of the existence of the relevant sections, even though not in force, and to the error on this point in the dissenting judgment of Hobhouse LJ in the Court of Appeal.

> The mistake which, if I may say so, underlies the dissenting judgment of Hobhouse LJ is to treat these sections as if they did not exist. True, they do not have statutory force. But that does not mean they are writ in water. They contain a statement of Parliamentary intention, even though they create no enforceable rights. Approaching the matter in that way, I would read s 171 as providing that ss 108 to 117 *shall* come into force *when* the Home Secretary chooses, and not that they *may* come into force *if* he chooses. In other words, s 171 confers a power to say when, but not whether.
>
> If that is the right construction of s 171, then the intention of Parliament in enacting that section is exactly, and happily, mirrored by the reaction of the hypothetical man on the Clapham omnibus. The Home Secretary has power to delay the coming into force of the statutory provisions in question; but he has no power to reject them or set them aside as if they had never been passed.

Lord Keith in his dissenting judgment notes the issue, as he sees it, to be one of politics and finance and not of law. He states, at p 247, that if the statutory scheme in the 1988 Act had been brought into force compensation payments could have been made only under that authority as the statute would have subsumed the prerogative power. He then went on:

> But since these sections have not been brought into effect the prerogative power remains the only source of power to make such payments. If ss 108 to 117 had never been enacted, it would have been open to the Secretary of State to discontinue making payments under the 1964 scheme and to start making payments under a tariff scheme. On the basis that the 1964 scheme had become more expensive than the nation could afford, which is the ground upon which the new tariff scheme is proposed and which is essentially a political matter, such a decision would not be open to challenge as being irrational. In my opinion, the position is no different by reason that ss 108 to 117 are present in the statute book but not in force. I do not consider that the doctrine of legitimate expectation properly enters into the matter.

Lord Keith at p 247 makes an issue of the fact that the Secretary of State does not owe a duty to members of the public to bring the relevant statutory provisions into force. Lord Browne-Wilkinson agrees with this line of argument but maintains it does not deal with the crux of the problem. At p 254 he explains:

> In my judgment, these arguments overlook the fact that this case is concerned with public, not private, law. If this were an action in which some victim of crime were suing for the benefits to which he was entitled under the old scheme, the arguments which I have recited would have been fatal to his claim: such a victim has no legal right to any benefits. But these are proceedings for judicial review of the decisions of the Secretary of State in the discharge of his public functions.

For our purposes here in New Zealand the case is interesting in a number of ways. It illustrates, particularly in the judgments of Lord Browne-Wilkinson and Lord Lloyd, the constitutional importance of Parliament as an institution formally separate from and independent of the political parties that make it up. Ministers are, the case emphasises, members of the Executive and thus in theory subject to the authority of the Legislature, of Parliament. This basic constitutional principle has long been obscured by the working of the party system whereby the Executive has become the dominant element in the constitutional system. It may be that under MMP this will change in New Zealand; but there remains the risk of the development of a coalition system that will necessarily become an even more rigid party arrangement. No one will want to enter into a coalition unless the respective party leaders can guarantee their party vote in the House. Be that risk as it may, the *Fire Brigades Union* case is a salutary reminder of the primacy of Parliament.

The other issues, and they are perhaps of more distant interest for New Zealand, include the references, in this decision, to the royal prerogative as a basis of government power and decision making. In the judgment of Lord Keith and in the passage already quoted from the judgment of Lord Browne-Wilkinson at p 254 the point is made that the existence of a statute on a particular issue precludes the prerogative as a basis for separate Executive decision-making on the point. If, of course, the monarchy is abolished here, then the royal prerogative power as such would obviously be abolished with it. The only legitimacy for any government action then would be an express statutory authority. The abolition of the monarchy, in the absence of a written constitution (somehow established), would necessarily entail the abolition of the powers of the Queen's Executive Council except for those authorised by statute. It would be absurd, to say the least, to abolish the monarchy but at the same time declare the royal prerogative as a basis for government action to remain intact. But perhaps that is not an issue that will trouble our politicians even if they are able to understand it.

An interesting sidelight on all this was the report in *The Dominion* newspaper of 25 May 1995 of remarks by the Minister of Justice. Mr Graham was echoing comments made earlier by the Prime Minister about the referendum the Government is required to hold later, on the number of professional firefighters. He confirmed the Government's determination to proceed with restructuring the Fire Service *before* the referendum is held. He is reported to have said that the Government might change the law if it was used for "useless" polls like this one. Technically the Government cannot change the law of course, only Parliament can, and Ministers are going to have to change their mindset. It is hard not to read this particular passage in the newspaper as arrogant, but it is more likely merely an example of the customary way Cabinet Ministers' minds have worked for many years now. The Minister is reported to have said that citizens had a responsibility to ensure the issues they were addressing would still be relevant when the poll was held. The change of circumstances he was referring to however, is of course purposeful Government action in the meantime. Could it not more honestly be said that Ministers have a responsibility to ensure that a referendum can be relevant, by refraining from taking intentional action to make it irrelevant.

The Citizens Initiated Referenda Act 1993 provides for a referendum *on any subject* provided enough citizens sign a petition. It is for the citizens to decide where their responsibility lies in exercising a right they have under a statute passed by Parliament. It is not for Cabinet Ministers to decide what they consider to be suitable subjects for referenda when the legislation passed by Parliament specifically allows for a referendum on any subject. Perhaps the legislation should not have been passed in the first place. It seemed a rather silly piece of legislation from the start. So it might even have a salutary effect in making Parliamentarians think twice before enacting legislation for grandstanding purposes and with the expectation that it will be of no effect. Statutes are not, or at least should not be, statements of goodwill aimed at pleasing some modish pressure group, as has been done too often in the past.

The Minister, when he speaks of the Government legislating, would seem not to be thinking clearly of the new political reality of the present make-up of Parliament – and of its likely future composition. If the Fire Service restructuring merely allows for a possible reduction, by administrative decision, in the numbers of firefighters some time in the future it is not inconceivable that someone might try at least to argue in Court that such action must await the outcome of the referendum.

The Citizens Initiated Referenda Act 1993 should not presumably be thwarted by mere administrative decisions pre-empting the very issue to be considered by the electorate at large. The future looks interesting for the development of a new line of administrative law cases.

The *Fire Brigades Union* case in the House of Lords is one of considerable constitutional significance. Technically of course it is concerned with a narrow point applicable only to the United Kingdom, but the principles on which it is based are of wider application. As a reminder of basic constitutional principles that may become even more relevant here in New Zealand over the next few years, it is a case of very great importance that deserves careful consideration and understanding.

P J Downey

Case and Comment

Corporate groups and informality

Hickson Timber Ltd v Hickson International plc (unreported, Court of Appeal, CA 113/94, 17 February 1995)

The conduct of corporate groups is often accompanied by a degree of informality: the result makes good business sense, though the paperwork may take some time to catch up. While the group is solvent there is usually little problem, if only because there is no one to complain of the irregularities. Nevertheless, occasions do arise where inter-group dealings become subject to judicial scrutiny. When it does the tension, which has long been part of company law, between requiring strict adherence to company law rules and facilitating the conduct of business is brough into stark relief. In the recent decision of *Hickson Timber Ltd v Hickson International plc* (Court of Appeal, CA 113/94, 17 February 1995) the Court of Appeal was called upon to reconsider the balance which must be struck between these aims. The Court's apparent willingness to uphold the transaction at the expense of corporate law doctrine suggests a further shift in the balance toward facilitation.

The case concerned a group of companies whose principal activities were chemical processing and wood preservation. Faced with liquidity problems it was decided to sell off a substantial part of the group's assets, owned in New Zealand by H Timber Protection (NZ) Ltd ("HTNZ"). The four sale agreements entered into by HTNZ, which are the source of the dispute, provided for the purchase price to be payable in three instalments. The first, of three million Australian dollars, was payable to HTNZ. The second and third instalments represented increases in the initial price following audit reports. These sums were expressed as payable to Hickson Investments (Australia) Pty Ltd, or to whomever it might direct. Hickson Investments subsequently directed payment to Hickson International plc ("PLC"), the group holding company.

Somewhat later, HTNZ was sold to a company controlled by its former directors, and was eventually placed in receivership. The receivers then commenced the present proceedings to recover the money retained by PLC from the purchase price. PLC, as a company without a place of business in New Zealand, filed a protest to jurisdiction, the outcome of which turned on whether HTNZ had an arguable case. It was contended in the High Court that as PLC received the money as agent for HTNZ it was liable to account. This claim failed. In the Court of Appeal it was again alleged that PLC was liable to account as agent. It was also contended that the directors of HTNZ had exercised their powers for an improper purpose and that PLC, as a knowing party to the misfeasance, held the money as constructive trustee.

In the Court of Appeal, Cooke P, speaking on behalf of Casey and Tompkins JJ, rejected both claims. His Honour found that the agreements made it quite clear that

> any increases [in the price] were to be disposed of as directed by Hickson Investments . . . that is to say in effect to PLC; [HTNZ] had no right to participate in any such increases and naturally did not appoint . . . PLC as its agent to receive the increases (p 6).

Cooke P also rejected the contention based on the principle that the board in agreeing to a transaction under which HTNZ would receive only a portion of the proceeds had infringed the principle that corporate assets may be used only for corporate purposes. There was, in his Honour's opinion, no principle of company law "precluding a wholly-owned subsidiary from paying over its reserves to the parent company by some act which it has capacity to perform, provided that this does not improperly prejudice the interests of creditors". (p 8). HTNZ had capacity to distribute its reserves to its members, and PLC had instructed the board of HTNZ to declare a dividend equal to the sum retained by it, although this instruction had not actually been acted upon. At the time, HTNZ was strongly solvent with substantial reserves. It followed, in the Court's opinion, that HTNZ's claim must fail. Although short, the judgment raises a number of important issues. In particular, it warrants comment on three fronts.

Can there be a dividend on the facts?

The first concerns the Court's treatment of the moneys retained by PLC as a dividend paid to it by HTNZ. In the Court's view, although it did not take this form, as it was an allocation of the company's profits to its shareholder it was in substance a dividend. While such a conclusion can in principle be readily accepted, it is doubtful whether this conclusion was open to the Court on the present facts. Although the matter is not free from doubt, it seems that PLC was not in fact a shareholder of HTNZ. Rather, the shares in HTNZ were held by Hickson Investments Ltd, which in turn was owned by PLC. Thus the Court of Appeal noted that HTNZ "was wholly owned by [PLC] through a United Kingdom subsidiary, Hickson Investments Limited" (p 2), and later, when detailing the management buy-out of HTNZ, that the "parties of these agreements

were Hickson Investments Limited as vendor . . ." (p 7).

As it is axiomatic that dividends can be paid only to a company's shareholders, the retention of the money by PLC cannot be treated, even in substance, as a dividend from HTNZ. Nor can one explain the apparent oversight in the Court's reasoning on the basis that the overall result can be rationalised as a "cascade" of dividends: HTNZ to its parent Hickson Investments, Hickson Investments to its parent PLC. In terms of the movement of the moneys received from the sale of HTNZ's assets, it was Hickson Investments (Australia) Pty Ltd that caused the moneys to be paid to PLC.

Furthermore, even if the Australian subsidiary's role is ignored, a "cascade" analysis is still not possible. As an English company, Hickson Investments is subject to the rules contained in the United Kingdom Companies Act 1985 with respect to distributions. These require certain formalities to be observed, including the preparation of accounts and the obtaining of auditor's reports. As *Re Cleveland Trust plc* ([1991] BCC 33) shows, these requirements cannot be waived and the failure to comply allows the improperly paid dividend to be recovered from any shareholder who knew of the impropriety.

Declaration of the dividend

Even if one assumes that PLC was the shareholder of HTNZ, there are still difficulties in construing the money retained by PLC as a dividend. As mentioned, although directed to by PLC the board of HTNZ did not, either formally or informally, declare a dividend. The Court of Appeal dismissed the lack of a declaration of dividend as a mere formality. It was enough, it seems, that the sole shareholder had ordered it. Three objections can be raised with respect to this conclusion.

First, it is far from clear that a declaration of dividend by the board is a mere formality. Typically, the articles of the company will provide that nothing is payable unless and until a dividend has been declared, and it is not until there has been a declaration that a debt enforceable by shareholders is raised. It is at least arguable, therefore, that the declaration is the source of substantive rights and, as such, not a matter of mere form.

Secondly, it has long been accepted that in respect of the powers vested in it, the board is not required to act on the directions of shareholders, nor can shareholders usurp the board's authority and exercise the power in question (see, Greer LJ in *John Shaw & Sons Ltd v Shaw* ([1935] KB 113, 134). Under the Companies Act 1955, while the power to declare a final dividend is one granted to the general meeting, the power to declare an interim dividend is vested in the board. In *Hickson*, the purported dividend was most likely an interim one. Final dividends are usually declared only at the annual general meeting and the Court of Appeal seemed to acknowledge that the matter was one for the board. In *Scott v Scott* ([1943] 1 All ER 582) it was held that such a power can only be exercised by the board. Had the matter been decided under the Companies Act 1993 the position would have been even clearer. Section 52 vests all authority to make distributions in the board, s 107 merely allowing the board, as the persons entitled, to waive the formal procedure. Thus, in respect of the power to declare an interim dividend the directions given by PLC were neither binding on the board nor capable in themselves of exercising the power.

Thirdly, in some circumstances it is possible to overcome the lack of compliance with formal requirements and establish a valid exercise of corporate power by invoking the unanimous consent rule. This rule provides that in a matter intra vires the company the unanimous consent of its shareholders is binding on the company. While the varied instances of the rule's operation demonstrates its versatility, it is far from clear that it can be used in respect of powers vested in the board. As I have argued elsewhere ("The Unanimous Consent Rule in Company Law" [1993] CLJ 245, 266), the unanimous consent rule was developed before the rules on the division of powers between board and general meeting were fully worked out. Thus, while the unanimous consent rule is, literally, capable of extending to powers vested in the board, it must now be read as subject to the more recent principle that denies shareholders power to exercise management powers.

Gratuitous payment or sale at under value

If the foregoing is accepted, and the dividend analysis is rejected as unavailable on the facts, one is left with the question of how the process by which PLC received the money is to be characterised. The Court of Appeal felt that the intention of the parties ruled out an inter-company loan. There would seem, therefore, to be only two further alternatives. Either HTNZ was to receive the additional sums and thereafter make a gratuitous payment to PLC or, on the assumption that HTNZ was never to receive the additional sums, the initial sale of HTNZ's assets was at an undervalue. On either analysis, however, it is difficult to see how PLC's retention of the moneys can be justified.

Turning first to the gratuitous payment analysis, at common law it has long been accepted that corporate powers and assets may be used only for corporate purposes, that is the objects set out in the memorandum of association. This principle was held in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* ([1986] 1 Ch 246) to deprive the board of actual authority to bind the company to a gratuitous inter-group guarantee. Where the other party was aware of the improper purpose, it could not rely on the board's apparent authority and the transaction was void. A similar principle was applied to powers vested in the general meeting. In *ANZ Executors & Trustees Co Ltd v Qintex Australia Ltd* ((1990) 8 ACLC 980) McPherson J held that a parent company could not be compelled to cause its subsidiary to grant a gratuitous inter-group guarantee. In his Honour's opinion this would infringe the principle of company law about corporate purposes. In the present case, these authorities suggest that neither the board nor the shareholders of HTNZ had the authority to cause the payment to be made to PLC. As PLC was aware that the payment was unrelated to HTNZ's authorised purposes, the payment is void.

Recently, in *Westpac Banking Corp v NZ Guardian Trust (No 2)* ((1994) 7 NZCLC 260,507) Greig J suggested that the reforms to the ultra vires rule, first introduced in

1983, and now in ss 16 to 18 of the 1993 Companies Act, extend to transactions entered into by the board for unauthorised purposes, with the result that the board's excess of authority could not be challenged. With respect, such a conclusion is difficult to accept, both in terms of the structure of the Act and in principle. First, the Act refers to the capacity or power of the *company* to do the Act. Where the directors have acted improperly, it is, as *Rolled Steel* establishes, the board's powers that are in issue, not those of the company. Furthermore, Greig J's interpretation must render the provisions relating to the board's authority, now in s 18 of the 1993 Act, redundant. Secondly, authorities on the equivalent Australian provisions have recognised that the issue of the board's authority to bind the company remains outside the ultra vires reforms (*Darvall v North Sydney Brick & Tile Co Ltd* (1988) 6 ACLC 1095). In principle also, Greig J's approach confounds the conceptually distinct issues of the capacity of the company with the authority of the company's organs to bind the company. Thus, it is suggested, if there was a gratuitous payment, it was beyond the authority of both the board and the shareholders, and as PLC must have been aware of the excess of authority it would, following *Rolled Steel*, hold the money on constructive trust.

Alternatively, the transactions might be viewed as a sale at an undervalue. The Court of Appeal seemed to accept that the terms of the agreements were such that HTNZ had no right to participate in any increases in the price. In substance, therefore, HTNZ sold its assets at a price well below that which could have been secured from other, unrelated, purchasers. In the English case of *Aveling Barford Ltd v Perion Ltd* ([1989] BCLC 626) Hoffmann J held that it was a breach of the board's fiduciary duty to sell knowingly the company's assets for less than could have been obtained. On the facts, as the purchaser was aware of the breach of trust it was accountable to the company as a constructive trustee.

In the present case, although PLC was undoubtedly aware of the breach of trust, it might be suggested that as a shareholder it could ratify the breach. As the Court of Appeal noted, as HTNZ was solvent "the retention of the price increases by PLC could not involve any violation of the rights of creditors of HTNZ . . ." (p 9). Even assuming that ratification had occurred, it is far from clear that it could prevent the new controllers of the company from suing in respect of the sale. Two points can be made in this respect. First, as Partridge has demonstrated ("Ratification and Release of Directors From Personal Liability" [1987] CLJ 122), if the ratification is to be effective against subsequent controllers then the shareholders must, in substance, surrender corporate assets: the rights of action against the delinquent directors. In the absence of supporting consideration it is doubtful whether the release from liability is effective. Secondly, while breaches of the directors' duties of good faith are clearly ratifiable, if the matter is approached as one of an improper purpose the matter is significantly less clear. It is at least arguable that the effect of an improper purpose is to render the transaction void, not merely voidable, and thus incapable of ratification (see, Grantham, "The Powers of Company Directors and the Proper Purposes Doctrine" (1994-1995) 5 *King's College Law Journal* 16).

Finally, we can now return to the Court's statement of principle, that there is no "principle of company law precluding a wholly-owned subsidiary from paying over its reserves . . .". While this statement is accurate enough, as the foregoing discussion has shown, it is an incomplete statement. In particular, it is vital to consider the method by which the reserves are paid over. In the case of a dividend, it is important to determine which organ had the authority to declare the dividend. If other methods are chosen, even where the company's solvency is not threatened, an unauthorised purpose or a payment not in the company's interests can invalidate such a payment.

Conclusion

In *Hickson* the balance that is reached between the aims of maintaining compliance with the rules of company law and facilitating the conduct of business seems to have shifted markedly in favour of facilitation. The Court of Appeal, and indeed Barker J in the High Court, seem content to uphold the transaction despite the fact that no dividend was actually declared, that technically PLC was not the parent of HTNZ and that no attention was given to whether it was in HTNZ's interests to pay the increases to PLC. It must be questioned, however, whether the Court should be so willing to dismiss the rules of company law as mere formalities. It must be remembered that the whole notion of the company is an exercise in formalism and the rules and procedures associated with it play an important part in the legal separation of the company from its members. There comes a point, therefore, where to dismiss the formality is to dismiss the company itself and with it the distinction, so important to the Court in other contexts, between the shareholders and the company.

Ross Grantham
University of Auckland

The disappointed beneficiary in the House of Lords

White v Jones [1995] 1 All ER 691

That a solicitor owes a duty of care in contract to his or her client is not in question. Nor is it in question that a solicitor owes a concurrent duty in tort to the client. What is in question is the extent of any duty in tort owed by a solicitor to a third party. Since the decision of Megarry V-C in *Ross v Caunters* [1980] 1 Ch 297 a solicitor has been liable in tort to a disappointed beneficiary for negligent failure to ensure a client's will has been executed in accordance with the Wills Act 1837. This duty to third parties was extended further by the New Zealand Court of Appeal in *Gartside v Sheffield Young & Ellis* [1983] NZLR 37. There the Court held that a duty could be owed to a potential beneficiary for negligence where the will was not timeously drafted. Writing in this Journal on the Court of Appeal's decision A M Dugdale saw no good reason why this duty should not be owed to either a disappointed beneficiary or an intended donee. (Dugdale "Solicitors Liability to Third Parties: the disappointed beneficiary" [1984] NZLJ 316).

However since then there have been decisions by the House of Lords which restricted duties of care

in new situations not covered by previous authority. This has been particularly so where the loss incurred was economic loss, and the loss suffered by a potential beneficiary is just that. This trend culminated with the decision of *Murphy v Brentwood District Council* [1991] 1 AC 398, which led at least one commentator to ask whether *Ross v Caunters* was still good law (See Evans "Is *Ross v Caunters* still good law?" (1991) 7 PN 137). Recent cases, however, have indicated that this trend has halted, if not reversed as the House of Lords has focused on assumption of responsibility as a paramount factor in determining whether a duty of care arises. Assumption of responsibility had a central part to play in *White v Jones* as well.

Facts

After a family row between the testator and one daughter, where the other daughter sided with her sister, the testator made a will in March 1984 cutting both daughters out of his estate. Reconciliation took place not long afterwards and by mid-June the testator, becoming concerned at the terms of the new will, advised his solicitor that he wanted to change it. By 17 July the solicitor had received a letter detailing the dispositions to be contained in the new will, and advising that the testator's own copy of the "old" will had been destroyed. Appointments were made for the solicitor to call upon the testator on three occasions but the solicitor failed to keep them. A month after the letter had been received by the testator's solicitor the solicitor dictated an internal memorandum to the firm's probate division requesting a new will be drafted. The next day he left for a two week holiday. By the time he returned to the office the testator himself had gone on holiday, and the earliest possible appointment that could be made was 17 September. Unfortunately for all concerned the testator suffered a heart attack and died on 14 September.

There were two documents – the letter of instructions and the will – but the letter could not be admitted to probate as it was not witnessed as required by the Wills Act 1837. The family could not agree on how the estate should be divided. The daughters took the view that the inexcusable delay on the part of the solicitor was the reason they did not receive the benefit their father intended they should obtain from his estate, and brought an action for damages for negligence.

This was a case which, as Lord Goff recognised, as a matter of justice impelled the imposition of a duty. If a duty was not recognised then the only persons who had suffered a loss (the intended beneficiary) had no claim, while the only person who might have a valid claim (the testator) had suffered no loss.

The decision

Lord Keith and Lord Mustill were unable to reconcile the plaintiff's claim with principle, nor did they consider that its recognition would represent an appropriate incremental advance in the law. However the majority of the House of Lords (Lord Goff, Lord Nolan and Lord Browne-Wilkinson) held in favour of the daughters' claim.

Lord Goff adverted to the conceptual difficulties facing such a claim which had been advanced by the appellants. These, they argued, meant it was not easy to accommodate the decision within the ordinary principles of the law of obligations. The appellants' argument was that properly analysed the claim necessarily had contractual features which could not ordinarily exist in the case of an ordinary tortious claim. That is that the decision under appeal extended tortious liability into an area which should be the exclusive domain of contract. It was, in fact, these difficulties which led Lord Mustill in his strongly reasoned dissenting judgment to reject any duty of care.

First the appellants argued that any duty owed by the solicitor to the client was normally in contract and this determined the scope of the duty. A concurrent duty could be owed in tort, to the client, but in performing any duties to the client a duty was not normally owed to third parties. The second, and related argument focused on the nature of the damage suffered, namely economic loss in the form of a lost expectation. That loss it was argued was not recoverable in tort. Third, as the testator himself owed no duty to a beneficiary, it was argued that it would be illogical to impose any such duty on the testator's solicitor. In the alternative if the claim was allowed it effectively meant the estate of the testator doubled. A final difficulty, identified by Lord Goff, was that there was no act as such by the solicitor and that as a general rule no tortious liability attaches to an omission unless the defendant is under a pre-existing duty to the plaintiff.

This led to a scrutiny of Megarry V-C's analysis of the legal problem in *Ross v Caunters*. Megarry V-C it will be remembered thought the basis of the solicitor's liability was "either an extension of the *Hedley Byrne* principle or, more probably, a direct application of the principle in *Donoghue v Stevenson*" (*Ross v Caunters* at p 322), and as such the fact that the loss was pure economic loss did not prevent the imposition of a duty. However, as Lord Goff observed, this analysis had followed the *Anns* route, with the conceptual difficulties identified in *White v Jones* either not raised or not accorded the same importance. Because this line of reasoning did not meet the conceptual difficulties now raised Lord Goff thought that to follow it would be inappropriate. On ordinary principles the solicitor assumed no responsibility towards the intended beneficiary, and nor was there any reliance upon the solicitor by the intended beneficiary who, depending on the circumstances of a given case, might not have even been aware that a solicitor had been instructed to prepare a will.

While German law had filled this lacuna in the law by extending the law of contract to meet the justice of the case Lord Goff did not consider it appropriate for English law to follow suit. To do so he thought could invoke criticism as leading to an illegitimate circumvention of long established doctrines such as that of consideration. Instead His Lordship thought the appropriate remedy should be fashioned in tort by extending the *Hedley Byrne* principle.

The assumption of responsibility by the solicitor to his or her client was extended in law to the intended beneficiary. Lord Browne-Wilkinson carefully analysed the meaning of the phrase assumption of responsibility as the solicitor's conscious assumption of responsibility for the task, and not the assumption of legal liability. Once the solicitor accepted responsibility for the task he or she had created a special relationship in relation to

which the law attached a duty to perform carefully. Where it was reasonably foreseeable that an intended beneficiary would be deprived of a benefit under a will in circumstances where neither the testator nor the estate had a remedy against the solicitor the beneficiary could pursue the negligent solicitor. Their Lordships considered this did not involve an unacceptable circumvention of the established principles of contract law. Nor did any problem arise simply because the loss was economic loss as liability for pure economic loss under *Hedley Byrne* was an established head of loss. They saw the assumption of responsibility by the solicitor as subject to any term of the contract between the solicitor and his or her client which might restrict the liability of the solicitor. And because the liability was founded on an assumption of responsibility by the solicitor this did not prevent the solicitor being liable for a failure to act.

While there was no fiduciary duty between the solicitor and the intended beneficiary the law would develop novel categories incrementally and by analogy with established categories. This was one such area where the majority of Their Lordships thought this should occur. It should be observed however that the decision probably sits squarely on the outer boundary of liability.

Comment

In light of the indigenous New Zealand approach to negligence issues there is nothing unexceptionable about this case. Not all of the conceptual difficulties identified by Lord Goff would be so identified here where actions for economic loss do not receive such an unfavourable reception. Economic loss may tell against a duty but is not, in and of itself, sufficient to negate the duty. Moreover *Gartside* has been the law here for over ten years and does not appear to have created any real difficulties in the legal profession. Indeed if anything it has led to an improvement in professional standards. The lapse of over two months before any work was done on the will in question was, in Lord Nolan's words an "inexcusable delay" (p 735).

Rosemary Tobin
University of Auckland

Monarchs and personal character

George IV (1762-1830) was King from 1820 to 1830. He was notorious, as the following assessment shows. He was succeeded by William IV, and then in 1837 by Queen Victoria, that by-word for moral rectitude. Which illustrates the need to avoid hasty judgments about the monarchy as a constitutional institution as distinct from the personal character of any individual monarch.

The character of George IV was a singular mixture of good talents and mean failings. Undoubtedly he was clever and versatile, and lazy though he was, he acquired a fair dilettante knowledge of many things. When he chose he could prove himself a capable man of business, nor could a person who associated with all the distinguished men of two generations, and won the regard of not a few of them, have been either without natural merit of his own, or incapable of profiting by their society . . ..

He was extraordinarily dissolute. In addition to his five more or less historic connections with Mrs Robinson and Mrs Fitzherbert, and Ladies Jersey, Hertford, and Conyngham, Lloyd and Huish, who devote much curious industry to this topic, enumerate eleven other persons by name and two others unnamed who were at one time or other his mistresses, and intimates the existence of very many other more temporary intrigues. Greville, who knew him well, and had no reason to judge him unfairly, says of him: 'This confirms the opinion I have long had, that a more contemptible, cowardly, unfeeling, selfish dog does not exist than this king.' In substance this is likely to be the judgment of posterity. There have been more wicked kings in English history, but none so unredeemed by any single greatness or virtue. That he was a dissolute and drunken fop, a spendthrift and a gamester, "a bad son, a bad husband, a bad father, a bad subject, a bad monarch, and a bad friend", that his word was worthless and his courage doubtful, are facts which cannot be denied, and though there may be exaggerations in the scandals which were current about him, and palliation for his vices in an ill-judged education and overpowering temptations, there was not in his character any of that staple of worth which tempts historians to revise and correct a somewhat too emphatic contemporary condemnation. All that can be said in his favour is this. The fact that his character was one which not even his own partisans could respect or defend caused the personal power of the monarch, which was almost at its highest when he became regent, to dwindle almost to a shadow years before he died.

Dictionary of National Biography

Recent Admissions

Barristers and Solicitors

Alley D L	Gisborne	19 May 1995
Brown P P	Gisborne	19 May 1995
Clarke R G	Napier	12 May 1995
Francois R K	Auckland	12 May 1995
Haapu J J	Gisborne	19 May 1995
Heaslip P T R	Auckland	10 May 1995
Tong C J	Napier	12 May 1995

The right to silence and the presumption of innocence

By His Honour Judge D J Harvey, District Court Judge, of Otahuhu.

The right to silence has recently been the subject of much discussion in New Zealand by, for example Justice Robertson, Justice Thomas, and Bernard Robertson. In this article Judge Harvey first explains the historical background. He considers the position in England and in the United States as well as in New Zealand. He contends that if our present accusational and adversarial system is to be maintained the right to silence must remain in full force as a reflection and ingredient of that system. His Honour of course is expressing his personal views and emphasises that they are not necessarily these of other Judges.

1 Introduction

There is a heated debate concerning the silence of the accused in the context of the criminal trial. The controversy is not new. Bentham was critical of the silence of the accused at trial. Yet confusion has developed concerning the exercise of silence. Much of the confusion arises from the exercise of silence being described as a "right". Justice Thomas denigrates the concept of silence at trial with the epithet "so-called". ("The So-Called Right to Silence" (1991) 14 NZULR 299.) Historically and logically there is no basis for describing the exercise of silence at trial as a "right". The term "right to silence" has developed as a form of shorthand for much broader concepts within the context of the accusatorial/adversarial criminal trial. Those broader concepts include the values that underpin our criminal trial system and the reflection of those values in the allocation of proof burdens and the fixing of proof standards. Critics of the exercise of silence claim that modifications to the effect of silence will have no effect upon the burden of proof. Such a claim is incorrect.

Within the accusatorial/adversarial criminal trial the accused has three significant rights:

(a) the right to be presumed innocent
(b) for the burden of proof of the charge to rest upon the prosecution
(c) for the proofs to be established with admissible evidence.

Essential to the presumption of innocence and the burden of proof is the concept that the prosecution should not resort to the accused for its proof. As a collateral proposition, inaction by the accused need not be put in the balance nor utilised to assess whether existing evidence has established the level of certainty[1] requisite to establish guilt.

This article will show why the phrase "the right to silence" within the context of the criminal trial[2] is a misnomer. It will establish the importance of silence as a part of the greater matrix of values, proof standards and the allocations of burdens thereof in the accusatorial/adversarial criminal trial. It will demonstrate why the current use of s 366 of the Crimes Act 1961 and the guidelines for judicial reasoning in *Police v Trompert* impact upon the presumption of innocence and the burden of proof. Finally I will suggest that steps taken recently in England assault the values and fundamental premises of the accusatorial/adversarial criminal trial. Those who criticise the exercise of silence by an accused would do better to question whether the accusatorial/adversarial criminal trial with its matrix of values, proof standards and allocations is appropriate as a means of establishing guilt of criminal conduct.

2 The "right to silence" a misnomer

The right to silence and its origins have been confused with the privilege against self-incrimination. An examination of criminal trial practice in the sixteenth to eighteenth centuries establishes this.

Prior to statutory empowerment an accused was not competent to give evidence on his own behalf. The basis for this is summed up in the maxim nemo debit esse testis in propria causa. (No man should be a witness in his own cause.) The incompetence of the accused was not based upon the privilege against self-incrimination, and indeed predates the development of the privilege. One early objection related to reliance upon oaths. The jury's conclusion upon guilt or innocence was made under oath which was a form of proof. Their finding could not follow from another form of proof – the oath of the accused. Furthermore, anyone having a personal stake in the outcome of a trial was thought to be irresistibly tempted to perjury thus making his testimony untrustworthy. (Levy, Leonard W. *The Origins of the Fifth Amendment* p 324; Wigmore, John "The Privilege Against Self-Crimination" (1901) 15 *Harv LR* 610, 627-8.) Thus there was both incompetence and disqualification for interest that prohibited the accused giving evidence at trial. During the seventeenth and eighteenth centuries this recognised and well-established incompetence was enhanced with the newly developing concept of the privilege against self-incrimination. It was necessary to protect an accused against cross-examination which might elicit a confession.[3]

Thus the early criminal trial procedure apparently proceeded without any evidentiary participation from the accused. In such a situation it can be clear that the onus of proof rested squarely upon the prosecution. The accused could have no onus, for he could call no evidence.[4] Developments in the eighteenth century allowed an

accused to call witnesses on his behalf. Yet the onus of proof remained.

But the jury did not arrive at a conclusion without any input from an accused. Statements made under oath were often presented at trial, and invariably the accused was an active participant in the trial process in what has been described as the "accused speaks" trial procedure. (Langbein, John H. "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1994) *Michigan LR* 1047.)

The Marian statutes

Two statutes passed in the reign of Mary allowed for the development of the official investigation of crime. The statutes have been collectively referred to as the Marian Statutes. (Statutes 1,2 Philip and Mary C13 and 2,3 Philip and Mary C10.) The first required a Justice of the Peace to decide whether an accused should be allowed bail pending trial. As part of the determination, the Justice was required to conduct an inquiry into the circumstances of the offending.

The second statute required the Justice to conduct a pre-trial examination promptly after the accused had been apprehended. He was required to transcribe anything that the accused said that was material to prove the felony. He was directed to transmit his record to the trial Court where it could be used as evidence against the accused. Unlike the Continental system, the Marian system was designed to gather only evidence for the prosecution. Evidence favourable to the accused was not suppressed if it came as part of a statement from a prosecution witness. Witnesses that came forward expressly to prove the innocence of the accused were not examined.

There were no protections for the accused. Although he was not subjected to torture, he was expected to answer questions put to him. There was no caution given. Any refusal to answer was reported and stated by the Justice in his testimony at trial.

The Marian scheme turned the Justices into back-up prosecutors. Private citizens continued to prosecute most cases, but where there were no private accusers, or where their evidence was going to be insufficient, it was the Justice who would investigate, bind witnesses, appear at trial and orchestrate the prosecution. Professor Langbein observes that this pre-trial procedure was designed to induce the accused to make a statement promptly. By making a statement to the Justice the invocation of any supposed privilege against self-incrimination or right to silence would be of little assistance. If the accused said nothing that could be drawn to the attention of the Court. If he later attempted to recant his pre-trial statement, that statement would be invoked at trial. From the period 1670 to the mid-1730s, the time when the privilege against self-incrimination was regularly being recognised in the Courts, not one accused invoked the privilege as a basis for exclusion of the pre-trial record, or as a basis for remaining quiet at trial. (Langbein, above.) This leads to the other significant involvement of the accused at trial.

The "accused speaks" trial

Until 1832 a person accused of a felony (apart from treason) had no right to counsel. A person accused of felony played an active role at trial where each witness for the prosecution was challenged in a altercation that was part cross-examination and part counter-allegations of fact. This gave the accused a chance to explain away the prosecution evidence. The often spirited altercation allowed the jury to hear the accused's explanation even although he was unable to give evidence.

In effect, the accused performed many of the tasks which would later be assumed by counsel. As long as he was without counsel there was no distinction between the accused as defender and as "witness". To invoke the newly developing privilege against self-incrimination or a "right to silence" if such a thing existed, would effectively have amounted to the right to forfeit all defence.

The prosecution was required to produce evidence that the accused was guilty of the charge presented. It was not assumed that the accused was innocent until the case was proved beyond a reasonable doubt. A factor which was taken into account in considering innocence was the quality and character of this altercation with the prosecution witnesses.

In an examination of the Old Bailey Session Papers there were found to be a number of other characteristics of the criminal trial.

1. Trials were speedily dispatched while recollections were clear. Trials conducted in the December 1734 session of the Old Bailey arose from committals that had taken place in the preceding October or November.
2. The pre-trial examination by the Justices contributed to efficient courtroom prosecution. The Justice frequently obtained a pre-trial confession and was able to select the best witness so that the Court did not have to hear inconsequential testimony.
3. There was no voir-dire procedure, no opening or closing statements or evidentiary or procedural motions. Cross-examination, such that it was, was by way of altercation conducted by the accused.
4. Judicial instruction was perfunctory. Juries were frequently composed of veteran jurors who needed little instruction, who heard several cases one after another. Such procedure was not conducive to detailed instruction. Many of the cases were very simple and the standard of proof was at that time inchoate.[5]

It was only upon the involvement of counsel in the criminal felony trial[6] that major changes took place in the trial process, not the least among them being that the accused fell silent.

The involvement of counsel

Only since 1730 were those accused of the most serious felonies allowed to engage counsel at all, and slowly Judges allowed defendants to be represented by counsel out of a sense that more effective prosecutions were tipping the balance unfairly against some prisoners in the Courtroom. What counsel could effectively do was limited and remained so until 1836. Counsel really could only do what the Judge had done – to speak to points of law and ask questions of the witnesses. In the 1780s the limited role of counsel and indeed their limited utilisation changed. In 1786, for example, 200 men and women facing felony trial had the assistance of lawyers. There was also a change in attitude on the part of the lawyers. They were more anxious to take

advantage of the opportunity to cross-examine witnesses. They developed argument on legal points which became the subject of findings by the Courts. They kept notes of these cases which became guidelines for future similar decisions.

As a result of the involvement of the lawyers there was a major procedural shift from the "accused speaks" trial to the "testing the prosecution theory" trial. (The terms are those adopted by Professor Langbein.) Defence counsel shifted the focus of the trial by casting doubt on the validity of the factual case by the prosecution. The prosecution was compelled to prove each and every one of its assertions. "Cases" replaced "altercations". Rather than having the accused challenge each piece of evidence as presented, the "case" system developed whereby the prosecution presented all its evidence. During the prosecution case, witnesses could be discredited and objection could be taken to certain pieces of evidence. At the end of the case, the defence could move for a directed verdict on the totality of the case or could elect to call its evidence. The embryonic presumption of innocence that had existed became more fixed, along with the beginnings of the formulation of the standard of proof as being beyond a reasonable doubt.

Most significantly, the jury no longer had an opportunity to see the accused. He no longer took an active role. He remained silent. His "speaking" role was taken over by counsel who acted as his proxy. No longer could the jury make an assessment from his performance in challenging and asserting. Defence counsel could and did insist that the prosecution case be built from other proofs. It must be remembered that as a witness under oath, the defendant was both disqualified and incompetent. Thus his silence at trial developed from procedural changes following from the involvement of the lawyers,[7] rather than being based upon any perceived "right" that he could sit back and require the case to be proven against him. Indeed, it was in 1898 in England that the accused obtained the "right" to give evidence, with a recognition in so doing that he waived the privilege against self-incrimination in respect of the offence charged.

The real nature of silence

It can be seen from this very cursory historical ramble that to describe silence as a "right" is a complete misnomer. The exercise of silence cannot be isolated as a separate and distinct right, although it advantages the critics for it to be so, in that the effects and consequences of silence can be attacked without seeming to do violence to other aspects of the criminal trial. In my view, the exercise of silence by the accused cannot be considered in isolation from the overall criminal process, since the development of the exercise of silence took place within the context of the allocation and establishment of proof burdens and at a time of other significant procedural developments within the criminal trial process. When he made his now-famous statement on the permissible comment that a Judge may make on the silence of the accused, Lord Parker (in *R v Bathurst* [1968] 2 QB 107) was not expressing any comment upon the right to silence, but rather upon the burden of proof. The silence of the accused at trial cannot be treated as evidence. Silence at trial has no evidentiary significance whatsoever. When the silence of the accused is viewed in this context, as part of the matrix of proof burdens and standards of the accusatorial/adversarial criminal trial, and not as a separate, distinct and somewhat irritating "right", it becomes clear that to interfere with the silence of the accused constitutes an interference with the complex matrix underpinning the criminal trial and challenges the very values of the accusatorial/adversarial trial.

3 The accusatorial/adversarial criminal trial – A complex matrix of values and procedures

The accusatorial/adversarial criminal trial has been described as a Due Process Model of criminal procedure. (Packer, Herbert L. "Two Models of Criminal Process" (1964) 113 *Univ Pa LR* 1.) In developing two models of criminal procedure, Professor Packer abstracted two separate and competing value systems. In contrast with the Due Process model, the Crime Control Model described by Professor Packer de-emphasised the adversarial aspect of the process, focusing primarily upon efficiency and outcome. The Due Process model places higher value upon the individual in the process, is more "rights" oriented, places limits upon official power, and places as much emphasis upon integrity of process and the elimination of error as it does upon outcome.

The word "accusatorial" points to the values of our criminal justice system. "Adversarial" defines the process which reflects those values and which is in the nature of a contest between two competing interests. The Judge or the jury are essentially disinterested in outcome. The values which underpinned the development of the process from the early days of the development of the jury until the Bill of Rights Act of today have not been constant. But there has been a common insistence upon resort to the community as adjudicators of guilt and a resistance against excessive interference in the process by the State. (Stephen, Sir James Fitzjames; *A History of the Criminal Law of England* Vol 1; Fortescue, Sir John; *De Laudibus Legem Angliae*.)

Accusation by a private person is essential, and associated with that is the concept that the accuser must bring the proof. Thus, the central value in the accusatorial system is the presumption of innocence which forces a number of disabling and qualifying doctrines into play which the prosecution must overcome if it is to establish guilt.

The presumption of innocence is a normative rule, and is fundamental to the accusatorial system. It is not simply a procedural direction. It requires that society consider an accused person be innocent until he or she has been properly tried and convicted. The accusatorial system developed out of a deep respect for the uniqueness of the individual, for individual sanctity and for the protection of the individual from interference by the State.

4 Silence as an ingredient of the presumption of innocence and the burden of proof

If a person is to be presumed innocent, the law must ensure that such a presumption is not compromised by requiring or compelling that person be his or her own accuser, or to provide evidence that may lead to an accusation. An essential principle of the adversarial system is that there must be a complainant who

levels a charge at the accused. The discussion that follows is in the context of the "right" to remain silent at trial, but it demonstrates the way in which proof burdens can shift if there is interference with the "right" to silence. (As an aspect of the presumption of innocence – for ease of expression and in the interests of reader familiarity I shall use the term "right to silence" although, as I have demonstrated, it is not a "right" at all.) If, for example, the privilege against self-incrimination in another judicial proceeding were to be abrogated, the right to silence at trial would become somewhat futile. Thus the two concepts (silence at trial and the privilege against self-incrimination) are interdependent.

It is not enough for an allegation to be made. The prosecution must prove that the accused is guilty of a specific offence. If proof of an essential element is lacking, or evidence has been discredited upon cross-examination the prosecution must fail because there is no case to answer. It is implicit in that finding that there is no need for the accused to say anything because the prosecution have not established a case to a prima facie point.

If the system were such that a mere accusation of an unspecified or unsubstantiated allegation without proof were sufficient to call upon the accused to respond, clearly there would be a reversal of the onus of proof, and would require proof by the accused that he or she was not guilty – thus a requirement would rest upon the accused to prove a negative. (This could be done within the context of an adversarial system, but not within an accusatorial one.) The adversarial/accusatorial system recognises as a fundamental proposition that an accused person is free from a need to answer an allegation until proof of guilt has been shown. (*Petty and Maiden v R* (1991) 65 ALJR 625; *Dubois v R* (1986) 23 DLR (4th) 503.) Once evidence sufficient to establish guilt exists, an accused has an opportunity to answer. Failure to do so enhances the risk of conviction. But that conviction cannot be based upon the *failure to answer*. Nor should failure to answer supplement the evidence that has already been given. If a conviction is to result it should be on the basis of the evidence that has been presented and not upon the silence of the accused.

It is the existence of sufficient evidence that erodes the presumption of innocence. At a certain stage of the trial it may appear that the presumption has been eroded, but that appearance may be deceptive in that subsequent evidence may explain that the appearance is incorrect. The way in which the defence may establish the incorrect nature of an apparent proof of guilt may be cross-examination which may tend to establish facts inconsistent with guilt or which may damage the credibility of the prosecution witness. Alternatively, evidence from defence witnesses may destroy what may appear to be proof of guilt. One of those witnesses potentially could be the accused. But issues such as evidence called by the defence from independent witnesses or from the accused do not arise until the prosecution has been able to establish evidence which appears to have eroded the presumption of innocence.

The presumption of innocence benefits the defendant to the point where that presumption has been displaced by evidence establishing guilt beyond a reasonable doubt. If the accused remains silent in the face of that evidence a conviction may result. If the factfinder is entitled to attach evidential significance to the fact that the accused remained silent, the advantage to the prosecution is that it may obtain a conviction as a result of inaction by an accused extrinsic to the evidence that has been advanced to establish guilt, and thus may establish guilt on a standard less than beyond a reasonable doubt, thereby reducing the prosecutorial burden of proof.

There are critics who would treat the silence of the accused as being a piece of evidence, thus giving failure to testify an evidential effect. (Glanville Williams "The Tactic of Silence" (1987) 137 NLJ 1107.) Such a proposition creates major changes in the position of the accused. It becomes difficult to assess the weight of the prosecution evidence that has been presented as conclusive proof, because there is the unknown factor of what weight will be attached to the exercise of silence. Thus, the accused will be motivated to testify for reasons other than an objective assessment of the evidence that has been adduced by the prosecution.

An example of the difficulty is encountered in the example provided in the case of *R v Gunthorp and Others* (unreported (1993) CA 46/93; 9 June 1993) where it was held that silence on the part of a witness allowed the Judge to attribute further weight to the prima facie evidence in considering whether there was proof beyond reasonable doubt. The Court of Appeal was very careful to emphasise that an inference can be drawn only from evidence and not from lack of evidence, and that silence cannot be used to supplant a want of proof. The inferences that can be drawn vary from case to case. Thus it becomes difficult to assess what weight a Judge will put on existing evidence absent accused testifying. Perhaps the only thing that can be said from an objective point of view is that the probative weight of evidence adduced which establishes a prima facie case becomes more compellingly persuasive in the absence of any evidence (be it from the accused or any other) to rebut it, and that compelling persuasiveness can remove the presumption of innocence.

A further aspect of silence and the presumption of innocence is that silence constitutes a symbolic and practical expression of the presumption of innocence. If adverse inferences can be drawn from silence at trial or pre-trial, pressure would be exerted upon a suspect to make a statement to an investigative body. Although formally the burden of proof would lie upon the prosecution, in practice the suspect would be the first individual approached for incriminating evidence. If silence were to be given evidential significance, the pressure would be on the suspect to speak to the police whether he or she wanted to or not. The circumstances would be such that an element of compulsion would exist which would not necessarily be imposed by the investigators or interrogators but from the system itself. In such a situation there could only be one explanation that a person relying upon the presumption of innocence could tender, and that would be an explanation consistent with innocence. Thus an accused would be asked to establish his innocence to the interrogator. An explanation consistent with or confirming guilt essentially would mean that the prosecution had established guilt from their first port of call, rather than accumulating evidence that it could present to the

suspect and ask for exculpatory comment (if there were any).

It may be argued that the presumption of innocence identifies the party who bears the burden of proof and does nothing more. It says nothing about the methods by which the burden of proof is discharged. (Dennis I "Reconstructing the Law of Criminal Evidence" (1989) *Current Legal Problems* 21.) The principle that the prosecution carries the burden of proof implies that it must use its own efforts to accumulate the evidence to discharge the burden. The invasive nature of pressuring a suspect (either by unfair pressure during the course of the interview or by a reminder that the system will apply on adverse inference to the exercise of silence) to disclose the contents of memory, other than by free and voluntary choice, essentially compels the suspect to provide the proof sought by the prosecution that it probably could not obtain by its own efforts.

Fundamental to the burden of proof is that the prosecution should prove its accusation by its own efforts independent of assistance by the accused. The law provides for the admissibility of statements made by an accused but only under strict conditions. To loosen the strictures upon admissibility of statements or to allow for the admission of compelled statements obtained in another forum makes the evidence gathering task easier and, consequentially, reduces the prosecutorial onus to one where the first port of call in an investigation will become the suspect, rather than the amassing of independent evidence.

Without the privilege against self-incrimination, evidence obtained in another forum can become evidence for the prosecution in the criminal trial. The reliance by the accused upon a pre-trial right of silence in the face of police investigation is nullified by the availability of precisely that evidence obtained under oath from another forum. The contradictions between the pre-trial right of silence and the admissibility of incriminating evidence obtained in another forum become clear. The result is a total lack of integrity within the process.

Ultimately, if heavy reliance is placed upon pre-trial confessions or statements obtained from other proceedings, the accused is placed in a position where he or she cannot simply sit back and let the prosecution prove its case, but has an onus case upon him or her to adduce evidence which either proves that certain aspects of prosecution evidence are unreliable or untrue, or, even more invidiously, that the statement or other evidence itself is unreliable or untrue. Once again, the conflicts and contradictions become insupportable.

The adversarial/accusatorial criminal trial did not develop overnight. At worst it has been "hodge-podge" in its evolution, often reactive to certain social circumstances rather than proactive. But that is the essential nature of the common law. Throughout that development, the basic features and values have become clear. I do not say that we have reached the point where perfection of process has been achieved, but over the centuries it is clear that a balance has been achieved between the rights of the individual and the interests of the State which are represented by the presumption of innocence and the onus of proof. The general right of silence of an accused or suspect (in terms of pre-trial silence, silence at trial or by invocation of the privilege against self-incrimination) is an essential factor in that balance.

5 The treatment of silence by the finder of fact

Against a background of the concepts and values of the accusatorial/adversarial trial, and especially that of the presumption of innocence and the burden of proof, the silence of the accused should not have any evidential significance, nor should it be relevant in the reasoning process.

The Courts in common law jurisdictions frequently insist that silence has no evidential significance, and frequent reference is made to the presumption of innocence and the burden of proof. But the silence of the accused *does* become very relevant in the reasoning process. Although silence is not tendered as evidence for the prosecution, the failure of the accused to give evidence may be taken into account when weighing or evaluating the prosecution evidence. In attributing the use of silence to the reasoning process, it appears that thorny questions of interference with innocence presumptions and proof burden allocations are avoided.

The clearest approach to the utilisation of the silence of the accused comes from the United States. There are, of course, constitutional issues which impinge and may not be *directly* relevant to the New Zealand situation. (Although the prohibition against compelled testimony in the Fifth Amendment is almost identical to the wording of s 25(d) of the New Zealand Bill of Rights Act 1990.)

A trial Judge directed, by way of comment on the failure of an accused to give evidence, that the jury

> may take that failure into consideration as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavourable to the defendant are more probable.

In addition, he stated that no such inference could be drawn as to evidence respecting which the defendant had no knowledge. The jury was reminded that silence did not create a presumption of guilt nor warrant an inference of guilt, nor relieve the prosecution of the burden of proof.

The Supreme Court (*Griffin v California* (1965) 380 US 609) held that the direction was:

> in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance.

(at 613. New Zealand law prohibits prosecutorial comment on the silence of the accused at trial. Thus there is no offer by the prosecution and acquiescence by the Bench. Rather, the trial Judge, of his own motion, may decide to offer the silence of the accused as an ingredient for consideration.)

Although the jury, whose reasons for decision are not known and cannot be examined, may draw whatever inferences it sees fit without any help from the Court, it was considered objectionable when the Court solemnised the silence of the accused into evidence against him.

Because the Fifth Amendment provided a right to remain silent, its exercise could not be questioned on the basis of motive, nor could unfavourable inferences be drawn because the right was enshrined in the Constitution and available to all. Thus, the exercise of the right to silence could have no probative value.

From this examination it is clear that there can be probative weight in silence. Comment may vest silence with the mantle of evidence, thus validating any unexpressed queries that a jury may have as to whether silence *should* be accorded weight, and the weight that should be applied. By adverse judicial comment upon silence, a jury may feel free to take it into account and may draw inferences from it. Such a course of action has judicial validation. Where no such direction has been given, a jury may hesitate in jumping to a conclusion bolstered by the failure of an accused to give evidence.

Recognition by the Court that silence may have evidential potential has a collateral effect upon the prosecutorial proof burden. If silence is vested, even indirectly, with an evidential aspect, the prosecution may rely not only upon the evidence of its own witnesses, but also on the *absence* of evidence given by the accused.

The evaluation of evidence by the sole factfinder has been covered in the decision of *Trompert v Police* [1985] 1 NZLR 357. Subsequent decisions have indicated that the *Trompert* principle is not fully understood. In *Drain v Police* (unreported; CA 249/94; 11 October 1994) Casey J said for the Court of Appeal:

> Properly understood, *Trompert* is no more than an affirmation that inferences against an accused may be drawn as a matter of logic and commonsense from his or her failure to give an explanation in the face of evidence calling for one.

Thus, silence becomes an aid to the reasoning process, or, as Fisher J put it in *Hiku v Police* (unreported; High Court; Auckland AP 112/94; 20 June 1994):

> One must first be able to extract from the prosecution evidence all the ingredients which could logically support a conviction. Only if that threshold has been satisfied and the Court is dealing with weight and degree can the *Trompert* principle be invoked.

But is, as Casey J suggests, the accused required to give an explanation? On the basis of the burden of proof and the presumption of innocence the answer must be no. Following from that, should the failure of an accused to give evidence be a matter for consideration at all. If the accused has a right to be *presumed* innocent, the exercise of silence has its foundation upon that presumption. If the evidence can be weighed as persuasive beyond a reasonable doubt, without resort to silence, then guilt is proven. The evidence and its ability to persuade can be evaluated without resort to the silence of the accused. Nor should the absence of testimony from an accused act as a make weight to cross the threshold from a prima facie case to one beyond a reasonable doubt. Different levels of certainty are present, thus preventing such an exercise. The test should not be whether or not the evidence logically calls for an explanation, but whether the evidence *on its own* is of sufficient weight to satisfy the standard of proof.

For this reason I suggest that *Trompert*, although pragmatically attractive, can be and has been used as a shortcut to avoid a rigorous logical examination of the evidence[8] based on the bright line principles of the presumption of innocence and the burden of proof. Careful scrutiny and evaluation of the evidence will obviate the need to apply a decision which, by its nature is inconsistent with those bright line principles.

Judicial comment to a jury pursuant to s 366 of the Crimes Act 1961 has implications for the presumption of innocence and the burden of proof.

Prior to an accused becoming competent to give evidence, a Judge commented on all aspects of the case. In *R v Rhodes* [1899] 1 QB 77 it was held that there was nothing in the 1898 Criminal Evidence Act which took away or purported to take away the right of the Court to comment on the evidence in the case and the manner of its conduct. That included comment on the silence of the accused.

The High Court of Australia (*R v Weissensteiner* (1993) 68 A Crim R 251) emphasised:

1 The silence of the accused was not evidence.
2 Nor was silence an admission of guilt by conduct – the accused has the right to put the prosecution to the proof.
3 When an accused elects to remain silent at trial, silence cannot amount to an implied admission.
4 Silence cannot be used as a "make weight".

However, the exercise of silence has a *consequence* – it can be taken into account by a jury in evaluating the prosecution evidence. The jury cannot be expected to shut their eyes to the consequences of silence. The lack of explanation could strengthen inferences which could be drawn from unchallenged evidence. Thus, *Weissensteiner* supports the conclusion in *Drain* that silence is used as a tool for evaluating the weight to be attached to prosecution evidence and may support inferences that may be drawn from unchallenged or unrebutted testimony.

The decision in *R v McCarthy* (1992) 8 CRNZ 58 emphasises that silence does not give rise to an inference of guilt but, depending on the particular facts, prosecution evidence and the natural inferences that may be drawn from it may be more easily accepted if not contradicted by evidence from the accused or called for the accused. The Judge is entitled to explain this to the jury. The passage in the judgment closed with the following comment:

> It may well be desirable to prevent the "right to silence" from being over-exploited (at 63).

The inferences that may be drawn from *existing* evidence, whatever its state, do not relate to the silence of the accused. Contradicted evidence raises, among other things, issues of credibility. Uncontradicted evidence may raise similar issues (depending upon the effectiveness of cross-examination and the fact finder's assessment) but not in such a direct way. Thus the presence of existing evidence addresses the question of whether or not the prosecution has crossed the threshold of proof. It does not need a Judge

to tell a jury that the silence of the accused can be taken into account *as well*. To do so already enhances a matter already within the ken of the jury – there is in existence evidence which is uncontradicted. To so enhance that matter by addressing the silence of the accused does violence to the right of the accused to require the prosecution to prove the case, and casts the accused's inaction into the pan.

In *R v Andrews* [1992] 3 NZLR 63 Jeffries J (dissenting) went so far as to suggest that the present application of s 366 and the present state of the law tends to create a functional coercion on the accused towards the giving of evidence. He considered the exercise of the discretion to comment was too uncertain and comes at a time when the defence has made all its strategic and tactical decisions and has concluded its case. He emphasised that there are often reasons unconnected with the trial issue why an accused may elect not to give evidence, many of them unconnected with explanations or rebuttals which may go to guilt.

In my view the emphasis that is allowed to be placed upon the "failure" of an accused to give evidence must be removed to maintain the integrity of the presumption of innocence and the burden of proof. The essence of the direction should emphasise:

1 The "right to silence";
2 That silence is not indicative of guilt
3 That the burden of proof is on the prosecution
4 That evidence adduced by the prosecution may convince the jury that there is sufficient to conclude that the burden has been discharged.

To go further and indicate that there may be matters which the accused could answer but has chosen not to do so, or that matters have been raised which could have been rebutted had the accused given evidence, allow the jury to speculate and shift the balance against the accused. Such comments constitute violations of the presumption of innocence and the burden of proof. The state of the law at the moment, with suggestions of the possibility of "strong comment" is tantamount to validating a suggestion that a jury may draw unfavourable inferences from silence, and attribute it probative weight. From there it is but a short step to suggest that silence may be indicative of guilt. To dress the consideration of silence as an evaluating tool is, with respect, elegant sophistry.

The difficulty that silence poses for the burden of proof and the perceived obstacles that it poses as an aspect of the presumption of innocence have been recognised and tacked in Britain with the passage of the Criminal Justice and Public Order Act 1994. (This Act was foreshadowed by the Criminal Evidence (Northern Ireland) Order of 1988 which in effect achieves the same treatment of silence as the Act, but which was justified as necessary for the apprehension and conviction of terrorists in Northern Ireland who remained mute in face of police questioning and at trial.)

6 The Criminal Justice and Public Order Act 1994

The Criminal Justice and Public Order Act 1994 makes a number of substantial reforms in the law of evidence. Among them is the severe approach to the "right to silence" of an accused, affecting an accused's immunity from comment on and adverse inferences from his decision not to testify at trial. It is a restriction only. It is not, as many opponents claimed, an abolition of the "right to silence". The policy, which has been described as "Benthamite"[9] has been part of a long-standing political agenda originally developed in 1972 with a legislative programme devised by the Criminal Law Revision Committee and which has been implemented in part in the Police and Criminal Evidence Act 1984 and the Criminal Justice Act 1988. The common objective of the provisions has been to eliminate or reduce familiar constraints on the use and evaluation of certain types of evidence. The goals of the legislation are stated as being to improve the efficiency of criminal trials, enable the Courts to convict more guilty offenders and provide greater satisfaction for the victims of crime and their families.

Professor Dennis[10] argues that the case for reform of the treatment of silence runs counter to the recommendations of the 1993 Report of the Royal Commission on Criminal Justice and much of the empirical research contained therein, as well as counter to the new-found European enthusiasm for the privilege against self-incrimination.[11]

Although the Act deals with the exercise of silence pre-trial, as well as at trial, I shall concentrate my discussion upon the exercise of silence at trial.

The Act provides that, upon satisfaction of certain conditions, inferences can be drawn from the accused's failure to give evidence, or his refusal, without good cause, to answer any question.

The accused must be aged at least 14. The Court must be satisfied at the conclusion of the prosecution evidence that the accused understands that he may give evidence, and that adverse inferences may be drawn if he chooses not to do so. The Court must also be satisfied that the physical or mental condition of the accused does not make it undesirable for him to give evidence. A provision of the Northern Ireland legislation is not echoed in that the Judge is not required to formally call upon the accused to give evidence.[12]

If the specified conditions are satisfied the Court or the jury may draw such inferences as appear proper from the failure of the accused to give evidence. What are "proper inferences"? That depends upon the nature of the issue, the weight of the evidence adduced by the prosecution regarding it and the extent to which the defendant should, in the nature of things, be able to give his own account of the particular matter in question. The circumstances may well be that the failure of the defendant to give evidence will found no inference at all. In *Murray* (*Murray v DPP* (1993) Cr App R 151, 155) the evidence adduced by the prosecution established a clear prima facie case which called for an explanation from the accused. Since the accused ought to have been in a position to give an explanation if one existed, his failure to do so justified a "common sense" inference that there was no explanation and that the accused was guilty. An inference of guilt may be drawn from the failure of the accused to give evidence but such an inference is not always permissible. The onus is still on the prosecution not merely to produce a prima facie case, but a case beyond a reasonable doubt. A prima facie case is not necessarily a strong one.

Despite the contrary view of its critics the Act does not *explicitly* shift the burden of proof. But the clear (if unstated) implication from s 35 is this – the silence of an accused is being treated as an item of evidence in the defence case from which adverse inferences may be drawn.

In the process of reasoning, an inference may not be drawn in the absence of evidence. Inferences leading to a conclusion may be drawn from various separate and apparently disparate items of evidence presented to the fact-finder. These items of evidence may not go directly to proof of the point. What s 35 allows the Judge to do is to direct the jury that in the process of evaluating the evidence before it, and as a part of the reasoning process, it may draw inferences from the fact that the accused remained silent. Thus, from a purely logical point of view, the recent approach adopted by our Court of Appeal in *Drain* (above) is validated for the jury. In reality, the distinction between the utilisation of silence as a part of the reasoning process and the use of silence as evidence will be hard for the ordinary juror to grasp. Certainly, the functional coercion condemned by Jeffries J is clear. The right to be presumed innocent and to remain silent as an integral part of that right is diminished.

The objections raised by the Supreme Court of the United States in *Griffin v California* are apposite, although the rights involved are different. The rights in the common law system are the accused's right to be presumed innocent and to require, as collateral to that presumption, to put the prosecution to the proof. An aspect of those rights is to refrain from participating in the proof process, and to remain silent. The recent legislation in England provides for a punitive consequence for the exercise of a right that is an essential ingredient of the values of the process of the accusatorial/adversarial criminal trial. By asserting the fundamental rights of the presumption of innocence and by requiring the prosecution to discharge its burden, an accused should not have the exercise of such right questioned. It is available to any accused. Its exercise should have no probative or adverse consequences at all. It is this that makes the English legislation philosophically incompatible with the values underpinning the accusatorial/adversarial criminal trial.

7 Conclusion

The erosions to the burden of proof and the presumption of innocence effected by the Criminal Justice and Public Order Act are greater than those of s 366 of the Crimes Act and the decision in *Trompert*.

Yet the critics of the accused's silence[13] maintain that further inroads should be made to the exercise of silence without consequent erosions of the fundamental values and foundations of the criminal trial. That assertion is rejected for the reasons that I have given.

Rather than isolate an *aspect* of the presumption of innocence and the burden of proof, it is suggested that the critics of silence examine the fundamental values of the accusatorial/adversarial criminal trial. An inquisitorial system, with its focus upon shifting burdens of proof within which silence is not an aspect of the fundamental values of the system, may find favour and may resolve the perceived problems that silence presents. But as long as society espouses an accusatorial/adversarial criminal justice system, with its matrix of values and presumptions, the exercise of silence by an accused, as a reflection and ingredient of that matrix, must remain unassailed. □

---

1 The fixing of the standard of proof is an expression of a level of certainty. In the course of the proof, the evidence may establish certain levels of certainty. The first level relates to the expression of certainty that brings the accused before the Court – reasonable cause. The second level of certainty is defined as the prima facie case. The third level of certainty, the highest, is where the evidence is assessed as proving beyond a reasonable doubt that the accused is guilty.

2 This examination is within the context of the common law criminal trial. It specifically does not deal with issues of silence pre-trial nor does it deal with the expressions of rights involving silence or the accused's lack of compellability contained in the New Zealand Bill of Rights Act 1990.

3 Levy, *The Origins of the Fifth Amendment*, p 325,493; Marks, "Thinking Up About the Right to Silence and Unsworn Statements" (1984) LIJ 360,371; Easton, Susan M in *The Right to Silence* Avebury 1991 claims that the incompetence to testify was based on a long-standing aversion to the forced interrogation and use of torture from the time of Star Chamber, and fears that an inarticulate or unprepossessing accused would create a bad impression if he testified and were exposed to the risks of a wrongful confession.

4 It was during the eighteenth century that the development of the "reasonable doubt" concept as an expression of a level of certainty came to be developed. See Shapiro, Barbara J. *Beyond Reasonable Doubt and Probable Cause – Essays in Anglo-American Legal History* University of California, 1991 especially Chapter 1.

5 In the *Popish Plot Case* (1678) 7 St Tr 1,14 Scroggs CJ defined the standard as follows: "The proof belongs to [the Crown] to make out these intrigues of yours; therefore you need not have counsel, *because the proof must be plain upon you*, and then it will be vain to deny the conclusion." [My italics.]

6 Counsel was available for misdemeanour charges but not where his life or posterity was involved which caused concern among many Judges from the 1640s onwards, including the infamous Jeffreys CJ in *Rosewell's Trial* (1684) 10 St Tr 147,267.

7 No doubt sparking Bentham's criticisms of the lawyers and judicial involvement in the exercise of silence by the accused which he expressed in 1824, over 60 years *before* the accused became competent to testify on his own behalf. Indeed, those critics who rely on Bentham as their starting point would do well to remember that at the time of the writing of *Rationale of Judicial Evidence* the "accused speaks" trial was still in the process of being replaced by the "testing the prosecution theory" trial, that there was no right to representation by counsel, and the fixing of the standard of proof had not become set. Thus Bentham's critique, although attractive, is predicated upon an entirely different set of trial procedures.

8 That there are still appeals 10 years after the decision indicates that there are still difficulties in understanding and application.

9 Dennis, Ian "The Criminal Justice and Public Order Act – The Evidence Provisions" [1995] Crim LR 4.

10 Ibid.

11 Recent cases decided by the European Commission on Human Rights hold that the privilege against self-incrimination is an implicit element of the right to a fair trial guaranteed by Art 6(1) of the European Convention on Human Rights. The case of *Saunders v UK* (Application 19187/91) dealt with aspects of Serious Fraud Office investigations.

12 This ritual, to be performed in front of the jury, was part of the original Bill but was withdrawn after considerable opposition from the Lord Chief Justice.

13 In New Zealand Justice EW Thomas "The So-Called Right to Silence" (1991) 14 NZULR 299; Justice JB Robertson "Rights and Responsibilities in the Criminal Justice System" (1992) 7 Otago ULR 501; Robertson, Bernard "The Right to Silence Ill-Considered" (1991) 21 VUWLR 139; Justice EW Thomas "Was Eve Merely Framed or Was She Forsaken" (1994) NZLJ 368,426.

All men are equal as all pennies are equal because they are stamped with the image of their Sovereign Maker.

G K Chesterton

A Judicial Commission

By Hon Paul East, Attorney-General

This article reproduces with only slight changes a paper delivered by the Attorney-General at the New Zealand Bar Association Seminar held at the Centra Hotel, Auckland, on 18 March 1995. Regarding judicial appointments the author expresses the firm view that merit must be the overriding consideration; and also that the American model of confirmation by the legislature should not be followed. The article concludes with a defence of the present system of appointment which is stated to be free of party politics, continues to work well, and does not need dismantling.

The suggestion of a judicial commission is one that has grown out of concern about the role of the judiciary in an increasingly complex and stressed society. New Zealand has come some way from the days when government was conducted with a strict (or at least reasonably so) separation of powers between Parliament, the executive, and the judiciary.

And society itself has changed. The opportunities are now there for people of all races and both sexes to pursue careers which involve holding positions of responsibility. Historically, the legal profession has been less welcoming to them but the increasing numbers would indicate that the legal profession is now starting to draw its practitioners from the full diversity of New Zealanders.

There have also been major changes in the practice of law. There is more interchange now between the academic, practice and law reform branches of the law.

Perhaps the biggest change is the growth of judicial review. The supervision of government is always a judicial function in the sense of ensuring that government acts lawfully, but decisions in relation to administrative review have increasingly placed Judges ever closer to making decisions about administrative decision making itself, something which on the pure doctrine of the separation of powers, is a matter exclusively for the executive.

Increasingly also the traditional institutions have ceased to engender respect simply because of their venerability. Rather, people are today making their own assessment of the performance of such institutions; there is no longer unquestioning acceptance of an institution just because it has always functioned in a particular way. The public are more educated and critical and it is not possible to dismiss criticism as readily as it once was. The Judges have also been subject to increasing scrutiny and people are less inhibited in expressing their views and opinions of the Judges and their decisions. People are also more open about expressing concern at the selection process itself.

Against this background the idea of establishing a judicial commission has been mooted from time to time with the suggestion taking various forms. The report of the Royal Commission on the Courts chaired by Mr Justice Beattie, which reported in 1978, probably marks the first serious consideration of this question. The issue was addressed from the perspective that the running of the Courts is not a function which rests easily with either the government or the Judges themselves and the proposal of a judicial commission was therefore advanced. What was envisaged was that the commission should comprise the Chief Justice, a High Court Judge, the Chief District Court Judge, the Solicitor-General, the Secretary for Justice and two members nominated by the New Zealand Law Society and appointed by the Governor-General – in essence to comprise the legal establishment. This commission was proposed to have responsibility for case flow in the day to day administration of the Courts, have the power to recommend appointments, arrange study and refresher programmes and provide the means of dealing with complaints. Of these, the powers to recommend appointments and to address complaints are from a general public perspective, the most controversial.

In the United Kingdom between 1993 and 1994 the Lord Chancellor has developed proposals for amending the judicial appointments procedures. He aims to make the process as open as possible by building on the strengths of the present system. The plans include the introduction of annual selections for judicial office below the level of the High Court with the advertising of vacancies to ensure that those who are eligible are encouraged to make known their interest. Interviews are proposed to be conducted by a panel comprising a member of the judiciary, a lay person and one of the Lord Chancellor's senior officials. It will be for the Lord Chancellor to personally decide whom he recommends to the Queen for appointment. Central to the changes being introduced are job descriptions and criteria for appointment, that are intended to give applicants an idea of what the office involves and to articulate the qualities and skills required for a person to perform well in the office. Criteria for appointment set out the eligibility requirements as well as legal knowledge and experience, skills and abilities, and personal qualities that are required. The Lord Chancellor collects assessments of candidates from the judiciary and the profession against these criteria.

In Australia in 1993 the Attorney-

General produced a discussion paper on the procedure and criteria for judicial appointments and comments on it have been invited. The option of an advisory commission is only one of several options which include popular election, legislative ratification, and retaining the present method of appointment but requiring the Attorney-General to consult various persons or bodies.

There are two issues on which I strongly agree with the Australian Attorney-General. First, that merit must be the overriding consideration for appointment and second, that the American model of confirmation by a parliamentary committee is not to be followed.

The Australian Attorney-General identified the advantages of a commission as enhancing visibility and public confidence and providing a guarantee of security of possible candidates. On the negative side there is the disadvantage that a commission may not provide wider choices, and it may prove to be a costly, cumbersome way of simply formalising the consultative process. There are dangers also in the inevitable public representation on the body and the pressure for representative appointments to accommodate factors such as race and gender. It is likely that that appointment process in itself would be extremely political. The government should take responsibility for judicial appointments. If the task is to be passed to a committee, who would appoint its members – the Cabinet, the Government Caucus, the House of Representatives? Anyone with any experience of the appointment process in those three bodies would keep the present system. It is in the nature of politics that it will necessarily become a partisan process. A system that has been devoid of party politics will change for all time.

It must be accepted that the judiciary should try to be reflective of all society by appointments being of people on the basis first of judicial qualities and, subject to that, reflecting the diversity of society and the law. It is difficult to predict how a commission might function, but there is the danger that the judicial members (who have the greatest knowledge of the functioning of the Courts) will sway the commission with that advantage. A judicial commission may therefore restrict the range of candidates considered for judicial appointment because the incumbent Judges would in effect choose who will join them.

As Sir Geoffrey Palmer eloquently stated in a speech last year:

> Furthermore, in my experience Judges are anxious to exert influence on appointments. It is clearly right that they should be properly consulted. It is not appropriate that they should drive the process and I believe they would under most variations of the judicial commission proposal, even if it appeared they did not. If Judges are on the commission they will exert great weight on the opinion of lay members. The tendency to turn the judiciary into a self perpetuating oligarchy ought to be restricted.

Furthermore I think there is also a very real danger that a judicial commission, once established, may be politically impossible to disband if it transpires that it is not in fact performing in a manner that serves the administration of justice.

It has been suggested that the commission be required to provide a list of names from which the Attorney-General makes a choice. That would have the undesirable effect of splitting accountability between the Attorney-General and the commission with perhaps each blaming the other for resulting appointments.

I have other concerns as well. The prospect of a judicial commission sitting in judgment on the Judges fills me with great concern. At stake here is the principle of the independence of the judiciary. Lord Denning when he delivered the 1980 Richard Dimbleby lecture on "the misuse of power" expressed it very well:

> Every Judge on his appointment discards all politics and all prejudices. You need have no fear. The Judges of England have always in the past – and always will – be vigilant in guarding our freedoms. Someone must be trusted. Let it be the Judges.

Obviously those words need to be read sympathetically with their 1980 context and with the acknowledgment that in the 1990s Judges may be both men and women and will have enjoyed diverse careers before appointment. But I do believe that someone must be trusted and there comes a point in the interests of finality and confidence in our institutions where there must be no further avenues of complaint, either with the substance of the matter under litigation, or with the Judges themselves.

The very nature of the judicial process lends itself to a level of dissatisfaction and criticism simply because in every case there will be a litigant who does not succeed. The fact that roughly a third of cases will succeed on appeal however many levels of appeal there are, also militates against the existence of any absolute right or wrong answer in the course of the search for justice.

At present any concerns that the profession might have about the abilities of an individual Judge have never been dealt with in a public way. On the rare occasions it has been necessary, such concerns have been addressed discreetly but effectively in other administrative ways. In my view that is as it should be – I believe that a judicial commission operating in public to hear complaints about the Judges would serve only to undermine public confidence in the judiciary. The reality is that in New Zealand we have a judiciary that is the equal of anywhere in the world both in quality and integrity. Quality in that sense is concerned with legal skills including knowledge of the law, legal analytical capacity and the ability to assess and evaluate relevant facts. Personal qualities of commonsense, patience, and an awareness of and sensitivity to the society that is judged and its needs are among other qualities that are reflected. There is simply no suggestion of corruption. We are extremely fortunate to have a judiciary in which we can have as much confidence as anyone in the world can even though we are robust and critical (at times unfairly so) in our attitudes to the judiciary.

This is not to say however that the process of appointment in New Zealand could not be improved, and one of the concerns about it is its lack of openness. The formal structure is the Attorney-General recommends appointments to the Governor-General. Traditionally I have done so after extensive consultation with the Chief Justice, as well as the President of the Court of Appeal,

and the President of the New Zealand Law Society. In recent times I have also consulted the President of the Law Commission and the Bar Association.

There is however a need for a more systematic open process. There should also be an appropriate system of record keeping so information is readily available regarding suitable candidates.

I take this opportunity today to outline a new procedure. The focus is on the need for more consultation and henceforth the Attorney-General will consult specified groups and persons and invite them to make suggestions of suitable persons for consideration when vacancies arise. These interests include the judiciary parliamentary and professional groups. The Chief Justice, the President of the Court of Appeal, the President of the New Zealand Law Commission, the President of the New Zealand Law Society and the President of the New Zealand Bar Association. It may also be appropriate to consult the Minister of Justice, the Opposition Spokesperson and the Chair of the Justice and Law Reform Select Committee. The purpose of this consultation is to seek the considered views of these people as to the best candidates to be considered for appointment and to ensure that the wider community has access to the system to make suggestions about appropriate people to appoint. It is important that the Attorney-General receives advice from legal groups beyond the present establishment, and to include representatives of womens' groups and from different cultures within New Zealand. We must ensure that a range of people suitable for appointment are suggested and the emphasis should be on getting a diverse group of names for consideration with an effort made to identify candidates who would have a background not reflected in the present judiciary.

The second phase will involve addressing this short-listed group and I consider it appropriate to address this question with those I have already mentioned, but in confidence and individually. It may also at this point be appropriate to speak to other Judges of the Court of Appeal and High Court and, when appointment of a District Court Judge to the High Court is being considered, to the Chief District Court Judge.

Once there is a preferred choice there would be consultation with the New Zealand Law Society and the New Zealand Bar Association at a local level to check that nothing seriously adverse is known. At that point also the person being considered will be contacted and asked if he or she will co-operate in that vetting by responding to a series of questions intended to confirm there is no background of a sort that might cause embarrassment after appointment. Once that vetting process has been satisfactorily completed an offer of appointment will be made. If accepted, the Cabinet will be advised of the proposed appointment. In my time as Attorney-General, no other politicians have been involved in the appointment process. There has never been Cabinet discussion about an appointment. The Cabinet has, merely as a matter of courtesy, been informed that the Governor-General has been advised to proceed with an appointment. Sir Geoffrey Palmer who held the office from 1984 to 1989 is similarly able to offer the same assurances.

I intend that the process be administered by the Crown Law Office which will also assume responsibility for maintaining records of factual biographical material on people that could conceivably be put on the short list. It would also separately collate comments made during the first phase of consultation and attend to any particular enquiries that are required. The Crown Law Office will maintain a record of those short-listed and of those approached about appointments which, while confidential, will be available for future attorneys to consider. I do not however envisage that judgmental material will ever be maintained on continuing government held records. Obviously, any person will be permitted to obtain any material held on the continuing record about him or her, and to submit material to be held on that record.

In proceeding in this way I hope to allay some of the concerns about the process for judicial appointment, while at the same time maintaining a system that has in fact served us extremely well.

So I defend our present system although I believe it can be improved. The responsibility for appointment should remain with the Attorney.

This debate gained some momentum in the last few years, yet I have seen or heard nothing that convinces me the present system is wrong. It is a system shrouded in mystery and subject to gossip and conjecture. But that is a matter of appearance and can be improved upon. It is free of party politics. It has worked well. There is no case for dismantling it. □

LAWASIA Conference Beijing, August 1995

The 14th LAWASIA Biennial Conference is to be held in Beijing China from 16 to 20 August 1995. Since the New Zealand Law Society is a member of LAWASIA, all New Zealand practitioners are entitled to attend.

The Conference is being hosted by the China Law Society which sent a delegation to visit New Zealand in March 1994 – see the article at [1994] NZLJ 184. The theme of the August Conference is The Importance of Law in the Development of Asian Pacific Economies. As is usual in legal conferences, there will be many concurrent sessions on such legal topics as Banking and Financial Services, Insolvency, Labour, Consumer, Human Rights, Alternative Dispute Resolution, and Computer and Technology Law among many others.

There is a financial benefit in early registration before 10 July 1995. There will be a social programme and special tours available immediately before and immediately after the Conference. Accompanying persons will be welcome and a special programme will be provided for them.

A brochure and registration form, for anyone who does not already have one, can be obtained from The New Zealand Law Society, PO Box 5041, Wellington. □

Law, religion and economics

By Bernard Robertson of Massey University

Social justice is an area of contentious discussion in contemporary New Zealand that those living in the 1950s would have considered had been finally settled with a general acceptance (consensus?) of the welfare state. In this article Bernard Robertson initially considers the Social Justice Statement of the Church Leaders, and the book Voices for Justice *which contains a set of essays discussing the Statement. He expresses some surprise at what he describes as the lack of charity displayed by the essay writers to those of differing views. Bernard Robertson then considers the views of Michael Novak, a recent visitor to New Zealand on a lecture tour. Robertson argues that the concept forcefully stated by Novak was that of the dignity of the individual human being which is not advanced by creating a system in which all are dependent on the State instead of one in which individuals make choices for themselves. This has legal implications, Robertson maintains, because it requires a system of known rules enforced by Judges in a predictable fashion.*

Two recent events have provoked thought on the relationship of Law, Religion and Economics. These were the visit of Michael Novak and the publication of *Voices for Justice: Church, Law and State in New Zealand* (eds: Jonathan Boston and Alan Cameron, Dunmore Press Ltd, 1994, 188 pp).

Voices for Justice sets out to discuss the Church Leaders' *Social Justice Statement*. It includes papers on the role of the Church in public life, on Love, Justice and the State; Law, Justice and the State; Biblical teaching; Catholic teaching and on current economic policy. It grows out of a seminar in which apparently "a range of perspectives" was encouraged but all the authors share a "commitment to social justice".

Actually this does not seem to be true. Cameron's essay on legal theory provides a number of reasons for rejecting the whole notion of "social justice" or indeed any qualifier before the word "justice". But then Cameron provides one of his own – "public justice". This seems to suffer from all the defects of social justice. A number of contributors discuss the "perceived imprecision of the *Statement's* notion of social justice" and even attempt to rectify it apparently without realising that imprecision is inherent in social justice. This is why "social justice" is inimical to the rule of law, a concept Cameron mentions but does not define.

The closest we get to a definition is that social justice entails avoidance of "excessive disparities in income and wealth". But what is an "excessive disparity"? If a brain surgeon earns ten times what a cleaner earns is this an excessive, a justified or an insufficient disparity? Who is to decide and how? In particular how can it ever be said that a person's income is "excessive" if it is derived entirely from payments made voluntarily by others? If someone may in future decide that my income is excessive how can I decide in advance how to direct my career, whether to take risks and so forth?

If Cameron had attempted to define the rule of law he would have found that any meaningful definition would prevent the government from having the kind of discretionary power necessary for "social justice". The rule of law requires the operation of published, generally applicable and stable laws or it means nothing at all. In fact, the whole concept of constitutionalism is in issue. Constitutional law is classically represented as a device for controlling government – what Harlow and Rawlings call the "red light view". Social justice requires a "green light view" – that constitutional and administrative law are devices to enable government to deliver the goods. This idea entails a new concept of constitutionalism. In this model the constitution is simply to deliver to the government the power it requires to fulfil its objectives and, presumably, methods of obtaining more power if it finds its powers inadequate. At this point the whole idea of a constitution, or indeed law, may as well be abandoned as there is no distinction between what purports to be law and the naked use of power to achieve one's objectives.

Cameron's essay is dense and informative as to various strands of jurisprudential thought but ultimately unsatisfying because he never gets down to the nitty gritty of what "law" is and how it differs from other forms of social control.

Ruth Smithies of Cardinal Williams' office explains Catholic Social Teaching. This is predicated on a number of ideas. One is the pre-eminence of human dignity, but there is no mention in the essay of the Decree of Vatican II on the Dignity of the Human Person with its emphasis on free choice. Another is that the notion that the "God-given nature" of human beings calls them to live in community. Does this mean that hermit monks lived in a state of sin? I cannot see that this idea justifies compulsion to associate in groups not of one's own choosing.

At least Ms Smithies recognises that "social justice" is different from "justice" which, she says, many New Zealanders associate with "Courts, laws and regulations". This seems to me a correct and neutral association, but the Church Leaders apparently regarded it as a negative one. But it was the Roman Catholic Church which gave the world the notion of an organisation built on law, a world in which people were entitled to equal treatment. This can only be achieved by a framework of

rules of reasonably certain content enforced in a predictable manner by Judges whose role is to give effect to the law and nothing else. "Courts, laws and regulations" of course make the achievement of "social justice" impossible since that requires untrammelled discretionary power. Ms Smithies seems to be talking about the triumph of social justice over law, not any reconciliation of the two.

Some of the essays contain little of direct impact on lawyers, apart from an aside by Boston about so-called "positive rights" which did not give sufficient detail to enable proper discussion. But they do serve to inform us as to the variety of views which actually prevail within Christendom. This is something which the Church Leaders and the media have tended to gloss over. After the *Social Justice Statement* was issued Bishop Brian Davis wrote in *The Dominion* about wanting to "raise the debate" but the Revd Jamieson was telling election meetings that "Christians believe in progressive taxation and state provision". Cardinal Williams has recently delivered the same message, through Ms Smithies, to the Finance Select Committee.

Agenda of Social Justice Statement

The *Social Justice Statement* is criticised by Boston for lacking specificity and by others for hiding an agenda behind waffle. The agenda has now appeared. Cardinal Williams has worked himself into the bind Boston speculates the Church Leaders wished to avoid. He has committed himself to a particular policy. The question is then raised "is this policy Christian in itself or merely the most effective way of achieving Christian ends?" Particularly noticeable is the complete lack of any direct response by Cardinal Williams and others to Sir Roger Douglas's book *Unfinished Business* which came out not long after the Social Justice Statement. In what sense is chapter 4 of that book not a Christian response to poverty?

If the Churches believe that Douglas's prescriptions will not achieve their desired ends, then they are entitled to that view. But in taking it they come clearly outside the area within which they may claim either expertise or respect. If one is genuinely concerned for the poor one should presumably be willing to listen to arguments about how the poor are best to be helped. It is not clear that everyone is. Michael Cullen for example, recently described his belief in the continuing state provision of education and health as a "point of principle". The commitment here is not to the poor but to a particular social structure; not to an end but to a set of institutions.

Perhaps the claim is that "progressive taxation" and "state provision" are Christian in themselves. These claims require consideration. If it is Christian to believe in state provision of education and health, why not food? The claim that "progressive taxation" is a matter of Christian compassion is even more dubious. If the majority choose (as at present) to excuse those less well off than themselves from some of the tax burden that might be called compassionate, if anything a group does can be so described. But when the majority vote to impose on a minority tax levels they are not willing to pay themselves, that is not compassion, it is oppression and confiscation. Once more, it is simply an exercise of naked power to achieve one's ends.

There are questions here that I had hoped to find answers to in *Voices for Justice*. How does one leap the logical void between Christ's teaching that we each have a personal responsibility to care for the poor and prescribing compulsion to do so? Is the argument that I so love the poor that I will confiscate money from those richer than myself to look after them? or is that I so love the rich that I will save their souls by taking their money away? These are the questions the Church Leaders need to answer in order to be intellectually coherent or even honest, but none of the *Voices* could provide an answer.

Social justice and the Treasury line

The editors predict that the final *Voice* is the likeliest to provoke strong responses. It is that of Petrus Simons in a piece entitled "Social Justice and the Treasury Line". The response it provoked in me was to question the editors' judgment in including a paper clearly not of the same quality as the remainder.

Simons is labelled as an economist but his argument includes an attack on the fundamental axioms of micro-economics: constrained maximisation and so on. This is like claiming to be a statistician while denying the axioms of probability. Certainly in the United States a person who denied the axioms would not be regarded as an economist but as a philosopher, a sociologist, or a political scientist. Within a few pages Simons attacks targeted benefits on the ground that they lead to abatement rates which act as a disincentive to work. But this is surely only true if people *are* rational calculators of utility and, furthermore, if they do not value work for its own sake (as other *Voices* assume they do). In any case it turns out that Simons has faith in macro-economic policy. He calls for macro-economic policy to be "altered" in order to achieve certain aims. But he has sawn off the branch he is sitting on. How can one predict the effects of a change in policy without some assumptions about human behaviour? Deprived of its intellectually rigorous foundations in micro-economics, macro-economics is just so much building castles not even on sand, but in air.

Economics is replete with jargon such as "scarcity", "social cost", "public good" and so on. These sound like common-sense terms and the layperson, on hearing these expressions, may think that he or she knows what they mean. Thus it is quite normal to find an attack on Law and Economies starting with a quotation of an economic text followed by argument based on a misunderstanding of the terms used. (An egregious example, involving the word "scarcity" occurs in Margaret Davies *Asking the Law Question* p 132). It is disturbing to find this technique used by an economist. Simons quotes a Treasury document which uses the term "social cost" to mean a third-party detriment, from a voluntary, bilateral transaction. But the argument Simons proceeds to make is only comprehensible if he is using "social cost" in its lay usage as in "unemployment is a social cost of rapid reduction of inflation". But this is not what the Treasury document means at all and his implication that Treasury believes it is better to put up with unemployment and poverty rather than do anything about them is little short of scurrilous.

Simons also complains that the Treasury's view leads to a compart-

mentalisation of life, because there are certain things that cannot be paid for individually such as defence and security. Correct. These are "public goods" and everyone from Adam Smith onwards recognises their provision as legitimate governmental activity. Alarmingly Simons includes in this category choosing "the kind of society in which they want to live". Just what does this mean? By what mechanism do we decide "in what kind of society we want to live"? What are the alternatives, how are they presented for decision and how do we ensure the debate keeps pace with external changes? If we are to "debate the kind of society we want" what happens to those who are in a minority? Do they get expelled, or re-educated, or left to get on by themselves? If the latter, what is the point of the "debate" in the first place? A free society is one in which we create, and constantly change, the kind of society we want to live in by the way we interact with other individuals.

Perhaps the answer is already given in a passage in which Simons deprecates the notion that society is no more than the sum of its parts. If it is not, Simons does not explain what it is. How can anything benefit "society" if it does not benefit individuals? And since most choices benefit individuals differently how can one assess their benefit to society other than by aggregating their effects on individuals? The idea that there are choices which are for the benefit of "society" rather than its individual members is not a Christian notion, in fact is it exploitation. No other idea has done more to justify organised oppression.

The argument descends to stretching the meaning of words like "coercive" until they lose their special meaning. I cannot see how a commercial enterprise can engage in coercive conduct, without breaking the law applicable to everyone, unless one returns to a planned economy in which the railways can force you to use them to transport your freight. Then we have the "western male" bit. Simons does not stop to ask why it is that "western male" ideas like individual freedom and rationality seem to have competed out others. Nor does he seem to realise that in questioning "western male" culture, he is questioning Christian culture or at any rate post-Reformation Christianity. The key distinction between Judaeo-Christian (ie "western male") culture on the one hand and almost all other religions on the other is that it admits of a church/state distinction, it propagated the notion of law as a fixed body of rules not made at the point of enforcement and allowed the diversity which has delivered a higher standard of living and greater opportunities than any other culture in human history.

Simons points out that Treasury's arguments are based on a number of "unarticulated assumptions" such as that "globalisation means that national governments have less and less control over their economies". One might add to the list the unarticulated assumption that the world is roughly spherical rather than flat. Simons wants to stop the world and get off. In particular he wants to control technological change. This will actually follow from the implementation of his other ideas. The driving force of innovation is the private property rights which make innovation worthwhile. That is why the Industrial Revolution took place in Britain and not elsewhere. Deprive people of property rights and, as the Chinese Empire and the Soviet Union discovered, you stifle innovation. Unfortunately the rest of the world will not stand still while New Zealand debates the kind of society it wants and considers how to implement technological changes in a planned fashion. Societies built on this model have to protect themselves with tariffs, exchange controls and eventually fences and watch-towers in order to prevent people seeking better opportunities elsewhere.

Under the banner "There are Alternatives" Simons offers us government expenditure as the solution to our problems. Not only does he ignore the problems for law and constitutionalism outlined about but he does precisely what Boston criticises the Church Leaders for doing. Simons fails to consider any negative effects of his "more progressive taxation" and "widening the tax base". The clear implication is that each job created is a net gain of one job. This is either infantile or dishonest. The argument is illustrated by an unreferenced anecdote from Holland. Like other aspects of this paper, this was more appropriate for dinner-party chatter than for inclusion in an otherwise worthwhile book on serious issues.

There are indeed alternatives to the viewpoints presented in *Voices* as "Christian". What is remarkable about much of this discourse, and especially visible in Simons's essay, is the lack of charity displayed to those of differing views. This is a reflection of the lack of charity some clergy have complained to me is displayed towards any of them who do not fall into this line. It is assumed that anyone opposed to progressive taxation or state provision does not care about human dignity, that the "preferential option for the poor" necessarily involves taking money away from the rich and redistributing it.

Visit of theologian Michael Novak

A welcome counterweight to these views was provided by the visit to Wellington of Roman Catholic theologian Michael Novak. In a rather rambling talk susceptible to detailed criticism he conveyed some important messages. Some are referred to above. One was that it was the Judeao-Christian culture above all others that has enhanced human dignity by allowing and celebrating diversity. The only way human beings can represent the image of God is through diversity since He is infinite and each of us very finite. One of the diversities this leads to is diversity of income and this is not to be decried at all (unless, I presume he would wish to add, it is created by compulsion). Novak actually asked the question "why are disparities in income a problem?" All the *Voices for Justice* assume that it is but none troubled to explain why.

Novak's major emphasis was on the "preferential option for the poor". What matters is not disparities in income but the actual state of those at the bottom. A society, he said, is measured by how it takes care of its poorest. This seems a questionable proposition, the questions being how "society" is defined and whether groups can be subject to moral evaluation. But let us assume consensus on the proposition of an individual duty to care for the poor. How is this to be done? Novak's tale of the last generation in America should give one pause for thought. Over that period social spending has enormously increased

and so has poverty. While the economy has expanded more or less continuously a growing segment of the population has been insulated from this prosperity by being trapped in housing projects and welfare programmes. Novak, who supported these programmes when they were introduced, is distraught at the effects that they have had. Here there seems a complete lack of willingness to recognise the problem.

In any case, says Novak, we are considering the wrong question. The question is not what is the cause of poverty, but Adam Smith's question – what is the cause of wealth? Effort spent on discovering the causes of poverty is wasted effort. If poverty were like measles then once we had discovered the cause we would know how to eradicate it. But poverty is much more complex, and more widely defined, than measles. Measures taken to eliminate one kind of poverty may well create another. The real question is how we can create wealth. On this the churches seem to have nothing to say, in fact they go out of their way to make those who create wealth feel guilty and to heap praise on time-servers. If we create wealth then two things will happen. One is that the lot of the people at the bottom of the pile will improve. This of course will not satisfy those who would rather be equally poor than diversely rich. Secondly the composition of this (and every other) group will constantly change. The fact that Novak had to spend time explaining how the composition of social groups changes was itself a tribute to how deeply the Marxist concept of fixed groups with opposing interests is engrained in "liberal" and religious thinking.

Novak said he preferred to talk about "capitalism" rather than a free market or private property. This paid tribute, he argued, to the importance of human capital. Marx thought that it was labour that created wealth. More recently people have assumed that natural resources create wealth. (This idea is truly pernicious since the only way to obtain more resources is to conquer territory containing them.) What creates wealth, Novak reminded us, is human ingenuity. This is why wealth is potentially unlimited and distribution is not the vital issue. The concept of "human capital" also demonstrates the fallacy of believing that over-population is a cause of poverty (another effect of believing that wealth is limited and the problem is one of distribution). Brazil has no greater population than Japan, spread over a wider area, yet we are constantly told that Brazil is over-populated. The problem is the system. Given opportunity each extra brain is an extra resource.

Novak somewhat played down the importance of law. He argued that a free market and property rights are only preconditions to development and that there is still required a "spirit" to bring development alive. His argument was buttressed by pointing to how that spirit has obviously been suppressed in some parts of the world. It seems to me that that spirit comes alive wherever a legal system committed to liberty and property rights, including intellectual property rights, allows it to do so. Novak himself spoke of how interest in the problem of poverty was sparked by the observation that poor people in Europe were able to emigrate to the United States and suddenly become relatively wealthy. But they not only worked as hard but presumably had the same spirit. The difference was the law. Likewise, Chinese flourished under the relative freedom of the British colonies and the Treaty Ports while their relatives at home continued to regard gunpowder as an amusement. The British themselves became the First Industrial Nation not because no German noticed that the lid of a kettle bobbed up and down when the water boiled but because Britain alone had a system of intellectual property rights and a people confident that they would receive equal treatment before the law.

A striking part of Novak's talk was when he spoke of the enormous improvement in the longevity and quality of life of the elderly. Clearly he saw this as an opportunity and a blessing. We tend to see it as a problem. Why? Because we have set up a system whereby we expect our children to pay for us in retirement. Then we have a sneaking suspicion that they will not be able to, especially when the superannuation payments have passed through the value-reducing maw of the government. We have turned one of the great achievements of the twentieth century into a stumbling block for the twenty-first.

The concept driving Novak throughout was that of the dignity of the individual human being. Even atheists and agnostics, he pointed out, are essentially "Christian" in their beliefs relating to humanity. The Church Leaders have failed to understand some central truths. The culture which invented human dignity and which has spread the concept of human rights is the same culture that has delivered the highest standard of living and the greatest opportunities. Human dignity is not advanced by creating a system in which we are all dependent upon the State for our development. Dignity is enhanced by a system in which we are allowed to make our own choices within a known framework of rules, enforced in predictable fashion by Judges who are committed only to the rule of law and not to imposing a vision of how others should live. And all the evidence is, for those who have eyes to see, that that system will also be the preferential option for the poor. □

Appeals to Hansard

Since *Pepper v Hart* [1993] AC 593, ministers' statements in *Hansard* can be cited to assist the court in interpretation of a statute. Although the power is *now extensively used* [emphasis added] there have been few changes to settled case law based on well-established Acts of parliament. It is recent Acts and those passing through parliament now where the importance of *Pepper v Hart* in assisting the court to construe a section will be felt. The new Criminal Appeal Bill gives one cause to doubt whether this system is really in the interests of justice or whether we will be relying too much on the words of a minister in the heat of political debate in order to construe detailed and technical issues.

Editorial
The New Law Journal
3 March 1995

When silence is golden

By R D Mulholland, Senior Lecturer in Business Law, Massey University

This article deals with the decision in King v Wilkinson *(unreported). The issue was whether silence could amount to misrepresentation in contract law. The decision Mr Mulholland argues extends the scope of misrepresentation and in so doing is within the current trend.*

Introduction

Those with an interest in contract law will find much of interest in the decision of Holland J in the High Court in *King v Wilkinson* (High Court, Christchurch, CP 134/92, 29 March 1994).

The decision considered the traditional text book topic of silence as misrepresentation and, it is submitted, carried the settled classical orthodoxy on this issue a significant step forward.

It has usually been assumed that a representation, sufficient to vitiate a contract, would be either an express representation involving an unequivocal assertion of fact, or inferred from the conduct of the representor.

Silence as misrepresentation

Traditionally under nineteenth century classical contract theory silence was not regarded as misrepresentation sufficient to amount to a vitiating element so as to afford the representee a right to damages or rescission; *Fox v Mackreth* (1788) 2 Cox Eq Cas 320, *Arkwright v Newbold* (1881) 17 Ch D 301, which was applied by the New Zealand Supreme Court in *Spooner & Archer v Eustace* [1963] NZLR 913.

It has long been recognised that a "half truth" that is a representation which is true so far as it goes but which, because of what is left unsaid, creates a false impression, will amount to a misrepresentation; *Wakelin v R H & E A Jackson* (1984) 2 NZCPR 165.

Also it has been accepted that it behoves a representor to correct a representation, which although correct when it is made, later, before the contract is concluded, becomes incorrect; *With v O'Flanagan* [1936] Ch 575.

These two situations are clearly distinguishable from the factual scenario in *King v Wilkinson*.

At the same time the deliberate concealment of facts has been held to amount to misrepresentation; *Gorden & Texeira v Selico Ltd & Select Management Ltd* (1986) 11 HLR 219. This situation is also quite distinct from that of *King v Wilkinson* in that it involves the deliberate concealing of something that would be likely to influence the decision of the other party and thus goes much further than merely remaining silent.

There is very slender authority for the proposition that the failure to disabuse a purchaser of a misconception, where that misconception is obvious to the representor could amount to actionable misrepresentation. In *Witham v MacPherson* (1982) 1 DCR 431, a statement by a prospective purchaser of a market garden that a particular piece of land would be suitable for a glasshouse was left without a reply by the agent of the vendor. It was held that the silence of the agent amounted to an affirmative reply to the effect that the particular area of land was within the boundaries of the property which was the subject matter of the contract whereas in fact it was not.

Several factual applications of silence

As with many legal concepts "silence as misrepresentation" is not limited to a specific set of facts. At least four quite distinct factual scenarios are relevant.

Firstly there is the situation in which a party makes no representation either by words or conduct, and there is nothing in the subject matter of the contract which would mislead a reasonable person.

Secondly there is the situation in which a statement is made by one party, or a question is asked by one party, and the other party remains silent in response to that statement or question.

Thirdly, as was the case in *King v Wilkinson*, no express or implied representation is made but the subject matter of the contract is such as would deceive any reasonable representee.

But these are subject to variations. Thus account could be taken of the state of knowledge of the representor. The Courts could take into consideration the likely effect of the silence upon the representee in the light of the facts of the particular case, and whether the representor could reasonably be expected to be aware of that effect.

The decision in *King v Wilkinson*

The factual substance of *King v Wilkinson* was very clear cut. The vendor of a block of land had failed to inform the purchaser of a difference between the boundary line and the obvious fence line of the property in dispute. This meant that the purchaser had obtained much less land than would have been expected from a visual inspection of the property. The first the purchasers knew of the discrepancy was when they were approached by a local real estate agent asking whether they would like him to approach their neighbours to the south to ascertain whether he could obtain a lease or licence of the relevant strip of land which was 3.5 metres in width on the southern boundary and extended for 32.6 metres, and comprised an area of 114 square metres.

The fence which was substantial and well maintained, had been erected by a previous owner, not the defendant. But the defendants were well aware that the boundary line deviated from the fence line.

According to Holland J;

> A misrepresentation can arise either from a statement or from conduct. In certain limited circumstances misrepresentation can arise from silence. The question of whether or not a representation has been made is a question of fact. The defendants as vendors must have known that

> unless attention was drawn to the true factual situation, any purchaser would believe, because of the set up of the property, that the southern boundary of the property was as fenced. They presented the property without anything to indicate that the fence was not on the true boundary. This was not a case of whether there might be mere confusion as to the exact position of the boundary. No-one examining this property without prior knowledge of the true boundary would contemplate that the boundary was anywhere other than on the fence line (p 8 of judgment in *King v Wilkinson*, unreported).

Much emphasis was placed upon the conclusive nature of the facts and the earlier decision in *Spooner v Eustace* [1963] NZLR 913, where "there was not the same established garden, stone posted entrance way, sealed drive and solid paling fence as exists in this case" (p 10) was distinguished. Thus the decision in *King v Wilkinson* would be readily distinguishable upon its own facts. The facts spoke for themselves. They were so decisive and unequivocal as to amount to a clear representation, within themselves, such as would mislead any reasonable person. They created a clear expectation. The purchasers were led into error; they did not merely fall into error.

Although they had not created the misrepresentation the vendors were fully aware of the factual situation and had, indeed, negotiated a lease of the property in issue from the adjoining owner.

In *King* the agent of the vendor had asserted (in response to a question) that the eastern boundary was as fenced but had omitted reference to the southern boundary which was that in dispute. It is clear that there is a duty on the part of a vendor to point out boundaries when asked to do so and the reference, by the agent of the vendor, to the eastern but omitting reference to the southern, could have within itself, amounted to misrepresentation. But the judgment places emphasis, not upon the contracts of sale aspects of the case, but upon the general principles of misrepresentation in contract law. According to Holland J:

> The presentation of the property for sale in this manner was a positive representation as to the boundary (p 9).

Does the decision in *King v Wilkinson* extend the law of misrepresentation?

As indicated above it would be possible to limit the decision in *King v Wilkinson* to its own facts. But in view of the distinguishing of *Spooner v Eustace* [1963] NZLR 913, the decision does seem to be clear authority for the proposition that there will be misrepresentation in those instances where the subject matter of a contract is unequivocally deceptive. In such instances it could be said that the representor is under a duty to disabuse the representee of the deception which the factual presentation of the property has created. If there is no manifest deception in the subject matter of the contract then the representor is under no obligation to reveal matters which are known to the representor and which would be likely to influence the representee in entering into the contract.

The Contractual Remedies Act 1979 has, for practical purposes, eliminated any distinction as between innocent and fraudulent misrepresentation. It seems that there would have been no misrepresentation in *King* had the vendors not been fully aware that the fence line and the boundary line did not coincide. It could be argued that the state of knowledge of the representor, is, in terms of the decision in *King*, (p 7 of the judgment "it is equally clear that the defendants knew that the fence was not on the true boundary") crucial to determining whether misrepresentation has taken place. That is a clear distinction would be made, in cases where a plaintiff is relying upon factual deception in the absence of an express representation either by words or conduct, between a misrepresentation made innocently and a misrepresentation made with knowledge of its falsity. The latter only being actionable.

It is contended that the decision in *King v Wilkinson* probably goes no further than this. Thus limiting the decision to instances where the presentation of the property can within itself, be seen as amounting to a positive representation.

On the other hand the decision in *King* could be viewed as moving towards infusing the notion of uberrimae fidei into general commercial contracts. Or, at least, requiring a vendor to disclose any matters which might reasonably be expected to be within its knowledge, and which would be likely to influence a purchaser in determining whether or not to proceed with the contract. It is contended that although there appear to be very wide moves in this direction, (see below) the results of such a move could be quite devastating to the commercial community. To refer to but one example; the real estate industry has adopted a practice of negotiating on the basis of written contracts. A standard form contract has been devised; REI-NZLS Form, 5th edition. A practice has arisen for agents to present a property as it stands with a minimum of comment. There is a reluctance on the part of land agents to enter into preliminary verbal agreements. Rendering silence actionable may mean that any comment or question left unanswered could be actionable.

It would be easy for a party accustomed to purchasing property to frame conduct including preliminary contractual negotiations, in such a manner that they could furnish themselves with an open option to withdraw from any contract at their discretion. Solicitors could advise clients of these techniques.

The interpretation of silence could also pose a problem. If, for example, a purchaser asked a specific question of a vendor, and was met by silence, it would be necessary for a Court to place an inflection upon the vendor's silence. This, in turn, would place emphasis upon the state of knowledge of the vendor. Thus a vendor could refrain from answering a question not because he deliberately wanted to withhold information but because he simply did not know the answer to the question. It would be extremely difficult to devise a set of rules prescribing the limits and circumstances in which silence could be actionable.

The decision in *King v Wilkinson* fits into broader movements in the law

Despite what has been said above about the problems associated with extending the limits of silence as misrepresentation it must be admitted that the decision in *King* is

clearly in line with broader trends which are presently taking place in contract law.

The caveat emptor principle obtained currency in the middle years of the last century when the law of contract was dominated by the commercial community. Prior to that time there was at least some authority for the view that contracting parties were obliged to disclose unusual facts which were known to one party but not the other; *Carter v Boehm* (1766) 3 Burr 1905; 97 ER 1162. The doctrine of caveat emptor and the absence of a need to disclose facts known to a vendor led to certainty in contractual dealings and this suited the business community.

There has been a clear retreat from the caveat emptor doctrine since the middle years of the present century. This has been included in a wide gamut of statutes the most recent of which is the Consumer Guarantees Act 1993. This is part of a general movement to assist consumers. But a similar tendency has been evident in the common law. Note, for example, the orientation of the Sale of Goods Act 1908, into a consumer protection measure by the Courts.

The decision in *King v Wilkinson* can be seen as a further step in the process of the retreat from the caveat emptor doctrine.

Equitable principles have made a reappearance and are now freely applied alongside the rules of common law contract. This could incline Courts towards regarding silence as relevant because equity recognised silence in some instances as a basis for jurisdiction. Thus in that breed of equitable estoppel deriving from the decision in *Ramsden v Dyson* (1866) LR 1 HL 129, a mere standing by and allowing a person to act to his or her detriment was sufficient to incite the intervention of equity. This was usually applied in circumstances where a party had improved land, the legal title to which belonged to another, in the belief that he had a valid title to the land. It is an interesting point whether the expectation which was created by placing the land, in *King v Wilkinson*, on the market in the state that it was, would have been sufficient to have founded a successful action in equitable estoppel.

But equity has intervened upon a much wider plane. There is now a growing requirement of probity and good conscience in all business dealings. One need only note the resurgence of the jurisdiction in unconscionable bargains. The sanctioning of unconscionable conduct could well be seen as the sub silentio basis of the decision in *King v Wilkinson*. If this were so the conduct of the vendors in placing the property on the market in the state that it was could be said to amount to equitable fraud. This would have to attach to the conscience of the representor and the state of knowledge of the representor would be crucial in determining liability. That is it was unconscionable for the defendants to withhold the information which was fully within their knowledge, and thereby take advantage of the highly deceptive facts.

Tort law has also moved further towards the imposition of a duty of care, that is a duty to disclose, upon a vendor in respect of known latent and dangerous, or potentially, dangerous defects in the premises, whether created by work done, neglect in the upkeep of the premises or otherwise; *Anns v London Borough of Merton* [1978] AC 728.

Silence under the Fair Trading Act 1986

Although *King v Wilkinson* was argued in terms of common law misrepresentation an interesting point for conjecture is whether or not an action would have been available under the Fair Trading Act 1986. A substantial degree of overlap clearly exists as between the Act and the common law; *Crump v Wala* [1994] 2 NZLR 331. In other words can silence amount to deceptive or misleading conduct in terms of s 9 of the Fair Trading Act?

This issue has been considered under comparable provisions of the Australian Trade Practices Act 1974, and present indications are that the Courts are tending to treat silence under the Fair Trading Act as analogous to silence under the common law of misrepresentation.

According to Bowen CJ in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 68 ALR 77, 84, citing with approval, from *Ward v Hobbs* (1878) 4 App Cas 13;

> The general rule, both of law and equity, in respect of concealment is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract.

However it does appear that if a Court can find that an obligation to disclose exists then silence may fall within the ambit of the statute. But vendors and purchasers have not been generally regarded as being, without more, likely to fall within that ambit: *Rhone-Poulenc*, p 85.

An example of a case where the circumstances were such as to raise a duty to speak occurred in *Dainford Ltd v Sanrod Pty Ltd* (1985) ATPR 40.513, 46.155, where an agent, who had full knowledge of the facts, confirmed the misconception of the purchasers of an apartment of the extent to which their view would be obstructed by the erection of a porte-cochere. Here again the state of knowledge of the agent, acting on behalf of the vendor, was vital. In this instance the vendor had "fed" the obvious misconception that the purchaser was harbouring.

In applying the Fair Trading Act it must be clear that there is some conduct on the part of the defendant which has misled or deceived the plaintiff. Thus:

> if a party assumes a certain set of facts which leads him to a particular conclusion, then in the absence of anything said or done by any other party which results in that conclusion being reached, it is not possible for the parties to say they have been misled or deceived by the conduct of that other party. It highlights the basic principle that it is the conduct of the party in question which must be looked at to see whether it has deceived or misled the party complaining (*Mills v United Building Society* [1988] 2 NZLR 392, 407, per Sinclair J.)

But in *Mills* it was conceded that whether mere silence amounts to deceptive or misleading conduct will depend upon the circumstances of the case: p 406.

It is widely accepted that the test of misleading or deceptive conduct under the Fair Trading Act is an objective one; *Savill v NZI Finance* [1990] 3 NZLR 135. This being so it is possible to conceive of situations

in which an obligation to speak could be seen to have arisen. This would probably be so in cases where a statement is made by a representee, or a question asked of a representor by a representee, in circumstances where it is clear the representee is harbouring a misconception. In such a case the silence of the representor is contributing to, or "feeding" the misconception of the representee; cf *Witham v MacPherson* (1982) 1 DCR 431.

Although a situation analogous to that in *King v Wilkinson* does not, as yet, seem to have been argued under the Fair Trading Act it seems probable that the conduct of the defendants would have been caught by s 9 of the Fair Trading Act. An objective approach to the conduct of the defendant representors would have concluded that any reasonable purchaser would have been deceived as to the true position of the boundary.

There is a requirement that the deceptive or misleading conduct should be "in trade". It is probable that the fact that an agent was employed in *King v Wilkinson* would have been sufficient to have satisfied this requirement.

Section 14 of the Fair Trading Act may also have been infringed by the defendants in *King v Wilkinson*.

Conclusion: The increasing effect of silence

The decision in *King v Wilkinson* falls clearly within the current trend evident in both the common law and the legislature, in extending the scope of misrepresentation.

The following propositions could be put forward in the light of the decision in *King*. The long-established rule that silence will not amount to misrepresentation still remains basically intact. However the decision in *King* is authority for a qualification of that rule to the effect that in determining whether or not misrepresentation has taken place a Court will take account of the facts of the particular case as a whole. Misrepresentation may still take place even in the absence of any express representation. That is the absence of any manifest words by a party may not necessarily amount to a defence to an action in misrepresentation if the defendant's conduct is otherwise deceptive.

The state of knowledge of the defendant is clearly highly relevant in determining liability in such circumstances. To this extent it could be argued that *King* represents a further inroad into the caveat emptor doctrine. That is the decision in *King* shows clearly a situation in which an obligation to disclose arises.

At the same time the decision in *King* does not represent any expansion of the uberrimae fidei principle into the arena of general commercial contracts. The decision does not lay down any general duty to disclose in situations where the facts are known only to one party.

Returning to the "several factual applications of silence" referred to above, the following points can be put forward as extending those applications of silence.

Firstly, in situations where no express verbal representation has been made, a representor is under no obligation to speak unless there are other factors which render that silence misleading. But an obligation to speak depends upon the state of knowledge of the representor.

The decision in *King* does not seem to affect the emerging rule that where a representee has asked a question or made a statement which appears to indicate that a misconception is being harboured, then the representor is under an obligation to rectify that misconception; *Witham v MacPherson* (1982) 1 DCR 431.

Finally *King* does provide quite clear authority for the proposition that where the property, which is the subject matter of a contract, is likely to deceive any reasonable purchaser, it behoves a vendor to rectify the misconception. This is despite the fact that no express verbal representations may have been made. Whether or not the subject matter of the contract is likely to deceive will depend upon the circumstances of the individual case. It would seem that the deception presented by the state of the property must be clear and unequivocal in its effect. However the state of knowledge of the representor must extend to a reasonable realisation that the effect of the non-disclosure would be influential in inducing the other party to conclude, or refrain from, concluding the contract. □

Values and virtues

"Values", since the 1960s scarce indeed in American society and culture, all of a sudden are not merely all about us but too much with us. From the bestseller lists to the congressional caucuses to the television talk shows, the chatter level on the subject of "values" has reached full-magpie density. Americans seem to understand, however vaguely and uncertainly, that they have lost the sense of moral consensus and imperative that any healthy society requires; characteristically, they are doing very little about the problem but talking it to death.

The difference between Gertrude Himmelfarb and all but a handful of those engaged in this discussion is that Himmelfarb actually knows what she is talking about. . . . She writes:

> Values, as we now understand that word, do not have to be virtues; they can be beliefs, opinions, attitudes, feelings, habits, conventions, preferences, prejudices, even idiosyncrasies – whatever any individual, group or society happens to value, at any time, for any reason. One cannot say of virtues, as one can of values, that anyone's virtues are as good as anyone else's, or that everyone has a right to his own virtues. Only values can lay that claim to moral equality and neutrality. This impartial, "non-judgmental", as we now say, sense of values – values as "value-free" – is now so firmly entrenched in the popular vocabulary and sensibility that one can hardly imagine a time without it. . . .

We have made, as Himmelfarb readily recognises, "considerable gains in material goods, political liberty, social mobility, racial and sexual equality". We have also suffered "no less considerable losses in moral well-being". But there is no direct or inextricable connection between these phenomena. The price of enhanced liberty and equality is not moral and ethical debasement.

Jonathan Yardley
(Reviewing Gertrude Himmelfarb's *The De-Moralisation of Society*.)
Guardian Weekly
12 March 1995

Kill all the lawyers?

By Craig Daniel Turk, Managing Editor, The Public Interest, *Washington DC, USA*

This article originally appeared as a review of the book A Nation Under Lawyers *by Harvard Professor Mary Ann Glendon, published by Farrar, Straus and Giroux. It was published in the Spring 1995 issue of* The Public Interest. *The book being reviewed is a critical consideration of the American legal profession in what is generally recognised as being a legalistic society. The description of the problems of American lawyers, and of the American judiciary, seems to be very apposite for us here in New Zealand, although of course not identical. The case of* Brown *referred to in the text is of course the famous landmark decision of the Warren Supreme Court in 1954 on the desegregation of public schools. This piece is reprinted with permission of the author and* The Public Interest, *Number 119, Spring 1995, pp 119-123,*

One of the most unfortunate legacies of the American experience in the middle part of this century is the degree to which expectations have been inflated with regard to government's ability to resolve complicated social conflicts. As executive orders, legislative mandates, and Court rulings came down to the people from on high, imperatives of individual responsibility were gradually abandoned. And as federal action replaced personal obligation, "citizenship" was redefined with an expanded conception of privilege and a greatly reduced understanding of duty.

Like a rubber band that has been over-stretched, the integrity of the notion of citizenship is exceedingly difficult to restore. Thus, it is not surprising that the instinctive reaction to the identification of a social dysfunction is to search for some formalistic salve. In *A Nation Under Lawyers*, Harvard Law School Professor Mary Ann Glendon surveys the current crisis in the legal profession, explicating the particular problems extant at the bar, on the bench, and in our law schools. Rejecting facile answers, she insists that reformation is possible only through a nuanced appreciation for the origins of these problems.

Law and practitioners

America, Professor Glendon explains, is a fundamentally legalistic society. For over two hundred years, our passion for liberty, justice, and self-government has been manifested in an unwavering respect for the law, law that has been applied as easily to the president of the country as to the commonest criminal. The practitioners of this law have accordingly been entrusted with fulfilling our most important responsibilities: 31 of the 55 delegates to the Constitutional Convention were lawyers; 23 of our 41 presidents have been lawyers; a majority of our current congressmen and cabinet officers are lawyers. Even some of our greatest fictional heroes, from Atticus Finch to Perry Mason, have been upstanding members of the bar. Glendon contends, however, that the manner in which law is practised has changed for the worse over the last 30 years. Morals have taken second place to money, while the wise counsellor has been shoved aside by the "Rambo" litigator.

The signs of the decay are clear: the prevalence of once-forbidden attorney advertising, the increasing acceptability of contingency-fee arrangements, the decrease in job security even among partners, and the end of lockstep compensation. There has been a corresponding explosion of litigation, with filings in federal Courts having tripled between 1960 and 1990. Activating these changes, Glendon suggests, has been the full entry of the legal profession into the free market.

For years, law was practised within a false economy – big companies loyally lavished a single firm of choice with all of their legal business; the heads of firms took care to assure all of their associates stable, well-paying positions, even "carrying" less able lawyers who were unlikely to ever make partner; and a gentlemanly reserve, placing a high value on corporate and contract work and frowning upon actual Courtroom activity, prevailed. The cost of maintaining such a system eventually became too high for even the wealthiest consumers, and the "golden days" of law drew to a close.

Law firms that had grown used to supporting certain inefficiencies, not to mention expensive perquisites, on the backs of their corporate patrons were dismayed when these clients began to shop their business around to other firms to find competitive pricing. For less specialised work, many companies began to use "in-house" counsel, which provided basic legal services at a fraction of the price charged by big firms. The ethics that had long dominated the legal profession were soon ignored as the industry was destabilised. Suddenly, there was intense competition for business; lawyers who were not contributing enough to their firms began to be eliminated, and "rainmakers" – attorneys able to bring in business – were at a premium. The abiding aversion to litigation fell away from the practice of law as attorneys began to scramble to survive.

The most basic feature of the consequent change in the profession, Professor Glendon points out, has been the shift in roles among lawyers from "officers of the Court" to uncritical advocates. Once respected and depended on to give sound advice in difficult situations, economic considerations and human nature conspired to relegate most lawyers to the status of functionaries. In easier times, a good attorney could give a client sound legal advice, regardless of what the client hoped to hear. Today, few attorneys can afford such candour; "client loyalty" is sovereign. In the now-competitive marketplace of legal services, attorneys are sought

out simply for their ability to win cases.

The idea of some shared moral compass to guide the practice of law has little currency now, and the informal understandings on which the profession was long based are all but ignored. Today, complains Glendon, "ethical agility" has supplanted informed reason as the most important survival trait among lawyers. Unheeded has been Roscoe Pound's caution that law is "no less a public service because it may incidentally be a means of livelihood".

It is important to realise that this is a relative change; the bar has always harboured its share of hucksters and apostates. Glendon's point is simply that the exception has begun to overtake the rule. As she makes clear, the sense of decline in the field of law is uncomfortably palpable. What is not clear, however, is why the imposition of market discipline on the legal-services industry caused such a significant moral crisis. Leaner should not necessarily imply meaner, particularly in a profession with a strong sense of public duty and a strict, self-imposed code of ethics.

The cause is not unfamiliar: unintended consequences. In the process of democratisation, the shedding of tradition necessarily restructured the way law was to be practised. New lawyers with new concerns established new rules. The negative effect that these new rules have had on the bar simply need to be weighed against the positives associated with greater egalitarianism and economic discipline.

Judiciary

The second sphere of the legal world, the judiciary, is no less troubled. Professor Glendon reminds us that the Founders cited the regular administration of justice as "the great cement of society". Recently, fissures in that cement have appeared and are spreading rather rapidly. She argues that the problem is basically one of philosophy, a struggle between the forces of "classicalism" and "romanticism" over control of the nation's Courts.

Since the *Brown v Board of Education* decision, Glendon asserts, there has been a substantial re-evaluation of what it means to be a Judge and of what the role of Courts in our society should be. The classical conception of justice holds that the role of the Judge is to determine what the law is; the increasingly popular romantic understanding encourages Judges to tell us what our values should be. Glendon admits that

> there was no reason to think that the school desegregation cases would be followed by extensive judicial foreclosure of local self-determination on matters ranging from defamation, the details of capital punishment, and exclusion of evidence obtained in warrantless searches to pornography, abortion regulations, Christmas displays, and school curricula.

Unfortunately, however, the ameliorative power of *Brown* was used to justify politically motivated judicial activism rather than taken as an individual example of justice done. A continued reliance on the Courts to enact a particular social agenda has ensured that "every advance of individual and minority rights is at the expense of another core constitutional value: democratic decision making".

Thus, the Warren Court paved a slippery slope. The use of the Courts to win "justice" for certain aggrieved groups sacrifices the essence of democracy. The potential for individual political action – democracy at work – is blunted by an appeal to a centralised institution – the Court system. This overriding of self-rule should not be misconstrued as a method of last resort for obtaining justice; it has become the preferred channel of many groups for a relatively quick social fix.

Law Schools

The "new faculty", as Professor Glendon calls it, has brought these same ideals into our nation's law schools. One of the most worrisome threats to the integrity of legal education, according to Glendon, is the appearance of radical ideological movements on campus. The problem is most evident in the rise of "advocacy scholarship", defined as research conducted in the specific service of a political ideal. Generally condoned by the new faculty, such work perverts the concern for balance that defines serious scholarship and undermines the legitimacy of the academy as a whole.

The groups promoting these activities, espousing philosophies like Critical Legal Studies, recklessly slay any sacred cow that they can catch. Their suggestions run from a wholesale re-evaluation of constitutionalism as the basis for our legal system to job rotation at the law schools, whereby janitors, secretaries, and professors would alternately take on each other's positions. Such absurdity has served primarily to underscore the point to which things have degenerated on campus, causing a former dean (quoted by Glendon) to observe that our law schools are faced with

> a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism.

In the wake of such enervating observations, the hope for a formalistic solution that will save the bar, the bench, and the law schools is not strong. The loosening of commitments – to ethical practice, restrained judging, and conscientious scholarship – has unmoored the legal world from its moral foundations. To her credit, Glendon resists offering a panacea and lets the depth of her insights suggest the nature of the needed reforms. Her lucid, engaging assessment of the crisis in law constantly steers the instinctively external, institution-oriented search for answers back to the appropriate level, that of the individual. Ultimately, the problem in law is merely symptomatic of the larger problem that exists in society: the need to revivify our sense of individual and professional responsibility. □

Professionalism

The passion for the honour of a profession, like that for the grandeur of our own country, is to be regulated not extinguished. Every man, from the highest to the lowest station, ought to warm his heart and animate his endeavours with the hopes of being useful to the world, by advancing the art which it is his lot to exercise.

Dr Johnson
The Rambler

Fast ferries:
New equilibrium versus ecological sustainability

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

In this article Mr Bruce Pardy considers the decision of Planning Judge Treadwell regarding the effects of the fast ferries in the Marlborough Sounds. He argues that the term sustainable management in the Resource Management Act has as one of its necessary elements what he describes as ecological sustainability, meaning the ability of an ecosystem to continue indefinitely in its existing state. He considers that the decision of Judge Treadwell is not in accordance with this view.

Introduction – The fast ferries

Shortly before Christmas 1994, fast ferries began making trips between Wellington and Picton. These ferries, operated by New Zealand Rail Limited and Sea Shuttles (NZ) Limited, offered a voyage of under two hours, which was substantially shorter than the three and a half hour sailings on the conventional Interislander ferries. All these ships travelled across Cook Strait and through Tory Channel and Inner Queen Charlotte Sound, in the Marlborough Sounds, to get to and from Picton.

Shortly after the fast ferries' service began, residents in Tory Channel noticed that the wash produced by the fast ferries impacting on the shoreline was substantially more powerful than the wash created by the conventional ferries. They became aware of numerous changes and effects along the shoreline which they attributed to this increased wash. These effects included substantial erosion, the stranding and destruction of marine and bird life, the washing up of large boulders onto the shore, disturbance of ancient burial grounds, potential damage to moored boats and structures such as boat sheds and ramps, and danger to individuals, particularly small children, who might be in the water or on the beach when a ferry passed.

The application

Concerned residents and the Te Atiawa Manawhenua Ki Te Tou Ihu Trust ("Te Atiawa") asked the Marlborough District Council ("Marlborough"), which had the primary regulatory authority under the Resource Management Act, to halt the alleged destruction. Marlborough declined. The residents then formed a local organisation called Save the Sounds – Stop the Wash ("STS"), and together with Te Atiawa applied for an interim enforcement order to stop the fast ferries from operating. Under s 320(3)(b) of the Resource Management Act, one factor which may be weighed in deciding whether an interim enforcement order should be granted is whether the applicant has given an undertaking as to damages: a promise to compensate the respondent for any losses resulting from the interim enforcement order in the event that the order was not confirmed after a full hearing. STS and Te Atiawa did not have the financial resources to make such an undertaking and Judge Treadwell of the Planning Tribunal declined to make an order on that basis.

STS and Te Atiawa nevertheless proceeded with an application for a permanent enforcement order. Marlborough eventually filed an application for a declaration as to whether it had the power or the duty to abate the operation of the fast ferries. The day before the hearing commenced, the STS and Te Atiawa application was joined by the Minister of Conservation.[1] The applications were heard together before the Planning Tribunal in March and April 1995, and Judge Treadwell's decision not to make an enforcement order restricting the operation of the fast ferries was released in early May. (*Marlborough District Council v NZ Rail; Save the Sounds-Stop the Wash v NZ Rail,* Planning Tribunal Decision W40/95, His Honour Judge Treadwell, 5 May 1995.)

The impact of the wash along the shore was found to have been severe enough to alter the equilibrium of the ecosystem. Despite that finding, the wash was held to be not adverse. One of the reasons for that conclusion was the possibility that a new ecological equilibrium would be established. The implication of the decision is that sustainable management, rather than requiring the protection of existing ecological equilibrium, calls for the maintenance of any equilibrium, even if created by the impact of a new activity. The decision is remarkable and raises fundamental questions about the purpose of the Resource Management Act and the meaning of sustainable management.

The issues

The legal issues in the applications can be reduced to two main questions: (1) Under s 12, was the operation of the fast ferries an allowed activity?; and (2) even if so, did the operation of the fast ferries create an adverse effect so as to warrant an enforcement order under s 17? The issue of altered equilibrium arose in the context of the s 17 inquiry.

The findings

(a) Section 12

Section 12(1) states:

> No person may, in the coastal marine area –
> (c) disturb any foreshore or seabed (including by excavating, drilling or tunnelling) in a manner that has or is likely to have an adverse effect on the foreshore or seabed . . .; or
> (e) destroy, damage, or disturb any foreshore or seabed . . . in a manner that has or is likely to have an adverse effect on plants or animals or their habitat; . . .
> Unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent.

There was an old Marlborough planning scheme which, under the Resource Management Act's transitional provisions (specifically s 367), was equivalent to a regional coastal plan. However, it contained no reference to the operation of ferries and was not relevant. There was also an old Marlborough Proposed Regional Coastal Plan which, like the planning scheme, predated the Resource Management Act. Judge Treadwell held that under s 370(3), this document was to be treated as continuing in force even though it was no longer really proposed as a future plan (at 8):

> it is regarded by anyone who has any connection with it as being a document which has never passed through the gamut of objections and despite the fact that the council have no intention of pursuing it through the statutory process further. It is an abandoned document.

This proposed plan contained general reference to the desirability of both the conservation and utilisation of the coastal resources of the region. It also acknowledged the importance of the transport link between the North and South Islands. Judge Treadwell made two observations about the plan. First, its objectives were weighted in favour of environmental protection; and second, a fast ferry service was not contemplated when the plan was proposed. Nevertheless, Judge Treadwell concluded (at 9) that had the plan been in force, operation of the fast ferries would have been an allowed activity and therefore the restrictions in s 12 did not apply.

One more section was relevant to the s 12 issue. Section 418(6B) states:

> For the purposes of this Act, Section 12(1) and (2) shall not apply in respect of any activity lawfully being carried out in the coastal marine area, before the 1st day of October 1991, which did not require any licence or other authorisation relating to such activity under any of the Acts, Regulations, or By-laws or parts thereof, amended, repealed, or revoked by this Act, until a regional coastal plan provides otherwise.

If the fast ferries had been operating legally prior to 1 October 1991, s 12 could not be applied to them. But because they had been launched in late 1994, the applicants submitted that s 418(6B) should not apply. Like the conventional ferries, the fast ferries were being used to make the link between Wellington and Picton. However, the design and capability of the vessels were different, as were their environmental effects. However, Judge Treadwell concluded that the operation of the fast ferries was a lawful activity predating 1 October 1991. In the words of the decision (at 9),

> The main argument . . . suggesting that these provisions did not apply was that the fast ferries were a different type of activity from that being carried out as of 1 October 1991. I do not accept that argument. I accept that different vessels with different effects are carrying out the same activity, namely, a Cook Strait ferry service.

The extrapolation of this finding is that the existing uses provisions of the Resource Management Act apply to new activities if they fall into a broad category of enterprise which was carried on before October 1991, even if they are carried out in a a different way with different environmental effects. Arguably, this would encompass all manner of activity, such as operating a new manufacturing facility, harvesting resources at a higher level, or building a bigger dam. This is a startling conclusion. If applied in this way, the fast ferries decision will significantly increase the number of activities which are excluded from duties and restrictions in the Act.

(b) Section 17

Section 17 imposes a duty to avoid, remedy or mitigate any adverse effect on the environment arising from an activity whether or not it is an allowed activity. It was found by Judge Treadwell on the evidence that changes had been caused to the shoreline and ecosystem along the ferries' route in the Sounds. However, it was also found that those changes were not adverse and therefore did not justify an order under s 17.

Expert evidence given at the hearing conflicted on the state of the ecosystem. Some testimony suggested that a new state of equilibrium had almost been produced already by the impact of the fast ferries. Other evidence contradicted that finding, citing the lack of any evidence of new equilibrium and suggesting a state of ongoing instability. There appeared to be general agreement that significant ecological change had occurred. One of the expert witnesses on marine fauna said this (at 42):

> There can be no doubt that recent and widespread environmental change has occurred and that the physical environment is likely unstable at present. It is very likely that, in time, the physical environment will adjust and re-stabilise itself with respect to the new impact. However, the new physical environment of affected areas will be different, thus the plants and animals which can survive there will comprise different assemblages and communities than those which existed before the fast ferries began to operate.

This passage describes a different ecosystem to the one which existed before the fast ferries. Judge Treadwell essentially concluded (at 46) that substantial ecosystem alteration was caused by the fast ferries, but because a new equilibrium had been or would be established, the impact was not adverse.

Sustainable management and ecological sustainability

The purpose of the Resource Management Act is sustainable management. Sustainable management is defined in s 5(2) of the Act:

> 5(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 5(2) has been the subject of much commentary. In particular, its wording has left open the question of whether priority is to be given to environmental protection or whether it calls for a balancing between environmental and human priorities.[2] Whatever the answer to that question, it is clear from the wording of the section that ecological considerations are not subordinate to other factors; they are at least on an equal footing. It therefore follows, although not referred to by name in s 5, that one of the elements of sustainable management is ecological sustainability.

Sustainability and altered equilibrium

I have argued elsewhere[3] that ecological sustainability means the ability of an ecosystem to continue indefinitely in its present state; that it means the absence of permanent change caused in an ecosystem by human activity. An altered ecological equilibrium is the antithesis of ecological sustainability: it means the ecosystem has been permanently changed. The decision in the fast ferries case does not accord with these principles.

In broad terms, there are only two sources of environmental impact: human activity and non-human events. There are only two kinds of effects: temporary and permanent. The target of environmental legislation is human impact which causes permanent change. The other variations (human impact causing temporary change, and non-human impact causing temporary or permanent change) are not relevant because they do not affect ecological sustainability. When an effect is only temporary, the equilibrium levels of ecosystem elements have not been affected. In terms of ecosystem function, nothing has happened. When a permanent effect is caused naturally without human contribution, the ecosystem may indeed change, but the change cannot be described as environmental damage; the system is simply evolving.[4]

It was found that the impact of the fast ferries would establish a new equilibrium. A new equilibrium indicates permanent change. Rather than justifying a finding that the impact was acceptable, the establishment of a new equilibrium places the impact in the target category: permanent change caused by human activity.

Why does ecological sustainability require the protection of the existing ecosystem, rather than the maintenance of any state which is stable and continuing? After all, in many cases ecosystems are not in an original or pristine condition but in a state already influenced by human interference. The ecosystem of the Sounds prior to the fast ferries could not be described as virgin; the human activity in the area, including the operation of the conventional ferries, has probably had some lasting effect. Why then should the equilibrium prior to the fast ferries be preferred to the equilibrium after? The objective of environmental protection is the preservation of the existing state because it is closer to a natural or pristine state than the one that follows the new impact. The existing state is the best case scenario remaining (in the absence of remedial measures to repair the effects of previous impact). Equilibrium is not the *goal* of sustainability; monitoring equilibrium is the *means* by which to determine if permanent change has occurred to the existing state.[5] Many stable ecosystems have been established by human activity. For instance, a hydroelectric dam which permanently floods a valley may create a new stable equilibrium. It also eliminates large areas of habitat and species of flora and fauna. The establishment of the new equilibrium constitutes environmental damage. It does not achieve ecological sustainability.

It is easy to cause permanent change to an ecosystem. It is easy to alter how the system functions so that a new equilibrium is established. It is much more difficult to leave the system alone. That is why statutes like the Resource Management Act are necessary.

Nevertheless, the creation of a new equilibrium appears to have been the criterion applied by Judge Treadwell to whether impact was sufficiently adverse to justify an order under s 17. Because a new equilibrium was in the process of establishing itself along the shoreline of the sounds, no order for the avoiding, remedying or mitigating of the impact was issued.

Conclusion

Marlborough District Council v NZ Rail is an important decision. It indicates that the establishment of a new equilibrium prevents impact from being adverse, and that ecological sustainability means the presence of any ecosystem equilibrium rather than the preservation of existing equilibrium. It represents a significant narrowing of the applicability of the Resource Management Act. □

---

1 The Minister for the Environment appeared pursuant to s 274 but not as an applicant.

2 See for instance DE Fisher, "The Resource Management Legislation of 1991: A Juridical Analysis of Its Objectives" *in* Brooker & Friend, *Resource Management* (1991) Vol 1; KJ Grundy, "In search of a logic: s 5 of the Resource Management Act" [1995] NZLJ 40.

3 B Pardy, "Sustainability: An Ecological Definition of the Resource Management Act 1991" (1993) 15 NZULR 351.

4 This is so even if the change is not to the advantage of the ecosystem's human inhabitants. Any steps to prevent the evolution of ecosystems may be justifiable on social or economic grounds; however, they do not amount to a defence of the ecosystem but rather an interference with it.

5 Assuming that the concept of equilibrium in ecosystems is valid. There is evidence to suggest that it is not. See for instance AD Tarlock, "The Nonequilibrium Paradigm in Ecology and the Partial Unravelling of Environment Law" (1994) 27 *Loyola of Los Angeles Law Review* 1121.