

THE NEW ZEALAND

LAW
JOURNAL

21 JULY 1995

Post-Privy Council appeals

The determination of the Government to abolish the right of appeal from our Court of Appeal to the Judicial Committee of the Privy Council may not be approved of generally in the legal profession, but this seems unlikely to deter the Cabinet. Abolition of this present right appears, on the face of it, to be a simple matter; and the citizen on his Sydenham omnibus is unlikely to notice any great change in media reports of the behaviour of District Court Judges in particular cases. And to recall what particular politicians have said on the issue in the past would of course only be an exercise in remembering but another example of duplicity. We have long since learnt to grin (well, wince) and bear it; and not to expect respect for principles or even simple consistency from politicians. If the right of appeal is to go, for whatever real or imagined reasons, then the question is what, if anything, is to take its place. The Solicitor-General has produced a report with a recommendation – Option 2 – that seems to be, at best, a retrograde step if appeals are abolished.

An editorial entitled "Justice on the cheap?" on an earlier report, that of the Law Commission entitled *The Structure of the Courts*, was published at [1989] NZLJ 113. In that editorial a suggestion was made for a structure that would involve the creation of a Supreme Court to hear final appeals from the Court of Appeal with some Judges of the Court of Appeal who had not sat on the original appeal sitting on the final appeal. The major criticism made of the proposal, and one that was strongly expressed, was that the Court of Appeal Judges would not agree to some of them sitting on appeal from others of them. This point is referred to briefly in the Solicitor-General's report at paragraph 70.18 as a criticism of Option 3 which is said to have the disadvantage of Court of Appeal Judges sitting on appeals from a Court that has included one or two of their number.

Be that as it may, it is worth noting that in the past some New Zealand Judges have sat on the Privy Council in cases on appeal from decisions of the New Zealand Court of Appeal. Three cases come to mind, and there may be more, in which the Privy Council, including a New Zealand Judge, has reversed the Court of Appeal

decision. In *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 Sir Owen Woodhouse was a member of a unanimous Board in allowing an appeal from a judgment of Cooke, McMullin and Somers JJ. Then in *Re Welch* [1990] 3 NZLR 1 Sir Robin Cooke actually wrote the unanimous judgment of the Board allowing the appeal from Somers, Casey and Hardie Boys JJ. Finally in *Re Goldcorp Exchange Ltd (In Receivership): Kensington v Liggett* [1994] 3 NZLR 385 Sir Thomas Eichelbaum was a member of the Board that reversed the judgment of Cooke P and Gault J (McKay J had dissented). There is therefore precedent at least for one Judge of the Court of Appeal, in his Privy Council manifestation, sitting in judgment on other members of the collegiate group of Judges of the Court of Appeal.

The recent report of the Solicitor-General is a very useful and well presented one in terms of the questions at issue. It was prepared as required by a Cabinet Strategy Committee decision of 5 October 1994. The Solicitor-General was invited to prepare a report on the constitutional, historical, jurisprudential and structural issues relating to the availability of appeals to the Privy Council, including arguments for and against its retention and an evaluation of possible alternatives to it. It could not unreasonably be said that the Cabinet Committee then went on, in effect, to state that there were to be no alternatives because, it said, any alternative should seek to be fiscally neutral. If this were to be taken literally of course then the only way fiscal neutrality could be achieved would be not to make any change at all. As the report makes clear simply to abolish the right of appeal and put nothing in place of the Privy Council will still cost money. In fact this financial requirement of the Cabinet Committee limits the so-called available options; but nevertheless many may be disappointed to note the Solicitor-General's practical and strong personal support for what many will see as this Treasury perspective.

The report sets out in simple diagrammatic form various arguments for and against the right of appeal to the Privy Council. Politically this appears to be an

exercise in futility as no one in the political arena now seems to be prepared to defend and explain the value of this right of appeal. The more serious issue now therefore must be what is to replace this right, but of course it has been pre-determined, in effect, by the terms of the Cabinet Committee decision.

The report suggests four possible "replacement" options. These are:

Option 1: Simple Termination of Appeals

Option 2: Establishment of a civil appeal division of the Court of Appeal

Option 3: Addition of a civil appeal division with a further appeal to the Full Court of Appeal

Option 4: Creation of Appellate Division of High Court with Further Appeal to Court of Appeal

The Solicitor-General does not support the first option for reasons that would also seem to lead to rejection of the second option. He argues that unless the Court of Appeal is able to give cases before it what he calls "full reflective judicial consideration" it will lose public confidence as a final appellate Court. It is presumably the Solicitor-General's opinion that the second option would enable full reflective judicial consideration; but in view of the fact that he proposes only a final Court of three for most cases, and no second tier of appeals, this is hard to see.

Options three and four would both allow for a second

tier of appeal, but the Solicitor-General sees no need for this. In this issue of *The New Zealand Law Journal* at p 208 there is set out the Solicitor-General's argument on this point. Following that is the response of the New Zealand Law Society and then a variety of responses from a widely invited group, of views of individual members of the profession.

On the face of it the question of Court structures and appeal systems is not of great moment to most people. Legal practitioners however have a particular responsibility in this area. Changes of such moment need to be considered carefully. They concern much more than the technicalities or mechanics of the legal system. They involve major social and constitutional issues. New Zealand has no written constitution and no second legislative Chamber; we are geographically isolated; we have a small population; and MMP is likely to circumscribe the activities of our single-Chamber legislature if not emasculate the decision-making process altogether. All of this means that the Courts are going to be even more significant in policy-making than they are at present. The structure of our Court system and the restraints on judicial political activism imposed by a particular form of appeals, become therefore of special importance. If Australian States, despite having abolished appeals to the Privy Council still have two tier appeals it seems strange that we should not; particularly if the real reason for the failure to do so is just to be fiscally neutral.

P J Downey

Recent Admissions

Barristers and Solicitors

Adams L-J A	Christchurch	2 June 1995	Gribb R B	Hamilton	2 June 1995
Ashworth L J	Hamilton	2 June 1995	Gurnell A J	Hamilton	2 June 1995
Barlow K M	Hamilton	2 June 1995	Hardaker J M	Hamilton	2 June 1995
Bell R E	Hamilton	2 June 1995	Henderson J K	Christchurch	2 June 1995
Bidois D R	Hamilton	2 June 1995	Hesketh B J	Hamilton	2 June 1995
Blackie R J	Christchurch	2 June 1995	Higgins D E	Christchurch	2 June 1995
Bodle C J	Hamilton	2 June 1995	Holder S A	Christchurch	2 June 1995
Clyne A V	Christchurch	2 June 1995	Johns A C	Hamilton	2 June 1995
Corcoran A S	Christchurch	2 June 1995	Kerry J U	Hamilton	2 June 1995
Crozier L J	Christchurch	2 June 1995	Le Creu D H V	Christchurch	2 June 1995
Currie K P	Christchurch	2 June 1995	Lim M C L	Hamilton	2 June 1995
Davies R A	Hamilton	2 June 1995	McClelland S M	Christchurch	2 June 1995
Dodd T M	Hamilton	2 June 1995	McKevith M R	Christchurch	2 June 1995
Dorset A J	Christchurch	2 June 1995	McKinlay B M M	Christchurch	2 June 1995
Edge J A	Christchurch	2 June 1995	McLisky C J	Christchurch	2 June 1995
Dwart L C	Hamilton	2 June 1995	Meredith S J	Christchurch	2 June 1995
Foster-Pratt D M	Hamilton	2 June 1995	Mulligan H J	Christchurch	2 June 1995
Gin K Yem Moi	Christchurch	2 June 1995	Nevell B C	Christchurch	2 June 1995
Gosset G	Christchurch	2 June 1995	Nichols K M	Hamilton	2 June 1995
Gould J R	Hamilton	2 June 1995	Schneideman TC	Auckland	1 June 1995

Case and Comment

Equitable tracing:

Bishopsgate Investment Management Ltd (in liq) v Homan and Others [1995] 1 All ER 347

In this case Bishopsgate Investment Management Ltd (BIM) was the trustee of the assets of various pension schemes for employees of MCC plc and other companies owned by or associated with the late Robert Maxwell. Very large sums of money from the pension fund had been improperly paid, directly or indirectly into the bank accounts of MCC and other companies, which accounts either were or later became overdrawn. Administrators were appointed on MCC's insolvency. These administrators wanted to make an interim distribution amongst MCC's creditors. BIM (then in liquidation) claimed an equitable charge in priority to all other unsecured creditors of MCC, on all the assets of MCC for the full amount of the pensions money of BIM wrongly paid to MCC.

Vinelott J held that BIM could only claim an equitable charge on any assets of MCC in accordance with the recognised principles of equitable tracing and these principles did not permit tracing through an overdrawn bank account. The Court of Appeal (Dillon, Leggatt and Henry LJ) agreed.

In the Court of Appeal BIM relied on certain observations made by Lord Templeman in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75 at 76-77:

... But equity allows the beneficiaries, or a new trustee ... to trace the trust money of all the assets of the bank and to recover the trust money by the exercise of an equitable charge on all the assets of the bank ... that equitable charge secures for the beneficiaries and the trust

priority on the claims of customers ... and all other unsecured creditors.

Sir Robin Cooke P was one of the members of the Board in the Privy Council which decided the *Space Investments* case. In *Liggett v Kensington* [1993] 1 NZLR 257, Sir Robin Cooke treated the statements by Lord Templeman in the *Space Investments* case as authoritative general statements of the relevant law to be given wide application. In *Re Goldcorp Exchange Ltd* (in receivership) [1994] 2 All ER 806 the Privy Council revised the majority decision of the Court of Appeal. Lord Mustill (at 827) pointed out that the Board in *Space Investments* was concerned with a mixed, not a non-existent fund. Dillon LJ and Leggatt LJ in the present case noted that Lord Templeman's observations above were obiter.

Leggatt LJ stated (at 355) that the *Space Investments* case is authority for no wider proposition that where a bank trustee wrongly deposits money with itself, the trustee can trace into all the bank's credit balances. Dillon LJ endorsed *Re Diplock* [1948] 2 All ER 318 at 347 where it was said:

The equitable remedies presuppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself.

Also endorsed was the view that tracing was only possible to such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period (*Roscoe v Winder* [1915] 1 Ch 62). This "lowest intermediate

balance" rule seems to mean that the right to trace disappears once the balance in an account falls to nil. (See Maxton, *v* Equity Update NZLSS 1993 at 69.)

It was argued that the beneficiaries under the pension schemes never undertook the risk that their pension fund would be misappropriated and paid into the overdrawn bank account of an insolvent company whereas all the banks which lent money to MCC took their chance, as a commercial risk, on MCC's solvency. BIM thus claimed an equitable charge over (i) money in MCC's accounts which had received BIM money or the proceeds of any assets of BIM misappropriated from it, and (ii) over any assets acquired out of any such bank account, whether or not in credit as at the date such assets were acquired.

One such account was in credit when the administrators were appointed; however Dillon LJ held that in the absence of clear evidence of intention to make good the depredations on BIM it was not possible to assume that the credit balance had been clothed with a trust in favour of BIM and its beneficiaries. With regard to (ii) the *Goldcorp* decision applied; trust money cannot be traced through an overdrawn and therefore non-existent fund.

At [1993] NZLJ 294 Zohrab expressed concern over *Liggett v Kensington* and the *Space Investments* decision. The writer considered that the wider theory of tracing proposed by these cases could allow preferential recovery in circumstances where none would be available under traditional theory. The Privy Council in the *Goldcorp* decision and now the English Court of Appeal in the present case put such concerns at rest. The traditional tracing rules apply.

Nicky Richardson
University of Canterbury

Court structure and appeals post-Privy Council

The Solicitor-General has recommended a Court structure consequent on the possible (or probable) abolition of the right of appeal to the Privy Council. He has considered four options. In two of these there would be no second tier of appeals as there is at present. The report is discussed in the editorial in this issue at [1995] NZLR 205. The editorial also serves as an introduction to the issues raised in the comments published below. An extract from the report on the two tier appeals question and the reply of the New Zealand Law Society is also published. These pieces are followed by invited responses received from members of the profession.

Extracts from Solicitor-General's Report

7 Is There a Need for Two Appeals?

48 This argument has long been regarded as of prime importance by the New Zealand Law Society. Likewise, the New Zealand Bar Association is of the view that if the right of appeal to the Privy Council is to be ended then that appeal should be replaced by another tier of appeal so that a two tier appeal system continues. The basis of this view is that following a first instance judicial decision, the interests of justice are best served by allowing an opportunity for two appeals. The right of appeal to the Privy Council presently meets that perceived need. It is then argued that unless and until such a two tier appellate system can be constructed in New Zealand above the High Court's first instance judgments, the appeal to the Privy Council should be retained. This is not, of course, so much an argument against abolition of the Privy Council appeal as an argument for retaining it until a two tier appellate system is put in place in New Zealand. I accept, however, that the importance of this issue requires that it be considered on its merits rather than as an incidental aspect of a decision on abolition. Accordingly, I address the pros and cons of the argument for having two appeals as I see them.

49 It is generally agreed that there is a very strong argument for there to be one right of appeal from any decision of a Court. While there is a public interest in there being an end to litigation following completion of a sound judicial process, there is always a possibility of error by a trial Court which causes injustice. For that reason, the desirability of an opportunity for review and, if necessary, correction of a trial Court's decision at a higher level of the judicial system is generally accepted. Indeed, in the area of criminal law process, the right of a convicted person to appeal is recognised as a fundamental right and is protected by s 25(h) of the New Zealand Bill of Rights Act 1990.

50 The need to have an opportunity to bring a further appeal, in my view, is much more debatable. There are two main arguments advanced. First, while a first appeal will almost invariably address issues of error correction, a second appeal can focus on the distinct legal policy issues, namely what the law should be in the context of the facts of the case. Secondly, it is said the availability of a second

appeal provides an opportunity for legal argument to develop and mature clear of the atmosphere of conflict which pervades both a trial and first appeal under our adversary system. The critical issues in the case, on this view, are better analysed and the competing considerations better presented in legal argument on a second appeal. This in turn is said to lead to a better quality decision by the second appellate body with the likely result of greater justice in the particular case. It will also result in a more considered and thus better statement of the legal principles arising for future application as precedent. It is pointed out that most other countries within the common law system provide for two rights of appeal, the second of which requires leave. Our own system, of course, already provides for second appeals in respect of cases beginning at a level below the High Court.

51 The essence of the converse argument is that appeals delay finality in the resolution of disputes by judicial process. Very often for the party who is successful after the first level of appeal a further appeal simply

means further delay in deriving the benefit of the first Court's judgment. Furthermore, all appeals are costly and this is a factor which may operate unfairly between parties according to their means. These detriments, it is said, are not outweighed by the perceived advantages of a second appeal. As to those "advantages", there is no reason why during the hearing of a first appeal relevant legal policy considerations cannot be effectively addressed along with arguments based on perceived errors requiring correction. As a result of the highly effective barriers to bringing any criminal appeals before the Privy Council the Court of Appeal, in the context of a single right of appeal, has developed New Zealand's criminal law and at the same time corrected errors by the trial Court. The present single appeal in criminal cases negates the argument advanced by some proponents that to have two opportunities for appeal has been seen as a matter of constitutional importance.

52 In my view, the proposition that a two appeal system will produce greater justice in particular cases or a better articulation of the law than will a single appeal system is unconvincing. At the level of the Privy Council, or any second

appellate body, it is clear that a percentage of decisions of the Court below will be reversed. As previously observed, at this level decisions tend to reflect a judicial preference for one of two finely balanced viewpoints. It is not often the case that an unbiased observer can categorise a second appellate decision as clearly correcting an error (or for that matter, as creating one). On the other hand, the delay and cost consequences of a second appeal are both real and inevitable.

53 It is true that many other countries within the common law system provide an opportunity for a second appeal hearing. Generally, however, a second appeal will only be available to the few who can show a sufficient element of general or public importance in their case. Furthermore, in Australia, Canada and the United States some cases of great importance can be decided originally as well as finally in the highest Court. A two tier system is usually seen as necessary in countries which have a federal system. The superior federal court will resolve different views of the law arising in the state appellate courts. Large countries tend also to have an opportunity for a second appeal. At that level, differences among members of a

multi-division first appellate Court will be resolved and consistency in precedent provided. As a country which does not have a federal system and whose Court system serves only 3.5 million people, we have more flexibility. Provided we can ensure appeals are decided by an appropriately organised and provisioned appellate Court system, there is, in my view, an opportunity to take advantage of the reductions in delay and cost that come with a single right of appeal.

54 Of course the chance to run once again arguable issues before a higher appellate Court is one which is inherently attractive to an unsuccessful New Zealand litigant and, often, to the litigant's advocate. The issue, however, is at what point will the public and private interest in putting an end to litigation outweigh the value of allowing a continuing search to see if greater justice can be found. Provided an appeal has been heard by a Court comprising judges appropriate to decide that particular case, in my opinion, there is no reason why the decision on a single appeal should not be the final decision. The challenge in considering the future structure of the Courts is to identify a model which meets those ends. □

New Zealand Law Society media release, 6 June 1995

New Zealand Law Society President, Austin Forbes, says that the debate relating to the abolition of the right of appeal to the Privy Council should include a careful consideration of appropriate alternative appeal structures for the New Zealand court system.

The issue is one which goes to maintaining public confidence in the courts. The Society has proposed that there should be two levels of appeal above the High Court. It sees

that as being very important. The High Court is the court of original jurisdiction in New Zealand. Virtually all other countries with a similar common law legal system have two rights of appeal above the court of original jurisdiction, with the first right of appeal being as of right but the second by leave only.

The Society and the legal profession continue firmly to be of the view that there should be two levels of appeal. In a recent report to the

Government the Solicitor-General recommended there should be only one level of appeal. The Society does not consider that to be satisfactory.

The Society has proposed that there should be an intermediate appeal court between the High Court and the Court of Appeal as the final appellate court (which might well be renamed), which could either be an appeal division of the Court of Appeal or the High Court, sitting

with three judges. The full Court of Appeal would then normally sit with five judges. An appeal from any appeal division would be by leave only. It would apply to both criminal and civil cases. There would also be the power to "leapfrog" cases direct from the High Court to the full Court of Appeal, where it was thought that their importance justified this.

An alternative which the Society would be willing to accept, if necessary, would be a more restricted right of appeal from an appeal division in any case which was considered to be truly of general or public importance or where there are other special circumstances. Only a few such cases would be likely to arise each year and leave to appeal would be expected to be

granted sparingly. The full implications of a case may not be apparent until after the appeal division's decision has been given. There might be cases which, on reflection, should probably have been "leapfrogged" to the full Court of Appeal originally. It would also cover those cases where there was, for instance, a strong dissenting judgment or where the decision was generally regarded as controversial.

A second level of appeal provides an opportunity for the arguments on each side and for the legal issues to be more focused. By that stage the facts, which can frequently be quite complex, are likely to have become more clearly established.

We would need to be very careful about adopting a court structure

which allows for only one right of appeal from the High Court. We would need to be sure of the reasons for saying that this was satisfactory in New Zealand when it is not considered to be appropriate in other countries with a similar system. There obviously has to be a limit on the number of appeals but two is generally considered appropriate. That is what the Society and the legal profession wants. The Government will be strongly urged by the Society to adopt that structure.

The Society considers that other groups in the community, particularly those with a direct interest in the court system, ought to consider this issue carefully as well, as part of the present debate on the subject of the Privy Council. □

Responses from the profession

From **Colin Withnall, QC**
Dunedin

My view is firmly that there should be a right of second appeal. Briefly, I consider that the arguments summarised at paragraph 50 of the Solicitor-General's report in support of the retention of a two tier appellate structure are correct and compelling. The converse argument summarised in paragraph 51 concentrates on issues of delay and cost. The question must be asked – delay to whom and cost to whom?

The Courts and the legal profession exist for the purpose of resolving disputes between opposing parties. In the present economic jargon, the litigants are the clients and the system is the provider. The choice of whether we have a cheaper and quicker service or a slower and more expensive one is surely a choice to be made by the clients. If the clients see the advantages, as summarised in paragraph 50 of the Solicitor-General's report, as outweighing the disadvantages summarised in paragraph 51 and are prepared to put up with the disadvantages in order to gain the advantages, then I do not believe the Government has the right to take that choice away from them.

In my own experience, the debate and decision on a first appeal often brings the issues into sharper focus or provides a different perspective not only on the policy issues but on the strictly legal issues. The second level of appeal provides for such issues to be refined and argued in a way that is often not possible at the first level. This is true not only of cases which I have argued myself but cases where I have read an appellate decision and detected what, in my humble opinion, are inappropriate policy approaches or erroneous lines of legal reasoning. Taking away a second level of appeal deprives litigants of the opportunity to have these issues explored and the law refined and developed in a more measured and considered way than a single level of appeal, with its pressures to get the business completed, allows.

I should add that I am unimpressed with arguments to the effect that our best judicial minds could be under-employed in a two tier system. If one accepts the premise that our best judicial minds are capable of delivering decisions of

the same quality as the House of Lords or the Privy Council (which is the premise underlying the move to abolish the Privy Council) then it follows that those judicial minds should be operating in the same kind of rarefied atmosphere as the institution which they replace. In reality, the Solicitor-General's Option 2 provides for two classes of final appeal, those two classes being defined by the seniority and calibre of the Judges who preside. The proposition is that the Judges should decide what class of justice the litigant should receive. I believe that it is fundamentally wrong and it is the right of the litigant to decide whether he, she or it wants to proceed to the highest level with the delay and expense or be content with the decision given at a lower level. If there are to be two levels de facto then I believe we should recognise this openly and provide for two tiers of appeal.

From **Richard Fowler**
Barrister and Solicitor of
Wellington

- 1 I support the retention of a second appeal from decisions of the High Court. I do not accept the suggestion of further delay in deriving the benefit of the Court of first instance's judgment. That can be substantially addressed via the stay of execution jurisdiction and/or a filter on access to the final appellate tier. I do not understand why a federal system or a large population should in themselves be the qualifications for a second tier.
- 2 The real criterion is the quality of jurisprudence. While we might well have confidence in our nation state to provide the judicial excellence to staff a second tier (a separate issue really) do we have the confidence, given the current pressures on the present Court of Appeal, that a single tier of appeal will be able to provide that refined ultimate level of jurisprudence the nation deserves? This correspondent thinks not.

From **W V Gazley**
Barrister, of Wellington

You will have no delay on my part in asserting the absolute need of retaining the right of appeal to the Privy Council. I speak from personal experience with Court of Appeal "decision making".

First, however, of general import: The need for the Privy Council is evident from the number – even in recent times – of successful appeals from the Court of Appeal. Though providing no support for the rectitude of the Privy Council advice, I say that I commend its determination to that of the Court of Appeal.

For myself: With the Attorney-General as (consenting) defendant, I presented questions of law – styled by the Bar Association as being issues "of great public importance" – to the Court of Appeal. The questions were argued over two days; and argument included that of an *amicus curiae*, and that of the Law Society. The Court of Appeal decision, given some three months

after hearing, escaped decision on the merits of questions of "great public importance" by the Court's creating its own unargued strike out jurisdiction – that Gazley lacked the jurisdictional propriety to assail judicial ears with argument on, I repeat, "issues . . . of great public importance". Particularly so, when decision on the merits would demolish a recent determination of that same Court.

It is painfully evident that, if the Court of Appeal can deny the public a decision on issues of great public importance, there is the ineluctable requirement of recourse to a tribunal capable of deciding questions of public legal right. There is no tribunal better qualified to decide questions of LAW, be they of common law or statutory interpretation, than the Privy Council. Much of the expense could be saved if the procedure for such an appeal was one of, in large, written submissions. If personal appearance of counsel be desired by any party, that could be allowed on grounds that appealed as proper to the Privy Council; and then on appropriate security for costs being provided by the party seeking a personal hearing; a hearing unwanted by the opposite party. At the present day, advocacy is moribund; and, in any event and on questions of law, incapable of replacing well-presented written submissions – provided, of course, they are served up in a form to attract the sapidity of even the most slothful Judge.

There is inexorable need of the PUBLIC's having unquestioned right of appeal against a Court of Appeal judgment on issues of law.

From **J G Fogarty, QC**
Christchurch

I think that preferred option 2 is the way to go. My reasons are similar to the Solicitor-General's, though I do not agree that a single appeal system can be the equal of a two-appeal system. A right of appeal is to check the quality of the adjudication. All adjudications are expressions of opinion. On peer review some opinions will be seen as following from error of fact or law or both. Such errors should be put right at the first tier. Remaining issues will be

matters of opinion as to what the law should be. Where such issues arise, a superior Court can improve the quality by considering both the responses of the trial Judge and of the appellate Judges at the first tier. However, appeals are not a stairway to the truth. It seems common ground that parties should not have a right to a second appeal. I prefer option 3 in principle. However, for our small country, I agree that option 2 has to suffice.

From **T R Ingram**
Barrister, of Hamilton

In my view it is essential that there should be a right of second appeal. The issue is one of quality assurance. Without a second tier of appeals the incentive for that necessary and visible extra effort by the judiciary is much reduced.

The actual number of appeals, and their outcome, is not the measure of the effectiveness of the three tiered appellate system. The ever present knowledge that the product of judicial consideration can be twice subjected to appellate scrutiny in itself constitutes a very powerful motivating factor for the maintenance of judicial standards.

In an increasingly complex society, the quantity and level of difficulty of problems requiring judicial intervention can only increase. Witness the perceived need for a Bill of Rights, the growth of judicial review actions, and the Treaty of Waitangi jurisprudence. In these times, quality assurance should be enhanced if possible. The deletion of one tier of appeal can only weaken that object.

From **John Katz**
Barrister, of Auckland

Abolition of the right of appeal carries with it the very real problem of a replacement structure. The debate hitherto has largely been on the question of abolition of the right of appeal on the assumption that there would be in lieu some other appellate structure that preserved the two tier system. Previous proposals have included a South Pacific

Court of Appeal, utilising the services of the High Court of Australia and so on. I believe it is only in more recent times that true attention has been focused on what the Solicitor-General now suggests is his preferred option, a single right of appeal. That is something to which I am strenuously opposed.

Whilst I acknowledge that there have been relatively few appeals to the Privy Council and all appeals are occasioned by immense cost, the same arguments would not necessarily apply if the appellate structure was retained so far as a two tier system was concerned but the ultimate appellate Court was in New Zealand. Further, with the now vastly increased jurisdiction of the District Court, and what I believe is in the not too distant future a likely increase further still to possibly \$500,000, that Court will in a short time be the Court of first instance for the majority of litigants. Indeed, there are some proposals in England, of which you are no doubt aware, to constitute a single Court of first instance with all Courts in the hierarchical system thereafter being purely appellate Courts. I think Paul Radich in Wellington has prepared a discussion paper to like effect for New Zealand purposes.

I am not in favour of a single Court of first instance in New Zealand yet although I believe there is considerable merit in debating the proposal.

I strongly favour the retention of a two tier appellate structure. However, I also favour the second right of appeal as being limited, perhaps with the requirement that leave of the first appeal Court be obtained or in the event of leave being refused, the requirement that special leave be obtained from the second appeal Court. I will not profess to have any great familiarity with the English system, but I believe that a similar system does operate in that jurisdiction with rights of appeal to the House of Lords not being automatic but requiring leave of the Court of Appeal or the granting of special leave from the House of Lords itself if leave is refused in the Court of Appeal. In such a situation, I believe the second appeal right should be a limited right involving only cases which by reason of their public or general importance or for any other good reason ought to be pursued to a second appeal. This would be much

like the requirements at present contained in Rule 2(b) of the Privy Council (Judicial Committee) Rules Notice 1973.

From **J A Laurenson, QC**
New Plymouth

To my mind the issue of whether there should be one right of appeal or two, comes down to a question of public confidence in the judicial system as a whole.

When considering such a system the starting point must be to ask, what is the purpose of the system?

The answer, I suggest, is to provide the populace at large with a total process to resolve disputes which will:

- (a) finally produce the "right" answer; and
- (b) do so in a manner which will encourage confidence.

To date, experience has shown that where there have been two rights of appeal, some second appeals have been successful, or, if you like, the first one was "wrong".

For this reason the right to appeal a second time must help to engender confidence in the total system.

Because the second option does not include the right to a second appeal, it seems to me that such a system will necessarily reduce confidence in that system in the eyes of the "users".

I believe that it will do so for a further reason. This second option impliedly recognises that the full Court of Appeal would be better equipped to deal with some appeals, ie those with a high level of importance.

As a lawyer I have little doubt that the Judges involved in deciding which cases come within this category will be able to do so with a proper degree of discernment. However, the basis for that decision will be by definition, determined by a consideration of issues which are wider than those which may be of a high level of importance to the particular litigants.

In those cases which are not considered to be of a high level of

importance, those litigants will be left in the certain knowledge that not only have some second appeals succeeded in the past, but also, that there is a differently constituted body which is regarded as being of higher calibre which could entertain a second appeal if the system allowed for it.

I suspect that the wider community will not be impressed.

From **P D McKenzie**
Barrister, of Wellington

The proposal in the Solicitor-General's report that decisions of the High Court should be subject to only one appeal causes me some disquiet. Most jurisdictions have a two tier appeal system and I believe for good reason. The judicial process recognises that none of us, including even experienced Judges are infallible. Decisions made by a single Judge at first instance are reviewed by a panel of experienced Judges. The appeal provides an opportunity for a review of the earlier decision where the issues can be refined, arguments can be developed more fully in a less time constrained atmosphere and without the same adversarial tensions that are involved in running a trial and presenting evidence at first instance. But that panel of experienced Judges again is not infallible. There can be blind spots or temporising from even the most discerning Tribunal. The constraint of knowing that one's decisions are subject to review is a powerful one. True, few decisions are taken to the second tier (only 35 Privy Council appeals in the last five years) but the constraint that the right of further review brings will be present in every first tier appeal that is heard. No doubt logic requires that the second tier too should be constrained by a further right of appeal but here logic needs to give way to necessity. One tier is insufficient. Two is enough.

From **John McLinden**
Barrister, London

When God made New Zealand he gave its inhabitants two eyes, two ears, two arms, two legs, and two rights of appeal.

This system has advantages for everyone. It is not letting the cat out of the bag to reveal that on his recent stint in London the Chief Justice enjoyed the burst of adrenalin when counsel retired and Lord Templeman turned to him as the junior judge and said "Well Tom?" This basic physiological reaction provides the answer to the question *sed quis custodiet ipsos custodes?* It is good for one's soul to have to account for one's position – especially if it is to the quizzical minds of four Law Lords with whom you have not enjoyed a cosy cosy relationship, as you have with your brethren in New Zealand. Besides our judges have much to teach these fish-eyed English lawyers. The lessons are better learned on both sides in the cut and thrust in Downing Street than at opposite poles of the world. The same applies to our advocates. There have been enough big fish at the New Zealand bar who have been fried by the Sumptions and Kentridges for us to have become aware that top English skills operate on another plane. It is healthy to be apprehensive about their ability – but it is another thing altogether to run off the field. Are we not a more redoubtable lot? I thought we were a quiet, confident people who had shown we could achieve remarkable results in a complex world. I thought our qualities were such that with some adjustment on all sides, we could operate competently in the sophisticated appellate system we presently enjoy. Severing ourselves from it will either be due to the Government's copycat pursuit of our neighbour's republicanism, or due to a need to proclaim our national legal identity. The former signals insecurity; the latter immaturity. As a New Zealander who will have to survive in the 21st century I know I will also have to be a world citizen. It will help to have a world court: the Privy Council.

From **Richard Mahoney**
Senior Lecturer in Law
University of Otago

I must say that the Solicitor-General's arguments were persuasive, yet at the end of the day I did not find them compelling. Without doubt the Solicitor-General must give more weight to fiscal restraints than I am motivated to do, speaking as I am from the perspective of an academic and practitioner.

One quick point of semantics is that while I support a "right" of second appeal from civil and criminal trial decisions of any Court, I would happily agree to a requirement that leave be obtained for the second appeal.

Everyone will be able to cite examples from our current law where the "correct" decision was reached only after an intermediate appeal. Whether it should be the case or not, I believe that there are times when a first appeal merely crystallises the issues, leaving full consideration for the final appeal court. I won't bother to cite an example from criminal law, but I close this comment with the suggestion that *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) stands as a beacon to remind us that sometimes even a majority of our Court of Appeal can get it dead wrong on a first appeal.

From **D L Mathieson, QC**
Wellington

Of the options outlined by the Solicitor-General, I favour Option 4.

The main reason for preferring two appeals over one is that, if there is only one appeal, the present level of confidence that the last Court to hear the case has taken all relevant factors into account and has reached the "correct" result will be substantially eroded. I can point to several cases in which either reasoning errors or neglect of the arguments raised or (very arguably) unsound departures from existing law have occurred, sometimes even when five Judges have sat in the penultimate Appeal Court. A further right to appeal is necessary and highly

desirable from the viewpoint of litigants. There can never be a *guarantee* that the second appellate Court will "get it right", but such a system builds in the greatest *chance* that the ultimate answer will be well reasoned and "correct".

The second reason is that it exerts pressure on the High Court Division to reflect carefully and never to decide cavalierly. The possibility of a further appeal is thus a spur to strive for excellence at that level.

My own oft-stated preference for a new appellate structure is none of the Solicitor-General's options, but rather a Court of Appeal (with, generally three Judges) from whom decisions on further right of appeal would lie, with leave, under a carefully crafted leave rule, to a High Court of Australia and New Zealand (4/5 Australian plus 3/2 New Zealand Judges sitting either as a Court of 5 or 7). This is, however, unlikely to be acceptable to the Australians.

As between retention of the Privy Council appeal (which your letter does not ask my view about) and any of the Solicitor-General's four options.

I believe that retaining the Privy Council appeal is a marginally better solution than Option 4, but less desirable than abolition of the Privy Council appeal PLUS immediate introduction of a preferably successor Court, such as my over-optimistic High Court of Australia and New Zealand.

From **John Milligan**
Barrister, Christchurch

Should there be a right of second appeal from decisions of the High Court? As a toiler in the vineyard of resource management appeals, my thoughts do not often stray in that direction. However, when they do they tend to hover between Options 2 and 3.

Whether or not either of these are "financially neutral" depends entirely on whose finances are being assessed. A problem with the present system is that while New Zealand gets a second appeal at no cost to the public purse, very high costs are borne at the private level.

As a consequence access to a judicial "policy making" function tends to be restricted to those who can afford to bid for it.

That function, so it seems to me, is the only *real* justification for a second appeal. If the policy issues *can* be isolated after the decision at first instance then the reference of it to a full Court of Appeal (rather than to a Division) makes sense – whether or not such a system can be made to work remains to be seen.

Perhaps the adaptability of Option 2 (which the Solicitor-General discusses at para 70.12 of his report) provides a reason for favouring that option, at least initially. We should, I think, resist the temptation to create a "once and for all" system which has some prospect of being adequate for the short term to medium term.

In any event, continuance of the current tendency towards enlarging the jurisdiction of District Courts, Planning Tribunals and so on, relegates the "two or three appeals" issue to those disputes which start in the High Court. With a few obvious exceptions the jurisdictional boundary is drawn in relation to the sum of money involved, and one ought not (without argument) to equate that with "the importance of the issue". If some other (and, I suggest, more socially aware) criterion were adopted for the identification of that last, I suspect it would be found that a large majority of the disputes so identified commence in circumstances in which there is already a second opportunity for appeal *in the absence of the Privy Council*.

**From Gordon Paine
Barrister and Solicitor,
Palmerston North**

For many years New Zealand has enjoyed the right of a two tier appeal process from the High Court. Despite the various statistics that have been quoted at length about the number of appeals to the Privy Council, the mere fact of a second level of appeal does and has on occasions concluded matters in a sensible and pragmatic way to avoid

the need of a further and more expensive appeal. Indeed, having the second level of appeal removed from New Zealand also can bring to the issue under debate a different or fresh perspective especially in matters which have become clouded with political overtones. I accept that the majority of appeals which go to the Court of Appeal do not go any further but that in itself is not a reason to abolish a second level and even the thought of republicanism should not preclude a two tier appeal structure which is in the best interests of this country.

**From Colin Pidgeon, QC
Auckland**

I view with considerable concern the possibility of implementation of the Report by the Solicitor-General on the abolition of the appeals to the Privy Council and his recommendation that there be only one right of appeal. The Report was written with the objective of putting forward an alternative which was "financially neutral". I would have thought that a Report should have been requested from the Solicitor-General as to what would be the most desirable, not the least expensive structure. You can not have justice on the cheap. Assuming that the Government is determined on abolishing appeals to the Privy Council, and I for one am not convinced that a case has been made for such abolition, despite the fact that in my view the Court of Appeal has struck the right balance in its development of the law of negligence while the House of Lords has shown an embarrassing vacillation of views.

Most counsel who appear with any degree of frequency in the Court of Appeal will be fully aware of how overworked that Court is, what little resources it has been given, and the lack of time and opportunity for the Court to deliberate on reserved judgments. Counsel will be familiar with the fact that on not too infrequent occasions matters are raised on appeal in that Court in the course of an exchange of views which may not have been canvassed in the Court below. A possibly novel

solution to a given problem may be put forward from the bench in the course of argument. Counsel is naturally expected to deal with such a proposition "on the hoof" without the benefit of research into the issue. Where there has been a change in counsel from the Court below, the new counsel may develop his client's case in an entirely different way in the Court of Appeal. Decisions may therefore be made without the benefit of adequate research and argument from counsel. Under the new proposal there would be no further right of appeal.

The danger of not having two rights of appeal in a Court system which is based on the acceptance of binding precedent in its hierarchical structure, would work against the development of sound jurisprudence in New Zealand.

Although there is room for argument on the nature of the second appeal, probably the most practical method is for the Court of Appeal to sit on the first appeal in civil and criminal divisions with three Judges, with the right of further appeal by leave to a Court of five. The requirement to obtain leave would act as a filter to reduce the likelihood of meritless second appeals.

**From John Prebble
Professor of Law, Victoria
University of Wellington**

I agree that there should be two levels of appeal, essentially for the reasons mentioned in John McGrath's para 50. An example of the Privy Council "clearly correcting an error" (McGrath para 52) is *R W Prebble v TVNZ*.

Be that as it may, my major concern is with the idea of abolishing Privy Council appeals at all, which seems to me to be a retrograde, costly, and jingoistic step.

From **P J Reardon**
Barrister and Solicitor,
Palmerston North

The vast majority of appeals to the Privy Council are civil, and that is the only field in which I have some appreciation of the issues.

All civil matters should be commenced in the District Court. The interlocutory processes should be dealt with there. When the issues are refined, a Pre-Hearing Conference should be held at which Counsel and the presiding District Court Judge can determine whether it is an appropriate matter to be heard in the District Court, or whether the substantive claim should be transferred for hearing in the High Court. That choice should be resolved in favour of the District Court unless there are exceptional features to the case.

Perhaps the party wanting to remove the case into the High Court for a first instance hearing should be required to file a formal application and argue why the District Court is not the appropriate forum. The virtue of formalising that decision is that it enables the losing party to appeal that interlocutory decision to the High Court, thus giving the High Court the right to determine whether it should be the appropriate forum, where the parties cannot agree and the losing party chooses to appeal.

If the above procedure were followed, the vast majority of civil cases would have a two-tier system of appeals available (High Court, Court of Appeal).

For the exceptional cases which are deemed fit to have their substantive first instance hearing in the High Court, there is still a right of appeal to the Court of Appeal (three Judges) and perhaps a right of appeal (with leave) to a bench of five Judges.

At present there is an automatic right of appeal to the Privy Council where the claim exceeds \$5,000. There should be no automatic right of appeal to a bench of five Judges. The intending appellant should be required to seek leave to appeal. The party seeking leave to appeal should have to establish that there are exceptional reasons why the matter should not stop with a decision of three Judges in the Court of Appeal. The intending appellant should have to establish that there are major issues of legal principle,

or constitutional significance or policy, etc. Again, that should be determined on an interlocutory application and hearing.

All of the above assumes that the Privy Council is no longer an appropriate final Court of Appeal for New Zealand. I do not object to the Privy Council on grounds of insult to sovereignty. I have never been able to understand that curiously nationalistic objection; we might as well not belong to the United Nations or the International Monetary Fund.

I do not even object to the Privy Council on the ground that England is now a part of the European Union, with the result that its law is increasingly affected by European attitudes. I think cross-fertilisation, particularly from such an illustrious source as the Roman Law tradition, is helpful.

My objection to the Privy Council is on purely pragmatic grounds of cost and delay.

From **John Rowan**
Barrister, Wanganui

I support the termination of appeals to the Privy Council even if this means that initially there is no second tier of appeals. As a practitioner working primarily in provincial and rural New Zealand I learnt early that counsel need to concentrate on succeeding at trial and issues such as whether or not there should be a second tier of appeals are of little significance.

I have considered for some time that part of the process of realising our growing maturity as a nation involves ending the right of appeal to the Privy Council. I say that despite the privilege of having spent time in the company of counsel who have taken cases to the Privy Council and who, with reason, support its retention.

In recent years while arguing appeals in our Court of Appeal, generally before the Criminal Appeal Division but occasionally before a Court of five, and in reading judgments of the Court, I have become aware of the immense pressure the community places not only on members of the permanent Court of Appeal, but more recently on the Chief Justice and High Court members of the Criminal Appeal

Division requiring them to be all things to all people. For me members of any final Court of Appeal need time to read widely, to keep up with current developments in their areas of special interest, to reflect, to consider issues laterally and in the context of the society in which we live. I am not saying that the Judges are not already doing those things but I have a sense that they do not have the time to do them as thoroughly as they would wish. Proper resources will assist in addressing this issue.

Reading the Solicitor-General's view my preference is that we begin with option 2 but always retain the availability to move to option 3 if experience shows that it is necessary. The present system of criminal appeals is working well and there is the flexibility of a Court of five if a significant issue arises. The Court is now open to suggestion from Counsel that a particular case involves questions of wide public interest. There is no reason why a similar system for civil appeals would not be equally successful. Whatever option is chosen we all have a duty to ensure that the Court is properly resourced both in money and people. The number of its permanent members needs to be increased and appropriate research and administrative assistance provided. I also suggest that in considering appointments to the extra positions that will be created on the permanent Court those having power to make such appointments keep in mind that:

1. a woman jurist should be appointed for the different but complementary insights and perspectives she could provide, and
2. a Judge or practitioner with significant experience of criminal defence work be appointed.

Such appointments will not only strengthen the Court but enhance its standing in the community.

From **Peter Salmon, QC**
Auckland

The question of whether there should be a right of second appeal from decisions of the High Court

depends very much on the quality of argument in the Court of Appeal and the ability of that Court to give the arguments the consideration that should be given at that level. In my view there can be no question that the Judges of our Court of Appeal are of appropriate calibre. I do believe however that they have too great a work load. That is a matter that can be overcome by increasing the number and divisions of the Court.

Those cases that raise really important or difficult issues should always be heard by a Court of five or seven Judges. They could be the subject of an interlocutory process designed to identify the issues so that when the appeal was heard those issues would be fully argued. In other words I would envisage that the most significant appeals would go through a two stage process. The first stage would be designed to isolate the issues. The second stage would be that at which argument would be presented. The first stage could be dealt with by a single Judge of the Court of Appeal. Provided the issues are identified and the case is argued before a Court which has the time it needs for full deliberation it seems to me that there is no need for a further right of appeal.

**From W S Shires, QC
Wellington**

If I were to accept the reasons of the Solicitor-General in his report, I would instantly come to a very obvious conclusion, namely that the sensible thing is to abolish our permanent Court of Appeal thereby reversing what can now be seen as the wrong decision made about appeals in 1958. Specialised Courts of Appeal are a quite unnecessary luxury in New Zealand. Further, they are positively bad because they reverse too many decisions, appeals are encouraged, and protracted litigation proliferates. They also exhibit a deplorable tendency for one Judge to disagree with another.

This line leads to the conclusion that all High Court civil appeals should be to a Divisional Court, on restricted grounds, and only with leave of that Court. Appeals are not to be encouraged and should be

confined to correcting obvious error. Error of law would be the only ground (although this would include no evidence points). Ideally, the same rules would apply to District Court appeals. These would be to a Divisional High Court (not less than two Judges) which would deal with leave. All such appeals would be final.

Criminal appeals would of course be to a Divisional High Court. Grounds for appeal would probably have to be left as they are. It would probably be seen as unsporting, if not unfair, to deprive criminals of their present opportunities to overturn convictions.

I myself do not accept the reasons first mentioned. Indeed, they seem to me implausible. It is not satisfactory that the obviously best alternative, our own New Zealand equivalent of the Privy Council, is dismissed as not deserving consideration.

This idea is not only the best but seems obviously practicable. Expense? There would be five permanent Judges at, say, \$200,000 cost per year each, with the two obvious ex officio members available to participate. No Courthouse would be needed. London precedents would indicate a Parliamentary committee room as perfectly suitable. Then there would be a Registrar with a small office. Appeals would be strictly regulated by leave and a generous estimate would be up to 20 a year, probably less.

What is impracticable about any of this including the modest expense indicated? And how much money has the Government saved over the last 10 years by having the Privy Council system free (ie at the expense of the British taxpayer)?

**From John Timmins
Barrister, Auckland**

I find it surprising that the Solicitor-General should propose a Court structure which provides for only one right of appeal from decisions of the High Court. This is a radical step (bearing in mind the well established practice in other common law jurisdictions) and it seems unwise to act hastily in this regard. There is considerable force in the argument

that a second right of appeal provides the most appropriate opportunity for legal policy issues to be addressed. In important cases which have significant policy consequences, it is desirable for the issues to be reviewed a step away from the more adversarial context of either first instance or the exercise of a first appeal right.

Another factor which is significant is the concern in many commercial houses – including those headquartered overseas – that the abolition of appeals to the Privy Council will result in a less certain application of the law in various commercial areas. Whether or not such concern is justified, it would certainly be exacerbated by the establishment of a system which deprived significant cases of a two-tier appellate structure.

The second right of appeal in a two-tier structure could be limited to important matters for which leave has to be granted. If two divisions of the Court of Appeal were created – a civil and criminal division – then the second tier body could be made up of perhaps a full bench consisting of Judges from both divisions supplemented, where necessary, by Judges such as the Chief Justice or Senior Judges from the High Court.

**From C J Walshaw
Barrister, Palmerston North**

In New Zealand there always has been a right of second appeal in civil cases. The Solicitor-General would retain that right for those cases which originate in the District Court, but would remove that right for civil cases which originate in the High Court, although these cases could be described as more significant.

Lawyers involved in significant civil litigation will know how such cases can be transformed in the course of the first appeal. During preparation, and frequently during argument, cases develop a different focus. Appeal judgments often contain phrases such as "the argument in this Court developed a rather different focus, and in the end the issue became . . .". The trial Judge, on reading a judgment on appeal from his or her decision, may barely

recognise the case which was tried.

There is nothing inherently wrong with this process. The trial itself requires concentration on the evidence and the full implications of this cannot always be predicted. Also, with respect, appellate Judges can bring their experience and knowledge to bear on a case and so address issues which either had not been thought of by counsel or for tactical reasons have been given less emphasis. Sometimes this has extended to either actual or effective amendment to pleadings. In a sense, the case is retried. An appeal may be allowed in part.

The Solicitor-General indicates that appeals are either an exercise in error correction or alternatively focus on legal policy. I am not sure that the process I have very briefly summarised is error correction but it is certainly not a focus on legal policy. I suspect that the process is more subtle than is indicated by both those phrases.

The result is that argument on the first appeal is less than adequate on the issues raised for the first time. Sometimes, it appears, the new focus is given undue prominence. In other cases the issues are so extensive that on first appeal there is in effect a narrowing down of the case, which requires a further process of elimination and focus on a second appeal.

Then there are the cases of general importance which also benefit from the process of refinement inherent in a second appeal.

I surmise from the report of the Solicitor-General that whilst he might acknowledge the correctness of the matters set out above, he is concerned that a Court of Appeal which is devoted to second appeals might not be fully employed (para 70.18). This and the other economic factors relating to the appointment of further Judges, is a pervasive and important aspect of the report.

Perhaps further consideration can be given to options 2 and 3. An amalgam of those options, which permits a second appeal in cases which I have described, may meet the desirable end, that justice is seen to be done. I suggest that this can be achieved by adopting now some of the adaptations to option 2 anticipated by the Solicitor-General (cp Para 70.12).

From David Williams, QC Auckland

I am strongly of the view in the event of the abolition of appeals to the Privy Council it is imperative that that appeal should be replaced by another tier of appeal so that a two-tier appeal system continues. The argument in support of this position has never been more lucidly expressed than by Mr J S Henry QC, as he then was, in an address to the Auckland Medico-Legal Society in 1983. His Honour said:

The Privy Council provides us with a second appellate stage from the High Court. This tier structure is a feature of the judicial systems of all major common law countries, I believe without exception. It still exists in those Commonwealth countries which have already severed their links with the Privy Council, such as Canada, and those which are in the process of severing that link, such as Australia. Hence the fallacy of equating the New Zealand position with, eg. Australia, if the right of appeal is abolished.

The two tiers exist unquestioned at the lower level of our own system. The need for the two tier retention must not be underestimated, either in respect of its general importance jurisprudentially, or in respect of its particular importance on the New Zealand scene. The general importance is that it provides a highly desirable opportunity for an important legal argument to develop and mature, clear of the dust of conflict which exists at trial and which not infrequently permeates through to a first level of appeal. It also provides the means for a critical analysis of properly crystallised issues, which may well have been the subject of differing views by different Judges. It also ensures that there is a firm reasoned basis for the matters of principle which it is the function of a Court of last resort to enunciate clearly and with certainty.

On the particular New Zealand scene the importance lies in the way in which and the conditions under which our Court of Appeal functions and will continue to function in at least the medium term future. The Court works

under extreme pressure, a pressure which I regard as unacceptable for a final Court. . . . On what is really a permanent basis there is nearly always one member of the Court seconded to it from the High Court on a temporary basis, a practice which runs counter to the concept of the separate Court of Appeal which the Law Society did so much to achieve, and which has been so successful. The need to supplement has recently grown, and we now have the situation where two retired Court of Appeal Judges have been brought back into harness from the green fields of retirement. The desirability of that in principle is questionable. It would be unacceptable as a way of running a final Court. The reason for it is obvious – the volume of work.

After giving an example of rushed argument in the Court of Appeal, Henry J continued:

I believe it is unacceptable for a final Court to be conducted under that sort of restraint, and that is a failing which cannot readily be overcome because the very nature of the system means that it will always be working under pressures of that sort, be it the first or the only tier of appeal. Final appeals require not only careful and mature argument, but also careful and mature consideration and judgment, all in the absence of time constraints at any stage of the process.

. . . I mentioned also the importance of principle in legal thinking, and the real need to ensure that principle is properly retained, or where appropriate developed. It is, I think, unarguable that a two tier system is vital for those purposes, and we only need look at some of the instances which have occurred over the years where the Privy Council has demonstrated that the Court of Appeal has been wrong on such matters, and corrected those errors to the undoubted benefit of our whole system. A few examples will suffice for present purposes . . .

His Honour then gave a number of examples of important cases where the Privy Council had reversed the

Court of Appeal. There have been many others since he wrote in 1983.

In spite of the voluminous comment on this matter in judicial and other circles since 1983, nothing has altered my views as to the validity of His Honour's comments. On the contrary, if anything the situation with the Court of Appeal has worsened and the current pressures, some of them self-inflicted, are both obvious and unacceptable.

May I suggest the following minimum components of an acceptable model for appellate procedure in New Zealand:

- 1 A party should have an absolute right of appeal to the first tier of the appellate system and a qualified right of appeal (ie. leave required in appropriate cases) to the second and final appeal tier. As to the leave requirement the observations of Sir Ivor Richardson in his article "The Role of an Appellate Judge" [1981] 5 *Otago Law Review* 15 may be cited:

From 1957 to 1977 the Court of Appeal had only three permanent judges. Now there are five. What of the future? I think there are considerable advantages in staying at five. If our workload continues to expand, serious considerations will have to be given to the development of a screening mechanism leading to the granting or refusing of leave to appeal in more classes of case rather than erode the collegiate character and possibly the public standing of the Court by an indefinite expansion of our numbers.

- 2 Every appellant should be allowed a fair opportunity to present arguments to the appellate court both in written submissions and orally but the appellate court should be authorised to specify in advance, by rule, practice note, or by specific notice to the parties in particular cases, reasonable limits on the length of both.
- 3 The appellate decision-making process, especially at the final level, should encompass both the individual thinking of each Judge and the effect of full consultation among the Judges. Ample time should be allowed for hearing and determination of appeals.

- 4 The practice of including temporary or retired Judges on the final Court of Appeal should be discontinued.

The pressures on the Court of Appeal must be reduced whatever the outcome of the current debates on the Privy Council and the two tier appeal principle. The paramount importance of unhurried decision making cannot be overstated. Justice Frankfurter of the US Supreme Court put the matter in these words:

The judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions. It is therefore imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication.

From **M R Camp, QC**
Wellington

I have never heard of a lobby group of prospective litigants who want two rights of appeal and it would surprise me if society was not content with one. All prospective litigants who choose ADR or arbitration are really voting in favour of no right of appeal, let alone two.

But some lawyers presumably favour two rights of appeal. Presumably they either see something defective in the first two hearings or some separate benefit in the third.

So far as the defects idea is concerned, they must be saying that our system is so bad we cannot get a good enough answer when we do it twice. That should cause one to examine the ostensible defects – not just do it again. If it is being done

badly twice, that is no good reason to say it is being done better the third time and if not, three bad shots would not beat two good ones.

The second right of appeal should not remain if it is only being justified on the grounds there is something defective in either of the first two hearings.

If there is separate benefit that is supposed to come out of that second right of appeal, I cannot see it. Issues of fact really need to be resolved at first instance and even now they do not get, and should not need to be, resolved at third instance. If it is issues of law we are concerned with, anything that is so grey that the answer could be; yes one from Judge, no from three, yes from five – with the last two results being by majorities, is too close a call for it really to matter to society and amounts to nothing more than pot-luck for the litigant. Obviously such fine judgments on New Zealand societal mores should be home grown (which may explain why Wellington and Downing Street get different answers). But if a difficult legal question is henceforth to be considered by one Judge at first instance, and five on appeal, I cannot really see why one would need to put another three in the middle of that, after all all the last five can do is either hold that the first one was wrong or the first four were wrong.

From **David I Jones**
Barrister, of Christchurch

Putting aside the fact that I am opposed to the abolition of appeals to the Privy Council, of the four options considered by the Solicitor-General, I would support option 3, being the addition of a civil appeal division with a further appeal to the Full Court of Appeal, despite its obvious additional cost to the litigants, it would still be cheaper than the costs incurred in travelling to London and presenting the appeal before the Privy Council. I believe that our final appeal Court should be as remote as possible from the Court of first instance, in this case our High Court, which I appreciate is very difficult in a country the size of New Zealand. □

What's new at Emgeoo?

By Nigel Jamieson, University of Otago

Mr Jamieson recently spent a month in Russia at Moscow State University, MGU to use its Russian acronym, and "Emgeoo", to give the acronym a name, as it is pronounced. Like his earlier articles on his Russian experiences (actually in the Ukraine) and published at [1991] NZLJ 215, 320, and 451, Mr Jamieson gives a vivid picture of the experience of being in a truly foreign intellectual clime. His recent academic experience in Moscow leads him to conclude, among other things, that a westerner such as himself thinks first of reforming the law, while his Russian counterpart thinks dolefully of reforming the soul.

In the most recent series of Hamlyn Lectures, William Twining suggests that "with the ending of the Cold War the lawyer can replace the spy". He is only talking about the lawyer as seen in films and novels – "a morally ambiguous protagonist, operating in a dramatic setting with endless narrative opportunities". The Hamlyn bequest, in speaking to a non-specialist audience, brings out the book of Twining's lectures as *Blackstone's Tower*. To quote from Turgenev's *Smoke*, the lawyer might truthfully reply "I never read novels now". Isn't that what Richard Posner means by law and literature as a misconceived relation? As for lawyers in literature, Twining might be right to regard them as spies, but on my recent trip to Russia I am thankful not to have had Twining's book in my bag.

This all goes to show that the literature of any developing legal system does not usually travel very well, but like Chianti under the hot sun of Tuscany is best drunk within its own jurisdiction. Glanvil, who takes the credit for one of the earliest commentaries on the common law, most certainly wrote for only home consumption. In later life he would travel – to die at Acre in 1190 in Richard the Lionheart's Crusade against the Saracens – but it is by his little lawbook back home that he is best remembered.

It is otherwise once a legal system beings to expand. By Bracton's time, less than a century after Glanvil, English legal literature is trying to pass off Roman Law as all its own – although Maitland has dismissed this claim of Maine as a "stupendous exaggeration". Therein lies a moral for New Zealand. In its repatriation of English law under the

Imperial Laws Application Act 1988, the Long White Cloud can be similarly accused of laying claims to self-creation.

It is true that the later literature of any legal system like Justinian's *Institutes*, must sometimes either take flight or perish. Without codification in Constantinople, the civil law could not have flown home to Rome and so crossed continents to reach Africa and South America. Similarly, the chief credential for setting up any lawman's office in the wild west was simply to possess a copy of Blackstone's *Commentaries*. "Have Blackstone – Will Travel" explained the expansion of the common law through much of North America. Today's newly-opened European Community (whose legislation already strongly influences our antipodean statutes) explains the reception of Roman Law finally for Britain – at least for England since Scotland long ago received it. This "toing and froing" across the continent now makes Brussels the spy-centre of Europe. In having my old boss and former Attorney-General Sir John Marshall as our foremost negotiator, New Zealand, as recorded in Michael Robson's *Decision at Dawn: New Zealand and the EEC*, was first and foremost on the scene. Both Berlin and Geneva have lost rank. Tangiers and Casablanca have given themselves over to other problems. "Butter-spies" is what we call the rising generation of the new look secret service. Once government agents gathered military information – now they gather commercial. Daniel Defoe wrote his *Tour Through the Whole Island of Great Britain* while under commission as a government agent to report on the

likelihood of rebellion. Now to Brussels and back enables the exchange of as much official information between different agents as once took place on the road to consult the oracle at Delphi. In such circumstances, spying is simply another word for the dissemination of information. Like the press, lawyers have become a fifth column in the fight for intellectual freedom.

It is ironic for our remotely antipodean nation that the common law now gives way to the common market. The Rule of Law is still recognised only to the extent that it remains commercially viable. To legitimate this discontinuity of law will be a triumph of espionage for western lawyers; but because Russian jurists are more used to this sort of revolution, on losing the Cold War they could, like the Germans, Italians and Japanese who lost the Second World War, be more likely to get there before us.

The question for New Zealand as a nation of travellers is whether we shall simply follow Britain into what she once taught us to dismiss as European slavery, or keep our old identity in leading others in the common law's development. England's entry into European jurisprudence clouds rather than clarifies the common law for Commonwealth countries. Should we keep the Privy Council, which paradoxically owes its jurisdiction over us to William the Conqueror's European land claims? Is the Queen still willing to remain our head of state after we have done so much to diminish the concept of her Crown in New Zealand? The retrenchment of our common law, whether done from a distance or self-inflicted, leaves us somewhat like a former Soviet republic which

has suffered the collapse of communism.

What will it take us to keep on travelling – a copy of Blackstone's *Commentaries* on the rebound from the American wild west or Justinian's *Institutes* on the rebound from what could become a far wilder community in Europe? Some wines simply will not travel – not even by weaving little baskets round the bottles – and it could be the same for our own limited edition of the common law, despite Busby, as the founding father of our legal system, being an impassioned proponent of viticulture.

Still travelling

The west associates Russia with iron curtains and closed doors; yet there is nothing more conducive to the creation of great literature than to be outlawed from one's peers. Even in legal literature, the cutting edge will be found, rarely in the supporting but more often in the dissenting judgment. What does it take to go on writing from Pushkin's Kishinyov or Solzhenitzyn's Karaganda? The sojourn is solitary, punctuated only by rising hope as the key turns open, then once again turns closed in life's slammed-shut door. Feeling shut out or shut in by his or her society is the ultimate test of whether the writer's literary spark will blow out or burst into flame – a candle in the wind.

Pasternak opens his prose poem *Doctor Shvago* with a contrast between two extremely different characters – an orphaned child who has been deprived of life's basic expectations and the child's uncle who, in being an unfrocked priest, has been there and done that but is yet "still travelling". There are cynics who would consider our common law, left lingering on in the Commonwealth as a consequence of Britain's entry into Europe, to be the same sort of orphaned child who has been deprived of life's basic expectations; but in delivering the Hamlyn Lectures on *Blackstone's Tower*, Twining discusses what it is for lawyers to continue travelling.

Because Twining refers to lawyers as "spies" and even "double-agents", it is easier for the "non-specialist audience" rather than other lawyers to take him seriously. It is worth remembering, however, that when Defoe wrote a *Tour Through the Whole Island of Great Britain* he did so with a spy-status

and under travelling circumstances not much different from those professed by Twining. In Twining's preface to the published lectures he introduces himself as a tour-guide to (what remains of) the English Law School, hoping to make this enterprise a Grand Tour "to be seen by a few as a Work of Art". The ruins of Britain will doubtless be as fascinating as the ruins of Rome, and the reader will be reminded of Macaulay's prophecy which gives the New Zealander a privileged position from the broken arch of London Bridge. Tuhupotiki Ratana, on being barred from presenting a petition to George V for the ratification of the Treaty of Waitangi, confirmed Macaulay's prophecy when he stood on Westminster Bridge to declaim "... when all your stone houses are in ruins ... I will be the government". Continuing trouble with the Crown over the Treaty makes it increasingly difficult for New Zealand to be associated with Britain in any other way.

Does Twining do justice to his own enterprise? In failing to distinguish between the legal traveller and the legal tourist, probably not. The seriousness with which the seasoned traveller can guide a tour requires him to identify the issues of the undertaking well ahead, and to cope with those persistent questions, which, in being part of the trip, cannot be resolved but must be regarded as essential to the experience. As Twining says "legal tourism ... is a recent development ... lawyers' tours to Russia ... have become quite common". What then would be the persistent questions of jurisprudence that any legal traveller as distinct from the legal tourist would take on board in leaving for Russia?

At the present time Russia is very radical in its search for some new system of law and order. Whatever persistent questions of jurisprudence the legal traveller takes with him for the trip are thus also bound to be radical. On the other hand if Twining is right about lawyers being spies, then the lawyer as reader will readily discern the degree of disinformation needed for every spying expedition. The legal positivist who always pretends that the law is the law is the law invariably begins with a discussion of what he calls persistent questions. The positivist pretends this even to himself (and so

becomes his own double agent). Now if the law were the law were the law, there wouldn't be legal room for any questions, far less persistent ones. On the contrary there would just be the law and everyone would leave for Russia with a completely open mind. But in beginning with persistent questions about what the serious legal traveller should take with him to get from New Zealand to Russia we risk entering that special class of falsehood known to the spy as disinformation. We rationalise that in our having been there before, not even the tourist can return with an open mind.

Disinformation is not just false information but as Peter Wright defines it in his *Encyclopedia of Espionage*, false information "specifically designed to look like a secret truth". The downtown practitioner will be the first to recognise this species of disinformation as being legal theory. In turn, most legal theorists denigrate black-letter law, promote inassimilable levels of law reform, and use the resulting litigiousness in the legal system as another bludgeon against black-letter law.

We are not talking about the eternal verities of jurisprudence (which legal theorists avoid) but only about those fashionable schools of thought, which dissect each and every legal system to promote their own species of disinformation about the law. Even the great Wigmore's *List of One Hundred Legal Novels*, being my own little hobby horse of law and literature, is one. The result of such legal grave-robbing is credible only because it purports to reveal a secret truth; but because this secret truth has to be presented in a form that is accessible to those who are without the patience and perseverance to map out a deep relationship within the law for themselves, the alluvial is soon exhausted and the lode never found. As the *Encyclopedia of Espionage* points out "intelligence work demands patience and vigilance over long periods of inactivity" which is something not encouraged by the economic accountability of contemporary scholarship. This makes flash-in-the-pan legal theory for the legal tourists, whereas long-term jurisprudence is for the legal traveller. What lawyers find wherever they go, Brussels or Berlin, Wel-

lington or Auckland, Moscow or Saint Petersburg, will always be as different as legal travelling is from tourism or legal education is from the playway system; but who can remember now that far worse alternative to the playway system known as cramming? A month in Moscow is "not going to be all beer and skittles", as Nicolai Danilov, Australasia's first university lecturer in Russian at Wellington's Victoria College used to say in warning tourists off his subject. On the contrary, it could be a bit of a cram.

Persistent questions

Some folks love to travel, but those who hate it are, on packing their bags, always troubled by the most persistent questions. If jurisprudence is experiential, who knows more about the law – the president of the World Court or the convicted murderer on death row? If the legal profession is a public service, how does one compare leading practitioners downtown with the ivory-towered idealism of the law professors who once taught them? If self-testimony is contradicted rather than corroborated by the evidence of others, to whom do you listen when you are told that the government is doing fine – the governor of the Reserve Bank or the doped out druggie who mugs you for a dime? If it is more than a figure of speech to refer to the life of the law, how do we measure its vitality – by our pleasure in receiving an invitation to the vice-regal garden party, or in sharing the soup kitchen at the autochthonous grassroots level of daily survival?

Through the legal positivism of the last generation and the critical legal theory of our own, we have found our own way of dealing with persistent questions. By trying to win each argument rather than watch where each is leading, it is not surprising that legal positivism has led to trashing the law in the way that one nonsense leads to another. How does one bridge the generation gap between leading law practitioners and leading law professors? It only takes a little etymology to see that both are professionals. It is a mark of wisdom to recognise that might is right when you would otherwise get mugged for no more than a dime – especially if you are on the way to testify against the Reserve Bank governor that the country is in the

best of hands. Opting for the president of the World Court as being more knowledgeable of the law than the convicted murderer means keeping the Privy Council since our main argument against a remote and distant Council is the experiential one that the Council lacks the intimate experience needed to decide our own affairs. So, too, there are wasps at the most enjoyable of vice-regal garden parties no less than on skid row there are flies in the soup.

For most of this century the former Soviet Union promoted a world view that would resolve these persistent questions. This world view was postulated on the premise that under communism there would be no need for law. What we had learned from Dicey in the west as being the Rule of Law would then give way to the Sovereign Science of Economics. All the problems highlighted in the previous paragraphs of this paper would then be seen for what they were – mere artefacts created by Law's Evil Empire.

Now with the collapse of communism in the Soviet Union, these problems are as terrifyingly real for the former Soviets as they are for anyone else. Due to what Gorbachev hailed as democratisation, Yeltsin's Russia all too rapidly reorients itself on purely economic terms. Is this the new Sovereign Science of Economics finally enthroned, or is it the old God of Mammon that sulked away its western imprisonment under the former Rule of Law? Following the example of the west, the new Russia is openly monetarised: it no longer ranks society in terms of workers (the proletariat) and wisemen (the intelligentsia), but businessmen (the employers) and others (the employees). The old Sovereign Science of Economics has taken over the Rule of Law – but bankers, in being marked by the mafia as targets for extortion and murder still need proletarian bodyguards wherever they go.

The real terror of the Cold War has been replaced for both east and west by a terrifyingly Colder Peace. Rising crime rates, chronic civil unrest, and outright terrorism not only in Russia but throughout the world indicate the withering away of law as a form of social order. This is manifest as far afield as London's underground is from Tokyo's com-

muter system and threats of terrorism in Aotearoa are from government offices in Oklahoma City. One can get mugged, machine-gunned or blown up anywhere without any need to go to Moscow. Because world issues are now seen to be entirely economic, so too the answers given to these issues are entirely economic. The end of the Cold War thus reflects certain consequences for world communism as well as world commerce. The history of war often indicates that the loser ultimately takes all – a formula for war that economists increasingly ignore.

Who will have the last word on the final outcome of this planet – big business producers or small-time consumers? How few big businessmen should be allowed to supply the needs of the many small-time consumers is both one of the oldest questions of Greek philosophy as well as the basis of our own anti-trust or competition law. A big business brotherhood can all too easily degenerate into only one big brother with nothing to do but watch over you. The persistent question used to be whether one's big brother would be Soviet or American. But now that question no longer persists, today's persistent question is who will it be if neither Soviet nor American? That is the ultimate question of resource management.

Midnight in Moscow – Specialia generalibus derogant

That song known in the west as *Midnight in Moscow* is known only in Russian as *Moscow Nights*. We went to Moscow earlier this year to clear up some similar confusions, and find out (some would say avoid) answers to the currently persistent questions of western legal theory. Just in case anyone thinks the questions merely verbal, we enrolled for a month in the Russian Language Institute of Moscow State University. In doing so we nevertheless categorically deny what every feuding member of the town versus gown faction vehemently believes – that intelligence is merely a euphemism for espionage. Our experience is that Twining should travel a bit more dangerously himself before he puts it about that all lawyers are spies. To quote again from Turgenev's *Smoke* "how can one believe someone whom everyone knows to be a spy?"

Because the full name of this university is Moskovskii Gosudarstvenii Univversityet Imeni MV Lomonosova, most Muskovites call it Emgeoo for short. George Orwell, famous everywhere outside the Soviet Union for *Animal Farm* and *Nineteen Eighty-Four*, fought against the political forcefulness of acronyms. (Tell that to the CHes who thereby doom current health reforms to failure.) The former Soviet Union (which also collapsed) was once the world's most prolific proponents of legal acronyms, but we shall continue to use MGU (pronounced Emgeoo) for Moscow State University, because it has the warm and cosy feel of an alma mater about it.

We are the first group of New Zealanders to enrol in this enterprise, and will be looked after by Emgeoo for four weeks of intensive language training designed (all unwittingly) to promote the severest culture shock. Some of us are already graduates in subjects as diverse as physics, zoology, geology, economics, philosophy, and law, as well as Russian. We are as likely a lot of New Zealanders as can be found in Istanbul, Alma-Ata, or even Sydney. In our mind's eye we are already in Moscow; although when we call at the New Zealand Embassy there expecting tea and cakes we are accordingly non-plussed to be kept on the street until we explain what we want. Among ourselves, we New Zealanders can be so blasé about travel – or is it the reverse, that we take our travel so seriously as to suspect even ourselves of spying?

In coming from the furthest end of the earth, New Zealanders still create a very vivid impression among others when they travel. So few people, especially Europeans, have ever seen the long white cloud called Aotearoa that they view us from another planet. Besides, New Zealand is not the sort of place in which you can stopover on the way to anywhere else. It has to be your destination. You have to make up more than your mind to get there – even though in finding the funds you can stopover quite easily in Australia. This makes New Zealand remote, but also unique and exciting which rubs off on New Zealanders and gives them an aura of enterprise that intensifies the further they travel from home. In the same way

the right occasion in terms of time and place appears to be made for them as much as they make the occasion. We are told by a visiting American scholar, for example, that we are "the talk of the town" in Moscow. Because most of us are only from Otago we refuse to take his flattery seriously. We know ourselves how difficult it is for the deep south to influence Wellington never mind Moscow. All the same it is good to arrive just as Emgeoo celebrates the 240th anniversary of its foundation. Mihail Lomonosov who gave his name so vigorously to Emgeoo that not even Lenin could supplant it, founded the university in 1755. Stalin – the so-called man of steel – wanted to identify himself with this new place of learning in more ways than one, but not even he succeeded. (On our last day here, we will climb as high as we dare of Emgeoo's thirty-two storeys and leave a memento that Hillary's folk were here – the urge to leave one's mark is extraordinarily infectious.)

Son of ordinary fisherfolk, Lomonosov ran away from home in search of scholarship. It took him one month to reach Moscow by walking across a Russia so huge that the verbs to go on foot differ from those denoting all other means of travel. We decadent westerners held ourselves hard done by in flying from New Zealand for three days with only a stopover for sushi in Tokyo. Would any of us have come to Moscow had we only to walk for a month like Lomonosov to get there? It would be difficult to say. At any rate we arrived, some of us from the most southern university of the antipodes, in time to celebrate for 1995 the results of Lomonosov's walkathon across Russia in 1755.

Across Siberia to celebrate Saint Tat'yanin's Day

There is no sequence of tenses in the Russian language. Stiff-lipped English grammarians consider this to have something to do with habitual inebriacy. From our own point of view Japan Airlines serve a good Bordeaux, and even on economy class, some of us are wining and dining a little too well to escape jet-lag in travelling back to the future of the former Soviet Union. One of the most potent powers and principalities over this place is alcoholism. It is cynically said of the Kievian Prince Vladimir that he accepted

Christianity rather than Islam for Russia because without vodka it would have been impossible for his people to endure the harsh northern winters. Because Vladimir became a radically different person as a result of accepting Jesus Christ, however, this tale of alcoholic conversion is probably just a wicked rumour centrifugally flung out from the Communist Party machine. In any case, Christianity is now thriving as never before in Russia since or because of its suppression by the Soviet Union – and this despite the severest shortage of what our own antipodean-legislation in 1835 called "ardent spirits". Nowadays, one dare only sample a single brand of vodka from any Russian bottle-store – there have been so many deaths from other brands of bootleg liquor.

Those of us wanting something stronger than Bordeaux are accordingly content to drink sake as we cross the frozen wastes of the Siberian tundra. Through our own glazed eyes and the occasional video camera lens, we watch massive rivers spread themselves out across the snowscape of frozen inland drainage. Like ice-aged glaciers, perhaps still containing monstrous mammoths beneath their slumbering permafrost, they roam across the tired and apparently limitless steppe. The sake still keeps coming in very small bottles, but like midges rather than mammoths, there are many of them. What were we saying about mammoths? Yes, they turned up like midges during the Second World War when *Mammut* was the name given to the monstrous German radar surveillance. Then, once again, but this time electronically, they roamed all over Europe. You can still buy professedly mammoth meat in Moscow. Our difficulty will be to find the ubiquitous German sausage – a sort of sushi known to New Zealanders since the First World War as Belgium.

Watching the riparian tracks of these mammoth waterways meander through the frozen wastes, even when seen from thirty thousand feet, is awesome. These are areas so vast that men from Mars – as indistinguishable from the native Chukchi as the Irish are from English, or the Maori from Pakeha – could touch down (or merely touch upon as Tasman and Cook were instructed)

and stay to settle there. Merging in with previously alien payloads they might pass unnoticed for another millennium were it not for *Mabo's case* (1992) 107 ALR 1 – variously described by some as a pitiful decision and by others as the correction of an enduring wrong. The result is to reduce the legal concept of territorium nullius to one of physical fact. This reductionism is in keeping with the world's current revival of indigenous law which resurrects the notion of the noble savage for Moutoa Gardens.

Would one eat the professedly mammoth meat one can still buy in Moscow markets? Civilised thought continues to be troubled by vestigial fears – the dark at the foot of the stairs, the sausages we have for breakfast, or the outcome of the next election. What furious outlaw or mammoth bogeyman may still latitat et discurrit “lurk and wander about” – to use the language of medieval legal fictions – in the waste lands of the world?

This persistent question haunts our flight across Siberia. The history of our Settled Land Acts 1865-1908 see-saws between the express acknowledgment (when agriculture booms) and repudiation (when agriculture slumps) or such primal fears. Our current Land Settlement Promotion and Land Acquisition Act 1952 openly testifies to the same ambivalence. Its own short title expressly makes the point. This is because in 1968 its draftsman Denzil Ward would not allow the government to amend the former Land Settlement Act 1952 as a coverup for a counter-policy of land acquisition. If the government did this, then the draftsman would at least change the title of the principal Act to make the contradiction clear. The Land Settlement Promotion Act 1952 then became the Land Settlement Promotion and Land Acquisition Act 1952 it still remains. In the context of that controversy, Ward's redrafting of long as well as the short title to the legislation is a masterpiece. It is a classic case of the draftsman acting as parliamentary watchdog. Our Law Commission should reconsider its proposal to remove long titles in the light of this instance of its use. Sometimes it is not civilisation but Siberia that seems to be the more settled. In the same way as deleting long titles, those who want to acquire the Queen's Chain as being

the last unsettled remnant of waste land round New Zealand rivers forget what it costs in confusion to supplant one set of long-settled legal values with another.

Meanwhile, we are looking out for the Lena in comparison with which our Waikato is without water; then we see the Ob which makes the upper reaches of our wide-mouthed Wanganui an empty boast. Here and there small towns twinkle through the gloom, but even from our pleasure dome of thirty thousand feet, the mammoth frozen rivers and windswept Siberian tundra turn our increasingly educated minds only to thoughts of refreshing liquids. It was Descartes who believed ideas to be the result of fluids flowing through what would otherwise be empty spaces in the brain. That there should be no shortage of liquid refreshment on our inward rather than outward flight encourages Cartesian thought. There is a darker side to refreshingly limitless thought, however, which suggests that the spirit of alcoholism, like imperialism, is swift to extend its territory. By this time we are over the Urals – what Urals? – and into Europe.

According to grandfatherly custom it is bad form to begin, but fair enough to end drunk on one's saint's day. Perhaps that's how we came to catch up on Saint Tat'yanin's Day a week after Emgeoo had celebrated its foundation. Even without sake to wash down sushi, calendars can be as confusing as international date lines. When was Magna Carta – 1215 or 1297? When was the Statute of Frauds – in 1676 or 1677? When was the Bill of Rights – in 1688 or 1689? When did James VI of Scotland become James I of England in terms of the international date line then existing between England and Scotland? So, too, Emgeoo's brave beginning can be differently dated. It can be celebrated either on the 12th or 23rd day of January, depending on old or new style calendars. In publicly claiming Saint Tat'yanin's day for Emgeoo, the Rector of Moscow University has let the church decide. After all, what was once built by Stalin on Lenin (now recalled Sparrow) Hills, has just established a new Faculty of Theology. This seems a paradox for us New Zealanders when Otago is squeezing the nation's one and only

Faculty of Theology into a mere division of humanities. Our own homeland consequently lacks coherence. Those fiercely independent spirits like Denzil Ward who could point out to the powers that be the consequences of contradicting their own terms of reference have become as mythical as mammoths.

Here in Moscow, it will take us a week, perhaps a month to realise that we have stepped out of our own, into the cause for celebrating another's academic history. To go on just being pleased at our touchdown here, is to mistake our still living happily at home for the rigours of what others expect of us in being away from home. It is said that no matter what distance you cover unless you change you do not travel. We have only just arrived – but not yet travelled. All we have done is move from one airport to another.

The almighty dollar

Our first day in Moscow began eight hours short of midnight. This would be one of those Moscow nights that feels more like midnight. Moscow takes a pride on having at least three airports, but as night fell it looked as if we were competing for Sheremet'yevo's one and only landing strip. No doubt this is an illusion for in coming into Chicago on an earlier trip to Minsk ([1991] NZLJ 215, 320, 451) the sky was so covered with converging planes that the safest place to land could only have been some way back up Grand Canyon.

We tumbled off the plane, before it flew on to Rome, down a dark, wet, and winding tunnel, one by one in pitch darkness, with not an end in sight. The last two of our group off the plane were cut off and left for lost in this steel tunnel by the closure of a mysterious glass door. (One of them was my son Tristan who is quite remarkable at extricating himself. Later he would be given a hero's welcome on being mistaken for a visiting American movie star at the Kremlin.) At length the door was opened by a number of customarily grey clad members of the militia or police force whose uniforms we later found could be purchased complete with hats and badges for less than half price in Red Square. Those governments who encourage the same open-marketed entrepreneurial competition in the west as Gorbachev did for the east had best

look after, and secure their own basic need of uniformed support.

The next few steps after tumbling off the plane were freely taken, and by the time the mysterious glass doors which seemed to have replaced the old iron curtain had allowed the last few passengers off the plane, we were all together again, waiting in queues to go through customs. One can travel through most of Europe now and never have one's passport checked west of Warsaw, but unlike Italy or Ireland, the bigger countries make a special point of enforcing overt controls over immigration. The United States has the Green Card system which works (or not) as the whole world knows from watching the film of the same name about the need for true love to avoid making false declarations. The new Russia, like most of the old superpowers jealously adheres to its own visa system. Without one's visa, one's passport, and the daily increase in sundry documentation needed to satisfy continual security checks in crossing the road from one's hostel to lectures, Russia is so large as to quickly lose sight of footloose aliens like Fitzroy McLean who wander off into Central Asia. Not unexpectedly, therefore, we must have our visas at the ready to pass through immigration.

In Hawaii the United States creates the equivalent of the Palazzo del Roma to impress the intending immigrant. Invercargill built a new airport to try and make the same impression, while Queenstown still debates the issue. As a relic of the former Soviet Union, Sheremetyevo goes for the other option. Instead of impressing the intending immigrant, it depresses him.

To arrive in Moscow's Sheremetyevo is to feel first overtly oppressed (by the dark, dank and dismal tunnel exit from the aircraft), then heavily repressed (by the failure of any human response from immigration officials) and finally completely depressed (by the closeness of the atmosphere, the weight of one's moneybelts, and the lack of space in which to move. That does not hold back one Slavonic Spartan from going up and down our queue haranguing us on how to make (or is it how to lose?) a fortune. We all imitate the Russians by looking straight ahead and saying nothing. If only one could shake off this

claustrophobic lack of space. We fondly recall how we could have run a mile within Minsk airport (where we nearly spent our first night in neighbouring Byelorussia in 1991) because there were no taxis into town.

Imagine being caught up in a time warp that transports us back to our own Wellington airport of the sixties (still around in the nineties) but with half the lights out and portions of the false ceiling falling down, and you have the arrival area for Moscow's Sheremetyevo right now. It is hangar-like, reminding one of Hobart in the seventies when Tasmanian devils off-loaded international flights directly into casino buses while far more respectable immigrants had to stand around waiting to be cleared through customs. Of course there are far worse airports in the world than those for Wellington, Hobart and Moscow – my father was once set down in the middle of a cornfield in Iowa – but we are only comparing those for capital cities.

I try to pass the brown bear equivalent of a Kiwi "g'day" to the officer examining my passport but he will have none of it. Not a word – not a smile. Alas, I've forgotten that to smile at a stranger is the hallmark of corruption in any city bigger than Glasgow. I doubt whether my straight-faced dishonesty can last the month. Of course it is even worse with the opposite sex for whom eye contact is bodily contact. Even a casual good-morning is making a pass. I am really more at home in Rome where it would insult a woman to walk past her without giving her a congratulatory glance. I have explained these culturally sensitive problems to my wife who tells me I should never walk out alone without black glasses and a white stick.

What my wife means is that I see too much. But all I can see of the passport officer in Sheremetyevo is his own head above the kiosk counter at the same law and rapidly balding level as my own. If my face haunts him as much as the seriousness of his own expression haunts me we will remember each other for the rest of our lives. I laugh behind the black glasses of my closed mind that this fellow is only another kyoskyor, as the Russians call the proprietors of the small shops selling stamps and tickets, but there is a

naked light bulb that the airline sake has sent swinging in my head that will not stop. Until I reprogramme my face to suit my passport (remembering that all Russian law students sit exams in forensic photography) I am going to absorb so much vicarious suffering from this officer's serious expression that he might as well have lectured me for a year on legal system.

What puts an end to both of us as talking heads is probably the opposite of what each of us would expect from our own use of words. Russian officialdom, like Maoritanga, often answers "nyet" . . . "nyet" . . . "nyet" . . . until being asked a fourth time surprisingly answers "da"! English officialdom is the very opposite. It says nothing at all until, having listened very closely, the case has been completely heard. The Russian mistakes this ongoing silence for consent, no less than the English official fails to hear the "not yet" in the Russian's "nyet". The Russian cannot believe the English official when only for the first time he says "no!" just as the Englishman fails to comprehend the persistence required of him by Russian officialdom to change a "nyet" to a "yes". For the most part, both east and west end whatever dialogue they have by making each other depressed. It is only by overcoming this demon of depression (which seeks to isolate ideas and divide nations) that the world's literature, not only of Tolstoi's *War and Peace* or Dostoevski's *Crime and Punishment*, but of Justinian's *Institutes* and Blackstone's *Commentaries* will be thoroughly opened from east to west.

Through immigration, our next faltering steps take us to the customs "red corridor". This is our rite of passage as distinct from the "green". We joke that the latter is for "greenies" but this means mostly Russians, for only they will be carrying less than sixty dollars of US "greenbacks". Alas, the "red corridor" is for rouble millionaires like ourselves.

Emgeoo, like Otago University, is no longer bezplatni or free so we each carry much more than sixty US dollars. These will translate at the current and still rapidly rising exchange rate of 4000 roubles to the US dollar into a rouble mountain of fees. (I have mistaken how many dollars I have shared out between

my son and myself, so in the presence of a very likeable customs officer distracted to tears – her name is Olga – I get stripped down to my money-belted waist. The movie-star beside me keeps his image, but by that time we have lost the group.)

United States dollars have not come cheaply to us in terms of time and effort. Before 1990 the greenback lacked an anti-counterfeiting strip that makes these earlier notes less accepted in Russia. Because one greenback equals 4000 roubles it can be embarrassingly difficult to change dollar notes of large denominations. It can also take days and nights of wandering around Moscow (as some of us found) to try and find banks that change travellers cheques. Consequently most of us arrived in Moscow stuffed with a month's supply of five, ten and twenty US dollar bills. Of course these are not legal street currency, but try bargaining with roubles as against articles priced in dollars and you get nowhere. It becomes clear that there are more US dollars in Moscow than among the credit card fraternity of Washington. What with EFTPOS as well as plastic money in the USA, there are probably more proclamations of trust in God around the former Soviet Union now than where the greenback first originated.

Life at Emgeoo

Some universities nestle in valleys, sprawl across plains, or burrow deep into the dead heart of cities, but Moscow State University leaps up from what were once called Lenin Hills. This south-western escarpment of the Moscow river, once again known as the Sparrow Hills of Tolstoi's *War and Peace*, rises high over the "wetness" that gives Moscow its name.

Like every state enterprise of the Stalinist era, the new university, as distinct from the old which once occupied the centre of the city, is built as a monument to Soviet life. As such, it has the air of a mausoleum about it, although this one is Stalin's rather than Lenin's tomb. Not surprisingly it is built on the site of the peasant village that gives its name to Sparrow Hills. Since the collapse of communism, the question now is whether the peasantry can find the finance to resurrect and maintain what, in being one of the world's foremost universities,

symbolises for Russia the highest point of modern learning. Without the same need once felt by the west for a socialism to counter the finer points of communism, the precarious position of Moscow State University (the Lenin Hills metro station has subsided into the river) is little different from many western universities (which lack even metro stations as indicators of decline).

In towering over the densely populated European plain around it, Moscow State University still rises out of Lenin Hills like a mammoth. With such a mass of learning, not to mention the physical weight of its walls, it is no wonder that the nearby metro is subsiding. Nevertheless, the concept of this last of the world's great universities is so gargantuan that unlike many western universities on Twining's Grand Tour, this one could easily lose two-thirds of its physical mass and still retain its present scholarly position. The reason for this lies in the specific gravity of brains. This hitherto overlooked index of achievement lays less store on initial intelligence for the realisation of human potential as it does on long-suffering dedication to the task in hand.

We are writing not just literally but figuratively of life at Emgeoo. The spire of its thirty-two storeyed main block still does a delicate little dance to a height of 240 metres. Like every church spire, even Stalin's spire on Emgeoo symbolises aspirations. It is said that Stalin wanted his own bust atop this spire, but it testifies to the autonomy of the university that the man of steel settled for a five metre red star. Anyone who has been stuck in a falling lift for even just eleven of Emgeoo's thirty-two storeys knows what Stalin must have felt in pinning his hopes to a falling star.

Whether all the world's universities are likewise failing is a moot point. The lifts in Otago's prize-winning Hocken Building are finally working better than ever before. Since their second hand installation in 1979 they have never (until recently) really worked (but then neither have they really failed). The heating system could not be turned off during the building's first year, the ceramic tiles soon fell off the walls and the anthropology department insisted on burning old bones up the basement stairwell. It may not have been as hot as Emgeoo's

centrally heated student hostel but one (non-legal) staff member sat in his underpants and others wore shorts and sandals. These are all events that would have surely led any visiting Soviet academics to wonder about western universities. One could go on . . .

It ought to be easier to laugh at ourselves than to laugh at the former Soviet because in the west we are told not to tighten our belts but that everything is on the mend. Is that a laugh? (No – not really because just recently we too have been told to tighten our belts). The fact remains that our carpets in the corridor still get wet when it rains, the tiles rise and buckle on the floors, and it is small consolation that the cracking concrete around the Hocken's prize-winning foundations indicates a shorter shift for the Law Faculty into the Leith than Emgeoo into the Moskvo. If that is another laugh, then there is precedent for our mirth since half of the building previously housing the Law Faculty (but now the Staff Club) got washed away once before by the Leith. There will be those like Rob Muldoon versus Tom Scott who mistake laughing at ourselves for treason, but as Peter Wright of *Spycatcher* fame points out "an intelligence service which cannot decide who is the enemy at home is unlikely to see clearly who the enemy is overseas".

There is more than a bit of Brezhnev to be found today in the west. It is not so much that this transplanted Brezhnev does not care, as that a new commercial sensitivity has opened up in the west perilously like the old area of political sensitivity that played down bad news in the east. The high level of commercial propaganda being injected into every nation's academic lifeblood is provoking an immune reaction that rejects the truth. For that reason the soaring spire of Emgeoo symbolises a strength of scholarship founded so much earlier that, like Otago's clocktower, it now probably belies its own monument.

That Emgeoo was founded in 1755 by Lomonosov, the son of a simple fisherman we have already noted. Mihail Vasilivech, as Russians call Lomonosov in their own brotherly way, was to achieve world renown as a linguist, chemist and historian besides being a mechanic, mineralogist, artist and

writer of verse. His statue commands pride of place on campus. So, too, the extent of the campus symbolises not just Lomonosov's walkathon, but the degree to which this high level of scholarship has spread nationally and internationally across the world's surface. This has happened not only to extend itself geographically and politically, but also to establish, as high flying aspirations at any house of learning require, the architectural support of a broad base.

Academic life at Emgeoo has changed according to the passage of the political seasons. Once the halls of Moscow University rang with heated debate between the advocates of eastern and western ideas – Turgenev's slavophiles and westerners. It could also be blessed with comparative silence when advocates of political and social reform published their theses immune from the usual state censorship. As the Pole Joseph Conrad wrote of Russia in *Under Western Eyes* this is "a country where an opinion may be a legal crime visited by death . . .". Our own comparative security accounts for the apathy with which we hold opinions in this country – although New Zealand is fast changing. Moscow University still retains the long standing tradition of democracy, now unhappily disappearing elsewhere, by which rector and deans are elected by and from the professors. All this information can be found in the usual calendars and guidebooks if one reads Russian. We ask instead how an academic fares in today's Emgeoo – which is the best way of learning Russian.

What strikes today's academic when asked this question of any seat of learning is how similar are the problems affecting all universities. In one sense we can be proud that universities are truly universal; but there is a real risk that universities the world over are closing down (if not closing up). This is to despite the fact that by declaring polytechnics to be universities Britain may create forty (or is it eighty) new universities overnight by legal fiction.

Consequent on the collapse of communism, one would think that Russian universities would have vastly different problems from western universities. The paradox is that this is not so. Since the end of the Cold War, the world's governments are beginning to decide that

they can do without intellectuals. The *Guardian Weekly* (19 March 1995) reports from the *Washington Post* that California is hiring new prison guards at almost the same rate as it is laying off university professors. The intelligentsia is dispensable. No new ideas are good ideas. All of a sudden the whole world has become infinitely more Soviet in its concern for the privacy of official information. The Cold War has not ceased, but only entered a new phase in which the State is less bothered by being identified as an enemy of the People. Perhaps, the new masters are in process of bidding for *Animal Farm*.

Learning at Emgeoo

We came to this place for one purpose – to study. Somewhere in Fuller's *Morality of Law* – of which my own copy is back in Dunedin and the nearest other is rendered incommunicado by blocked toilets in the Lenin Library – it is mentioned that the main reason for the failure of any human enterprise is the inability to keep in mind what one set out to do. We came to study, and we have four hours of lectures from 9.30 to 1.30 each morning followed by the necessary preparation for the next day's classes.

What makes these classes at Emgeoo so successful is the degree of confrontation built into the lessons, and the direction this takes from teacher to student. In the west we encourage our students to be participative in class, and even confrontational towards their teachers. If students refuse to participate, however, we are so jealous of their own good opinion of us as teachers that we let the matter slide and box on with teaching our subject as best we can. After all, for the purpose of promotion at least, never mind the increasing spectre of redundancy, the students' good opinion of us is more important than keeping troth with one's subject.

We came to study – ostensibly Russian language, but of course in doing so we cannot ignore what is going on by way of the new Russia rising around us: nor can we turn a blind eye, as in our country, to those enduring values that have survived the Soviet holocaust or been resurrected from its ashes.

One of the first questions asked of us as language students is whether we are believers? Until we en-

counter such a question in the context of scholarship (never mind the context of communism so recently abandoned) we cannot assess the extent to which belief commitment affects whatever else we say or do. Some of us are jolted into giving an answer that we can overlook on regaining our own country. Others express some diffidence – as if we had been asked ten years before whether we were communists. Later a classmate will tease me for being so politically correct; but as that has never happened before I disavow it now. His teasing only makes me nervous of what is going to happen next. What gives when Churchills take over from Chamberlains?

The political history of Holy Mother Russia is that of Christianity. Without Christian revival in Russia a return to communism is a real risk. But because communism has suppressed Christianity the life of the Church in Russia is renewed in a way (often through martyrdom) that would not otherwise be possible. Holy Mother Russia reclaims her heritage of renewed spiritual life.

Are you a believer? Nyet . . . nyet . . . nyet! Never mind, someday soon you may still say yes! Who knows, perhaps like many westerners you may, in answering this question, choose only to be politically correct, in which case you go down with the Chamberlains.

Whatever answer we have given to this question, as each of us was personally asked in class, was going to affect the issues of history, art, law, literature, politics, religion, society and family life that were to provide the means of developing our verbal skills. There is no easier way than this of learning a language for those who live for language.

Take the issue of what the Russians call "deep" but which we would call "close" relationships. These are the sort of relationships which our welfare and tax laws use to confuse and undercut family life. This happens through arranged marriages between students who cannot afford to live singly. It happens through the taxman equating marriage with lesser relationships, which interestingly enough, only work in favour of his collecting tax but against welfare payments. And it happens whenever we are called to glorify commercial law by answering questions about partners in place of husbands and wives. Thus our

society through its legal system openly supports and officially substitutes "shallow for deep relationships" as a Russian might say.

We are learning all about "deep relationships" in the context of Tokareva's short story of the same name. Of course our own Family Courts are debating these issues every day, but it is as if, in trying to please everyone, the Courts cannot come clean. The trouble with our own law is that, on Wigmore's terms, we have no literary backup. There is no champion of family life in New Zealand like Tokareva to tell the way really things are as well as prescribe the remedy that lightens rather than progressively burdens life.

An autumn wind blows off the river. One and Another stand looking, and because humanity is part of nature, they hang in the wind . . .

"Irene is stronger than I am . . . She works half as hard again as I do . . . This is belittling. . . ." says One to the Other.

"Right" says his mate.

"After ten years she still wants to treat me like a baby – whereas I'm a man. But she's the man – which means there's no woman in our house – I get so depressed I don't want to live."

"I understand" says his mate.

"I've decided to explain to Irene that I'm leaving her . . . The discussion might get heated, so it would be better if you come with me."

"Where?"

"To my place . . . I want to tell my wife I've leaving her . . ."

"If you want to tell your wife that, then you'll have to come to my place, because your wife left you this morning and has come to live with me. Now, she's my wife . . ."

If you want to learn how shallow relationships can be deepened you have to go to Emgeoo to find the happy ending. Tokareva's tale is full of strange twists that make us laugh through tears just as the strain of thinking deeply in a different language will either make or break us. The class rule is that only Russian may be read, written or spoken – even when a younger one of us is publicly asked why she dresses in punk rock style, and an older one of

us is just as publicly called to account for not marrying his de facto wife. The fastest way of learning a foreign language is to be on trial for one's life.

We examine the classic case in family law of what the Russians call, after Pukirev's famous painting, the "unequal marriage" – nyerevnii brak. We do so in the context of Pushkin's *Snowstorm*. Just recently a literary theory has arisen which postulates Pushkin as a spy, and attempts to decipher his literary work as a revolutionary manifesto. Well, one could similarly describe Shakespeare as a revisionist historian and Burns as a Red Clyde socialist. We steer as clear of literary theory as legal theory at Emgeoo and see the *Snowstorm* instead simply as Pushkin had intended – allowing either the miraculous intervention of God's grace, or as it may be, the divine destiny of God's providence – to account for the long postponed but happy ending. This is distinct from the tragic outcome of Chehov's *Anna Round the Neck* which we also study.

At what age should a man marry? At what age should a woman marry? What age were you when you got married? What age was your wife? Are you happy? Is your wife happy? Why are you happy? Would both you and your wife acknowledge the same source of happiness in your marriage? Why don't you take your husband's name? Then perhaps you still have your father's name? Wouldn't you, as a single person, want venchaniye – to be crowned in marriage? Why do you object to be given away in marriage?

These are some of the persistent questions that confront us day by day. The westerner thinks first of reforming the law whereas the easterner thinks first of reforming the soul. In doing so, the easterner goes straight for the jugular whereas the westerner remains content to massage the peripheral circulation.

There is no point in having itchy feet in response to these questions. As Lomonosov showed, it takes a long time to walk across Russia. Nor is it possible to give abstract answers to these questions as if they were only hypothetical ones of feminist jurisprudence. Here in the former Soviet Union, life is on the rocks despite several generations of equal career opportunities for women,

peoples' courts, institutionalised divorce, State care for children of working mothers, and abortion on demand. One leading Russian lawyer, head of her department, recently resigned simply to look after her children; most others are by now inexorably tied into their jobs. The Soviet experience requires the west to reconsider its own direction of travel – which seems remarkably more Soviet now without the USSR for comparison.

There is nothing like struggling with a foreign language to make one come straight to the point of one's brief. Hiding behind "language difficulties", even in one's own language, is so often merely a dodge to keep oneself hidden, and so a means of getting one's own way. Besides, all the questioning is so genuine in its concern not just for words, but for the love of life expressed by a love for language that we cannot find fault with the process.

Our most persistently questioning teacher, Elena Mihailovna, is quite a formidable figure. Not only the junior classes but most staff look on her with awe as she sails down the corridor. She will teach with a smile that stretches from one side of her silver fur hat, that she wears through four hours of lectures, to the other; then, after a brief respite for lunch, will continue teaching for perhaps another four hours, all with the same enthusiastic and encouraging smile. As already said, the specific gravity of brains is measured not only by innate intelligence but in long suffering and still joyful dedication to the task in hand. This is the best part of the good news from Emgeoo – but there is more to come. □

Adversary

Treating your adversary with respect is giving him an advantage to which he is not entitled.

Lawyer

He did not care to speak ill of any man behind his back, but he believed the gentleman was an attorney.

Boswell's *Life of Johnson*

Interim reinstatement injunctions and exceptional circumstances

By G P Rossiter, Senior Lecturer in Employment Law, Massey University

Exceptional circumstances is a rather elastic term. It is not surprising therefore that there has been some apparent difference of emphasis among Judges of the Employment Court in applying the term in cases of injunction applications for interim reinstatement. This article contends, in the light of the authorities, that the matter has to be considered in terms of the balance of convenience and the overall justice of the case.

It is well known that an applicant for an interim injunction must address three issues namely (1) whether the circumstances of the case give rise to a serious question (or possibly a strongly arguable case) to be tried (2) where the balance of convenience lies (ie which party will be likely to suffer the greater detriment or inconvenience from the grant or refusal of an injunction) and (3) the "overall justice" of the case.

Since the landmark decision of the full Court of the Employment Court in *X v Y and the New Zealand Stock Exchange* [1992] 1 ERNZ 863 it has been clear that that Court has the jurisdiction pursuant to s 104g and h of the Employment Contracts Act 1991 to make an interim injunction either (a) restraining an employer from giving effect to a threat to dismiss an employee or (b) requiring the employer to re-instate the employee to the position previously held pending the hearing of personal grievance proceedings before the Employment Tribunal which is the judicial forum having exclusive jurisdiction to make an order for reinstatement: (s 40(1)b Employment Contracts Act 1991).

In approaching the matter of its jurisdiction, the Employment Court in the *X v Y* case nevertheless was explicit that the matter before it was "exceptional". In the final passage of its judgment the Court said:

This is an exceptional case. Granting the interim relief sought amounts to reinstatement of a worker in employment from which he has been dismissed when that dismissal might be found to be justifiable. It is rare

for such a thing to occur . . . (This decision is not made lightly and should not be taken to be a general precedent).

Since this case, a reasonably substantial jurisprudence has developed with respect to the granting of interim reinstatement injunctions. There has been a certain divergence of approach among the Judges of the Employment Court regarding the exercise of the jurisdiction and the application of the judicial discretion which remains even where the essential elements for the grant of an injunction appear to be present.

In particular, the Court has had to consider (a) whether proof of exceptional circumstances is a factor to be proved "additional" to the matters to be satisfied generally in all interim injunction applications (b) the nature of the circumstances capable of qualifying as exceptional and (c) whether in any event there remains a need to prove exceptional circumstances either as a separate matter or as part of the Court's consideration of the overall justice of the case.

In *Baumgardner v National Institute of Water and Atmospheric Research Ltd* [1992] 3 ERNZ 800 the Chief Judge noted that "the word exceptional . . . in this context means what it says. It means in the rarest of cases" (at 804). It has to be said, however, with respect, that exceptional circumstances have in some of these cases been found in a range of conditions which are far from rare.¹

As to whether the issue of exceptional circumstances is a separate factor in itself or merely one part of the consideration of the "overall

justice" of a case, a comparison might be made between the approach of Judge Palmer in *Ritchie v Christchurch Carpet Yarns* (CEC 33/93; 23/1/93) and that of Chief Judge Goddard in *Ham v Hawera Aero Club* [1993] 2 ERNZ 756. In the former matter, the Court held that

additionally where an arguable case has been made out and the balance of convenience, extending to the overall justice of the case and the other remedies available to a plaintiff are weighed, the plaintiff must further show, upon an interim injunction seeking reinstatement to a position from which a particular plaintiff has been dismissed that there are exceptional circumstances . . . which justly occasion the making of an interim injunction.

By contrast, the Chief Judge expressed the view that

it is important . . . not to place too much emphasis on the question whether the circumstances are exceptional . . . in case this detracts from the broader considerations of justice by which the exercise of the discretion is to be governed.

His Honour also observed that

there is no warrant in the judgment of the full Court (in the *X v Y* case) for supposing that it had introduced an additional or a new requirement or even a higher hurdle.

Are exceptional circumstances essential?

What has remained at large is the more fundamental question of whether proof of exceptional circumstances continues to be an essential condition for the granting of interim relief by way of reinstatement (or the restraint of a threatened dismissal). This question was adverted to in several judgments of the Employment Court in 1994. For example in *Gore-Booth v Christchurch Casinos Ltd* (CEC 27/94, 27/7/94) and *Owens y de Nova v Ross* (CEC 39/94, 29/9/94) Judge Palmer had to deal with what in both cases His Honour referred to as "the contentious issue" of whether exceptional circumstances must be made out. In each case, however, Palmer J held that a decision on this point was not necessary as the evidence adduced did adequately meet this requirement if, indeed, as a matter of law such should still be considered to be necessary. The same issue came before Judge Travis in *Moody v Cunningham Construction (1987) Ltd* (WEC 44/94, 9/8/94) and *Luke v NZ Co-operative Dairy Co Ltd* [1994] 2 ERNZ 295. In the former case, His Honour suggested that exceptional circumstances might not need to be present "where the plaintiff has not been dismissed but as part of a continuing employment relationship seeks to have his previous work restored". In *Luke*, the Judge reviewed several of the relevant authorities and concluded that in one form or another exceptional circumstances still needed to be made out. The Court expressed agreement with the view

that the existence of exceptional circumstances is a factor to which regard must be had when considering the overall justice of the case. It was recognised in *X v Y* that to reinstate a worker in employment from which he or she has been dismissed is exceptional and out of the ordinary. This is especially so where it is alleged that there is dishonesty or some other form of serious misconduct (at 307).

Court of Appeal judgment

This issue has now been considered by the Court of Appeal (in *Port of Wellington Ltd v Longwith* (CA 20/95; 17/3/95. Cooke P; Hardie-Boys

and Gault JJ). The appeal was by the employer against an order of the Employment Court for the interim reinstatement of the plaintiff former employee. The termination had been on the ground of redundancy. In short, the gist of the case for the plaintiff was that the defendant had breached the terms of the applicable collective employment contract in declining two voluntary applications for severance the acceptance of either of which would (it was contended) have allowed a position for the dismissed employee and so his continued employment. The decision of the Employment Court in favour of the plaintiff on this point was found by the Court of Appeal to be unsupported by the evidence and to have been therefore affected by an error of law. The case was therefore remitted back to the Employment Court for reconsideration.

The Court of Appeal went on to address the question of whether there continues to be a need for a plaintiff to show exceptional circumstances before securing an interim order for reinstatement. Certain of the key Employment Court judgments were referred to including the *X v Y* case, *Baumgardner, Ham and Luke*. The apparent need to show exceptional circumstances was seen as resting upon two propositions. These were firstly, the Courts' reluctance to order specific performance of contracts for personal services and secondly the traditional requirement of the Courts for a stronger case to be established to obtain a mandatory injunction than a prohibitory injunction. Their Honours saw these propositions as undoubtedly

having validity in a general sense . . . but their application to employment contracts must be influenced by the clear direction of the legislature that reinstatement and compliance can be ordered.

These remedies are available upon substantive determination without the need to show exceptional circumstances. It was, therefore, according to the Court "difficult to see why they should dictate such a requirement at the interim stage".

An effective "floodgates" argument raised on behalf of the employer with respect to the consequences of a finding that proof of

exceptional circumstances is not necessary was rejected by the Court. It was held that "all the circumstances of a particular case must be taken into account in determining whether it is appropriate to order reinstatement". It was acknowledged that in some cases, the relationship between the parties will preclude reinstatement. "In cases of disputed redundancy the possible impact on the substantive determination will need to be weighed" (pp 9-10). A careful assessment of how best to regulate the position between the parties in the interim has to be made in each case. There was however, "no need in principle for an added requirement of exceptional circumstances before an order for interim reinstatement can be made".

This rather short judgment of the Court of Appeal is obviously helpful in resolving the matter of the relevance of "exceptional circumstances" to interim reinstatement injunctions although it should be borne in mind that its pronouncements on point were entirely obiter. It is, however, unfortunate that the problems inherent in cases such as these were not gone into in a little more depth having regard to the importance of the issue. As the Court notes, the Employment Contracts Act does provide for remedies of reinstatement and compliance.² Further, as the Court of Appeal also points out, those remedies do not require proof of exceptional circumstances. The Court's finding that plaintiffs who have lost their jobs should not have to face an excessively onerous evidential burden to obtain interim relief is timely in the light of the continuing chronic delays in the Employment Tribunal. However, the problem which has clearly troubled the Employment Court in several of these cases is the possibility of ordering the interim reinstatement of someone whose dismissal might ultimately be found to have been justified. The evidence in interim injunction proceedings before the Employment Court is invariably in the form of affidavits without the deponents being (generally) subject to cross-examination. The Court of Appeal is, in effect, concluding that the ramifications of reinstatement injunction can be considered in terms of the balance of

continued on p 240

Review of "Was Eve merely framed; or was she forsaken?"

By Dr Felicity Goodyear-Smith, BSc, MB ChB, DipObst

The following article was originally prepared on request for the purposes of a hearing in the Court of Appeal. That case is now disposed of and it has been suggested that the material in it is of general interest and should be published. In effect it consists of a review of the article "Was Eve merely framed; or was she forsaken?" by Justice Thomas that was published in The New Zealand Law Journal last year in two parts at [1994] NZLJ 368 and [1994] NZLJ 426. It is therefore particularly appropriate that the piece should appear in the same publication, and thus be available to the same readership, as the original article it discusses.

Dr Felicity Goodyear-Smith is a registered medical practitioner and holds the degrees BSc, MB ChB, DipObst. She is a Member of the Royal New Zealand College of General Practitioners. Dr Goodyear-Smith has worked in the sexual abuse field since 1982 as an examining doctor, writer, teacher, researcher and administrator. In 1988 she received a research grant from the Medical Research Council and published her findings in the New Zealand Medical Journal in 1989 in a paper entitled "Medical Evaluation of Sexual Assault Findings in the Auckland Region". She has published a number of papers and articles on aspects of sexual assault in various journals and other publications and presented papers on sexual assault topics at several international conferences. Recently she reviewed the current research findings in the sexual assault area, and in 1993 published a work First do no harm; the sexual abuse industry. In 1994 Dr Goodyear-Smith was awarded the Glaxo Foundation Fellowship 1995 to attend a conference held in Baltimore, in the United States in December 1994 on the recovered memory debate. This Fellowship requires her to teach the conference findings to New Zealand health professionals through the Post-graduate Medical Societies throughout 1995. She is currently an Honorary Research Fellow at the Department of Psychiatry and Behavioural Science, Auckland Medical School, and is conducting a survey of families where a family member has made allegations of sexual abuse on the basis of a recovered memory.

The main premise of Justice Thomas' article appears to be that a rape complainant giving evidence in a trial effectively undergoes a "second rape" by the brutalising nature of this experience. In Part II he explores ways that this distress might be alleviated without compromising the accused's right to a fair trial.

Justice Thomas refers extensively to feminist literature regarding rape issues. He quite rightly applauds the major contribution that feminist thinking has made on modern understanding and management of rape (p 369). However he does not refer to any of the growing body of literature and research findings which challenge or refute some of the more extreme claims made by feminist writers. Much is conjecture not based on established fact confirmed by scientific evaluation.

Feminist teachings can be seen to be divided between "power feminism" on the one hand, and "victim

feminism" on the other. In the former, women are considered to be strong individuals able to take control of their lives, whereas "victim feminism" is when a woman seeks power through an identity of powerlessness.¹ Many of the Judge's references belong to the "victim feminism" school of thought. He does in fact identify the potential conflict between conferring the victim status which does not allow women to be powerful but defines them as victims requiring protection and assistance; and putting into place policies and practices to take care of them which might be perceived as "protective and paternalistic" (p 359). This dilemma exemplifies the different orientations between these two schools of feminist thinking.

Whilst I agree with much of what Justice Thomas has to say about the nature and management of rape, there are three areas where his approach does not acknowledge the

existence of a considerable body of contrary opinion.

Firstly, there appears to be an assumption that all complainants are genuine rape victims, with a failure to address the issue of false allegations.

Secondly, he has a tendency to equate the extreme situation with the typical, extrapolating the effects of violent brutal rape onto all those who endure nonconsensual sexual intercourse, with sweeping generalisations about sequelae.

Lastly, procedures designed to provide advocacy and support for the complainant can result in loss of impartiality of the justice system and a presumption that the alleged offender is guilty.

To this extent, the arguments presented in these two papers represent only one side of the debate, and

the reference lists do not provide a balanced perspective on what is currently known and believed about the nature and effects of rape and rape trials.

1 Issues concerning false allegations

Throughout the article there appears to be a presumption that the alleged offender is guilty of the rape with which he is accused and the possibility of false complaint does not appear to be considered (for example, "Within the last year the complainant has undergone a horrendous ordeal in which her sexual integrity and autonomy has been terribly violated." p 371). The word "complainant" seems synonymous with "victim".

When a complainant makes an allegation of rape, there are actually three options: she is telling the truth, she is deliberately lying, or she is mistaken about what happened to her. I agree with the Judge that complainants are in all probability not likely to be more prone to deliberate fabrication in rape or sexual offences cases than in other crimes (p 431).

Deliberate falsehoods do occur. There are documented cases of deliberate false allegations motivated by anger or jealousy.^{2, 3, 4} There is also the situation which arises when a highly embellished or fabricated story comes to the attention of someone in authority and becomes the subject of a police charge. In this situation it becomes very difficult for the complainant, particularly if she is an adolescent, to back down, and the process escalates out of her control.

However, most false allegations are likely to be the result of mistakes rather than intentional lies. Apart from the situation where the complainant is alleged to have mistaken the identity of the man who raped her, the Judge fails to address other scenarios where the complainant is mistaken about what has happened to her (p 371).

There is now considerable evidence that a woman may come to believe she has been sexually assaulted when in fact this has not occurred. There are several circumstances when this might arise.

A Recovered memories

Many complainants allege that they recall sexual attacks occurring many

years ago, the memories of which they had blocked out of their minds (repressed) and only recently recalled. The theory of memory repression has become part of the pop psychology of the 1990s. It is disseminated via self-help books, television, magazines and other forms of media. Many women with poor self-esteem and dysfunctional lives feel that something is terribly wrong in their lives and wonder if it has been caused by childhood abuse which they have repressed. The basis of repression theory is that episodes of sexual abuse in childhood can be robustly repressed (instantly banished to the unconscious) and then recalled intact through memory recovery techniques or in other circumstances where the anxiety surrounding the event is removed.

To date, there is no scientific research which verifies this theory.⁵⁻¹⁵ Most studies involve retrospective self-reporting from clinical populations, and are hence anecdotal accounts which are impossible to confirm or deny.¹⁶⁻¹⁸ The only prospective study measures "not recalling" but not repression.¹⁹

There is however substantial evidence on how easy it is to implant false memories which come to be believed as true.²⁰⁻²⁵ Memory is a process in which new details can be added to old images or old ideas, changing the quality of the memory which is reconstructed rather than reproduced. There are a variety of factors and influences which can influence or distort memories, including:

- passage of time
- post-event misinformation
- interviewer or therapist expectations
- thinking, writing or talking about an event
- group sharing
- confusion of real event with dream or fantasy
- current beliefs and values.

Moreover, about 10 per cent of the population are easily suggestible and susceptible to hypnosis. Investigation of hypnosis has shown that there is no guarantee of increased accurate recall, but there is a likelihood of inaccurate recall but increased confidence that it is true.^{26, 27} Many of the techniques used by therapists or advocated in

self-help books to enhance or recover memories²⁸⁻³² are actually hypnotic in nature, although often not recognised as such by those using them.

When some current happening triggers the retrieval from memory of long-forgotten events there may be increased recall of the details of an actual sexual experience, but there may also be progressive confabulation related to suggestions of friends and family, a counsellor, the media, the hypersensitivity of sexual abuse in our community today, or the desire of a patient to find an explanation as to why her life is not going well for her.³³ Without external corroboration, clinicians cannot tell the difference between believed-in fantasy and viable memory about the past.³⁴ People who have developed pseudomemories about events are not lying: they sincerely believe in their mistaken beliefs about what has happened to them.

B Psychotic illness

An allegation of rape is sometimes the result of a delusion by someone suffering from a psychotic illness such as paranoid schizophrenia. The content of paranoid delusions is derived from ambient social phenomena, and in recent times sexual abuse allegations are likely to become incorporated into these delusions,³⁵ just as in different eras, paranoid delusions might have involved a belief in being possessed by witches or being persecuted by Communist spies.

C Misinterpretation of consent

Justice Thomas clearly identifies that many rape cases depend on determining whether or not the complainant consented to sexual intercourse with the accused. The issue is frequently that the complainant alleges that she was forced to have intercourse, whereas the accused maintains that she was a willing party. Justice Thomas quite rightly points out that "consent is a decidedly malleable concept" ranging from "failing to demonstrate some form of resistance" to "active participation or encouragement of another's approach" (p 429).

Lack of consent is clearly implicit where there is no active resistance by the woman but she feels coerced by threats by the man to inflict grievous bodily harm, or where such harm

is actually inflicted. As the Judge correctly explains, this situation applies "in only a small minority of rape cases" (p 429). Most rape cases involve situations where there are no threats of physical violence or actual force used by the man and the woman demonstrates no resistance to sexual intercourse.

Rather than the law looking for manifest dissent, he advocates that the accused would need to demonstrate reasonable doubt that "the complainant had freely agreed to intercourse, not just the negative notion of lack of consent".

In the 1960s and 1970s, society challenged the double standard which condoned promiscuity for men but not women.³⁶ The last decade has seen a return of this double standard. The media and advertising constantly display what is considered to be the desirable image for a woman. She should appear sexually attractive to men. Make-up, sexually-alluring clothes and many other consumer products are marketed with this in mind. A woman receives powerful messages that she should pay close attention to how she looks, her body shape and appearance. This objectifies her, and damages her integral sense of self-worth. Society does not encourage women to enjoy their sexuality as active participants and initiators.

Moreover, while her goal is to be sexually attractive to men, all men, there is a clear counter statement that it is not acceptable to be sexually active outside of monogamous marriage. Presented with this conflicting message of sexual allurements and rebuff, it is not surprising that many men are confused as to what constitutes consent. From a woman's point of view, she may feel pressured into a sexual experience. However, from the man's perspective, her resistance or lack of active initiation might be interpreted as modesty, and that she is really wanting sexual activity.

A woman might have actively participated in sexual activity "in the heat of the moment", especially if influenced by the disinhibitory effect of a drug such as alcohol. After the event, however, she may regret her actions, and feel she was "taken advantage of". The issue of consent then becomes a value judgment. From the man's perspective, he may have interpreted her actions

as "freely given consent". From her perspective, however, she may retrospectively interpret his sexual advances as unsolicited and subsequently believe that the experience constituted sexual assault.

2 Effects of rape

Justice Thomas quite rightly documents the acute trauma and subsequent sequelae (called the "rape trauma syndrome") a rape victim might experience following a violent sexual assault. He describes rape as "the most vicious and reprehensible crime" which results in the shattering of "a woman's sexual integrity and personal autonomy" causing "acute trauma and lifelong psychological and emotional scars". They are said to be "scared, or terrified, and many believed they were going to die" (p 368). However not all women will suffer this degree of disturbance, and not all will subsequently view themselves as "scarred for life".

The two case stories given are of violent sexual assault involving considerable use of force and physical injuries. In both cases the woman struggled and resisted the man's advances (370-371).

However Justice Thomas later acknowledges that use of physical force applies to only a small minority of rape charges. There is a continuum from suffering a violent painful physical act where there is realistic likelihood of serious bodily harm or death at one end of this spectrum, to a woman engaging in sexual intercourse with an acquaintance or partner when she has not actively invited or initiated the encounter at the other end.

Whilst in no way condoning the crime of rape, it can be argued that for many women the experience of being physically harmed, suffering torture, extreme physical pain and permanent physical disability is more feared and more traumatic than enduring sexual intercourse to which they did not freely consent but which they did not actively resist.

3 Effects of the legal process on the alleged rape victim

Justice Thomas succinctly summarises the fundamental hard-won rights to justice which are a hallmark of a fair and democratic society (p 426). These are the presumption of innocence, the onus of proving guilt on the prosecution, the require-

ment that guilt be established beyond reasonable doubt, and the exclusion of prejudicial or irrelevant evidence.

Our justice system is based on the principle of neutrality. A crime is alleged, evidence is gathered concerning that allegation and is placed before the Court to determine the innocence or guilt of the accused. In well-meaning attempts to make this process less of an ordeal for the alleged victim, procedures which offer advocacy and support for the complainant can lead to a presumption of guilt of the alleged perpetrator and erode the principle of impartiality.

The areas of contention are the assumption that giving evidence in Court is "like a second rape" for the complainant; the loss of the right of a defendant to face his accuser; and the shifting of the onus of proof onto the accused.

A The effect of the trial on the complainant

The Judge clearly identifies several sources of possible distress for a rape complainant (p 369). Making a statement to the police and having a medical examination may be stressful, although a number of measures have been put into place in recent years aimed at making these procedures as benign as possible. Months or years of delay between complaint and trial can be anxiety-provoking to both alleged victim and alleged offender. Many complainants also find giving evidence at the trial is an ordeal.

I certainly agree that Court proceedings should be operated with consideration and compassion towards all complainants. This courtesy should of course be extended towards defendants as well.

Cross-examination can be very distressing, and wherever possible, the Judge should intervene when a complainant is subjected to vicious personal attacks designed to destroy her credibility. Clearly, however, especially when the issue is one of consent and there is no supporting forensic evidence available, her testimony is required to establish the facts of the case as much as possible.

Although many psychotherapists believe that healing will result from clients reliving the trauma of sexual abuse,³⁷ the data to support this belief is unsure and I agree with the

Judge that having to relive the event is unlikely to be beneficial. However I do not agree with his claim that "reliving the trauma of the rape" in the witness box is a brutal and barbaric equivalent of a "second rape" (p 372). Whilst it may be a harrowing and distressing experience, describing details of an event in the relative safety of a witness box is hardly the same as undergoing a terrifying and painful encounter where one fears for her life. This argument demeans the experience of the violent rape survivor.

B Use of screens and closed-circuit television

Traditionally, an accused has the right to confront his or her accuser face-to-face. As Justice Thomas explains, this right extends back to Roman Law and is a basic tenet of British justice. The use of screens and closed-circuit television erodes that right. The theory that facing the alleged offender in Court is too distressing and traumatising for an alleged victim to endure is a matter of conjecture. To my knowledge this is not currently supported by good scientific evidence. It can equally be argued that facing the offender in Court, effectively saying to him "you did wrong and I'm not going to accept your behaviour" in the safety of a Courtroom supported by the full weight of law enforcement officers and the Court, can be an empowering and therapeutic experience for someone who has suffered rape.

C Burden of proof

Justice Thomas states that focus on the issue of consent frequently leaves the complainants feeling that they are on trial not the defendant (p 371). To redress this, he suggests a definition of rape as any episode of sexual intercourse where consent has not been "communicated in an unequivocal manner" (p 429). The defence would have to establish (beyond reasonable doubt) that the complainant had freely agreed to have intercourse with the accused. Whilst this may lessen the alleged victim's experience that "she is on trial herself", it shifts the burden of proof from the prosecution onto the accused, which is clearly contrary to one of the fundamental principles of our justice system, and which we ignore at our peril. □

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Authority

The general story of mankind will evince, that lawful and settled authority is very seldom resisted when it is well employed. For men are easily kept obedient to those who have temporal dominion in their hands, till their veneration is dissipated by such wickedness and folly as can neither be defended nor concealed.

Dr Johnson
The Rambler

The Council of Legal Education

Law, skills and transactions: The opportunity for an expanded curriculum

By R J Scragg, Lecturer in Law, University of Canterbury

The author of this article was formerly Director of the Canterbury Branch of the Institute of Professional Legal Studies. Funding problems have raised questions about the whole issue of the Professional Legal Education course. The author maintains that the working party set up to consider the future of professional legal training needs to examine the concept itself as well as its function and structure. Mr Scragg looks at the history and then puts forward some specific proposals intended to relate training and experience.

1 Introduction

On 9 September 1994, the Council of Legal Education issued an "open" letter addressed to the "law student". The need for the letter arose from the announcement in the Budget that government funding for New Zealand's Professional Legal Education (PLE) course was to end. In the letter the Council explains what is to be done about offering the course in 1995. Funding is the matter of immediate concern but the letter goes further. In the letter the Council of Legal Education announces the setting up of a working party "to investigate and report on the future of professional legal training" in this country. This is a matter of very real significance. It is to be hoped that the working party will not limit its inquiries to "how (PLE) should be delivered, by whom, and the quality and cost of the programme", which are the matters specified in the letter. Rather, this is an opportunity to consider the whole concept of Professional Legal Education and how it can best be developed to serve the needs of those who wish to enter the legal profession, the profession itself and the New Zealand public.

When classes began in 1988 in the then new Professional Legal Education course, New Zealand entered upon a new era.¹ The Council of Legal Education took direct responsibility for the course and offered instruction through a specially created body, the Institute

of Professional Legal Studies (IPLS). The Institute was, in effect, the teaching arm of the Council of Legal Education.

The course offered was itself radically different from anything available in New Zealand before.² It was skills-based, involved day-long classes on a "block" basis of thirteen weeks and was programmed so that the identical material and timetable were offered by the Institute of Professional Legal Studies at all four of the universities which housed law schools.³

The course has undergone various modifications since 1988 but it remains essentially as described here. Its reception has been varied. Not everyone affected by the course has understood the nature of skills-based training. Not everyone who has understood it has been enamoured of it. It has, however, remained the method of Professional Legal Education adopted in this country. In its own terms, that is to say, as a skills-based programme, it is an excellent course and it is a matter of very real regret that this has not been more widely appreciated. With the Council of Legal Education's proposed investigation, there is an ideal opportunity for the Council to develop the course significantly. If the Council were to expand the curriculum of the course, the Council would satisfy much if not all, of the criticism aimed at the course, the Council would benefit the students and would present

better prepared applicants for entry to the profession. This would, in turn, benefit the general public. Such an expansion would enable the Council of Legal Education to build on the achievements of the last six years while adding a new dimension to the training given.

When the Council of Legal Education decided to adopt a new form of Professional Legal Education in the 1980s, such training was virtually universally conceived of in terms of an "either/or". A full time block course of this kind should be either skills-based or transaction-based. Both methods have their respective merits. In this article it is argued that the best form of Professional Legal Education offers both skills-based and transaction-based training. In addition, it is argued that such training should be coupled with an extended period of qualification which compulsorily requires experience in a law office. Such a programme of training would require the creation of a new status within the profession, that of trainee barrister and solicitor.

2 Professional legal education

In order to understand these arguments, it is necessary to understand the whole concept of Professional Legal Education.

Professional Legal Education or PLT (practical legal training) is that part of a lawyer's training which follows the degree. In some jurisdictions, such courses are known as

bar admission courses. This name certainly makes their function clear.

Professional Legal Education takes different forms in different jurisdictions. Its purpose is to equip those who wish to go into practice for entry into the law office.

Long established forms of Professional Legal Education are articles (for solicitors) and pupillage (for barristers). These forms involve training on the apprenticeship principle. Both forms of training continue to be used in England and Wales where they form a part of the training of solicitors and barristers.⁴

More familiar to New Zealand practitioners is the essentially hybrid form of training employed under the old nineteen unit degree.⁵ Under this system, law students, in their second or third year of reading for the degree of Bachelor of Laws, took jobs as part time clerks in the offices of barristers and solicitors and "learnt the job" while undertaking their academic studies. Under this system, there was no formalised training in the law offices. The work required of law clerks was not regulated and there was no requirement of a need to comply with national standards. It was up to individual firms how they developed their law clerks and on graduation, such clerks automatically qualified to make application for admission as solicitors.

This method of training underwent a change in the late 1960s.⁶ With the introduction of the full-time degree, professional training (the "profs" course) became a one year course, designed to be undertaken while students were employed in an office. Under this system, knowledge of the law was acquired pursuant to full-time university study and "professional" training took place while the intending practitioner worked as a law clerk in an office and attended lectures at university, commonly early in the morning and in the evenings. Lectures covered conveyancing, advocacy, office administration, civil procedure and related "practical" subjects, together with two academic subjects. On the successful completion of that year, the student-cum-law clerk could apply for admission as a barrister and solicitor.⁷

In 1988 this system was replaced by the course proposed in the Gold Report.

3 The Gold Report

By the mid-1980s there was widespread dissatisfaction with the "profs" course. In the years leading to the sharemarket crash of 1987, there was an enormous growth in commercial activity which law firms could hardly keep up with in terms of a need for ever-increasing professional staff numbers.⁸ The result was a shortage of lawyers. In addition, it was commonly found that newly qualified lawyers were inadequate to the task before them and this compounded the problem. Law firms required staff who would promptly become fee earners, get through the large volume of work confronting firms and turn a profit. The newly qualified needed further training and they needed time to build their confidence before they became productive team members. Law firms also discovered that employees who had been "profs" students at different universities had received different instruction and this too proved a problem for firms. What was needed was a consistent course of instruction for all "profs" students which would equip them with a level of competence which would make them "useful" to their firms more rapidly than was then the case.

"Practical" training at that time had developed, in some jurisdictions, in a way never tried in New Zealand. In some Australian states, and in parts of North America, "full-time block" courses of Professional Legal Education had been developed as the method of training for admission to the profession.

"Full time block" meant they were courses which required students to attend classes everyday for most of the day. Students' time was occupied with exercises and success depended on satisfactory completion of assessment exercises. An analogous example is the very successful New Zealand Law Society Litigation Skills Course⁹ where students are engaged in performing exercises all day long over the period of the course. Students are given instruction, they practise exercises and they are given feedback on their performances by instructors who have expertise in the field in question. This is the "formula" for training in full-time block Professional Legal Education courses.

This approach to Professional Legal Education was, then, the way of the future. What was perhaps not widely understood by practitioners at that time was that "full-time block" courses were, in fact, of two distinct types. On the one hand there were transaction-based courses and, on the other, there were skills-based courses. Both are practical courses of instruction but their content is dramatically different.

In Australia, "full-time block" courses followed the transaction-based path. In North America, they were inclined to the skills-based path. This distinction is fundamental. With transaction-based courses, students learn transactions. They are trained in all the steps necessary to act on sales and purchases of real estate, to act in the administration of estates, to form companies and so on. In skills-based courses transactions are essentially incidental.¹⁰ In skills-based courses, instruction is not concerned with the procedural steps necessary to enable a practitioner to perform a transaction, rather, it works on the basis that anyone with a Bachelor of Laws degree is capable of learning procedure and can do so in their own time and in the course of their employment. Therefore skills-based instruction is concerned with those underlying requirements that enable lawyers to conduct transactions. For example, in order to work as a conveyancer, the practitioner needs to be able to conduct an interview so as to obtain instructions, understand the technique involved in giving advice, analyse facts, negotiate, apply sound principles of writing and drafting and so on. These are the underlying requirements. That is to say, they are skills which underlie the multiplicity of transactions collectively known as conveyancing. The theory of skills-based training rests on the basis that once certain skills are acquired, they can be applied to all transactions. What must be learnt, then, are skills, not transactions because transactions are finite and ever changing.

The word learnt, in the preceding paragraph, is used advisedly. In terms of the theory of skills training, skilled behaviour is learnt behaviour. Skill, in this context, is a technical term. Its meaning is discrete and distinct from its daily idiomatic usage. In terms of skills-

based training, conveyancing is not a skill, it is a transaction, or, more accurately, it is the term used to denote a particular collection of transactions. The application of a skill connotes the utilisation of technique. For example, the skill of interviewing, as taught by the Institute of Professional Legal Studies, involves three stages. The stages are:

- 1 Preliminary problem identification
- 2 Chronological overview
- 3 Theory development and verification

The skill of interviewing requires a student to be able to master and apply these stages. Patently, clients do not conveniently fit themselves into the pattern of an interview structure in the way in which they tell their stories and therefore students must consciously use additional skills to elicit information in an orderly fashion. This requires students to make a conscious selection of types of question to be used in order that the client may be dealt with effectively. Students must make a decision to use open-ended or narrow questions in order to conduct the interview.

Skills, then, involve the utilisation of structures and techniques. With skills, nothing is haphazard. The behaviour of the person applying the skill is disciplined to make a conscious selection of the most appropriate method of dealing with the client or problem in hand.

This is the essence of skills-based training. It is practical training but it is a form of practical training which does not concern itself with the procedural requirements of the transactions conducted in law offices. As will be seen shortly, the Council of Legal Education's course does involve transactions but only to a limited extent and for a very specific purpose.

This, then, is skills-based training and it is the form of training the Council of Legal Education has adopted in New Zealand. Such training was established in this country pursuant to the Gold Report of 1986.

In 1986, the New Zealand Law Society invited Professor Neil Gold to investigate Professional Legal Education in New Zealand and make recommendations as to its future direction. Professor Gold was then,

and remains, a leading figure in Professional Legal Education.¹¹ Professor Gold is a proponent of skills-based training and has gained an international reputation for his work in recognising the importance of skills in the training of lawyers. When he made his report, Professor Gold recommended that New Zealand adopt a skills-based course.

Professor Gold addressed his report to both the New Zealand Law Society and the Council of Legal Education. The report was adopted with the New Zealand Law Society accepting responsibility for the planning stage of the implementation of the report.

Professor Gold did not participate in the planning of the curriculum to be offered. Planning was undertaken by a team of people who had gained experience in Professional Legal Education course design in jurisdictions outside New Zealand, some of whom had worked with Professor Gold in Canada.¹²

From the outset it was determined that transactions would play a part in the course. Transactions were not to be taught in their own right, rather, they were to provide the focus for teaching the skills. The concept of a transactional focus is easily explained. To make the skills relevant to students, they were to be taught and practised as they applied to legal transactions. For example, the skill of interviewing could be taught with regard to a client wishing to bring a negligence claim arising out of a collision on the highway. Here, the procedure involved in such claims would become the transactional focus for the skill. Again, the skill of negotiation can be taught with a family law, commercial or conveyancing transactional focus. It is important to note that the transactions were not to be taught; the skills were to be taught, the transactions were to be the vehicles which were incidental to the instruction.

This method of training marks a dramatic change from that of its predecessor which was essentially concerned with knowledge of the substantive law and although transactions were discussed, by and large there was little practical application of transactional knowledge. Understandably, the new course met with a varied reception. Many students and many practitioners could not relate to such a method of training, it was

so far removed from anything they had known before. The course, however, continued.

4 The Roper Report

From the outset, it had always been intended that the course would be reviewed, once it was underway. The review came in 1990 and was conducted by Christopher Roper. ("The Report of a Review of the Institute of Professional Legal Studies", The Council of Legal Education, Wellington, 1990.) As had been the case with Professor Gold, New Zealand was fortunate in finding itself able to retain a person of such distinction when Christopher Roper agreed to undertake the review. Christopher Roper had been a director of both the College of Law in Sydney and the Leo Cussen Institute in Melbourne. (These bodies may broadly be described as the NSW and Victorian equivalents of New Zealand's Institute of Professional Legal Studies. Their functions are wider ranging than those of the Institute.)

Christopher Roper's function was to determine the extent to which the New Zealand course complied with Professor Gold's prescription and to recommend any changes he felt appropriate.

Christopher Roper made a number of recommendations and engrafted on the structure of the original course a number of modifications which have set the pattern for the course down to the present time.

Two fundamental changes were the division of the course into twin modules and changes in the way transactions were utilised in the course.

The two-module structure involved every student undertaking both the Commercial and Property Law module and the Litigation module. Both of these modules were to be taught by specialist instructors.

The changes involving the use of transactions required the number of transactions used in the course to be reduced but taught more fully.

In pursuance of these recommendations, the course was revised and its teaching materials rewritten. Such rewriting has continued ever since. A reading of the materials since 1991 reveals that they have plotted a course which, at times, has laid great emphasis on the trans-

actional focus and, at others, very little emphasis. Throughout, the course has remained skills-based.

From this discussion it is plain that the Professional Legal Education, world-wide, involves a considerable tension between skills and transactions. The obvious questions, begging to be asked, is why are both skills and transactions not given equal standing in Professional Legal Education courses? Why does it have to be one or the other? Plainly, both have their part to play. It is essential that a lawyer be able to conduct an interview and it is essential that a lawyer understands and can perform the transaction to which it relates. Such transactional knowledge forms the basis of the questions the lawyer will need to ask in the interview. In one jurisdiction at least, this question has been addressed.

In 1990, at a time when New Zealand was concerned with the Roper Report, Professor Gold was engaged in establishing a course of Professional Legal Education at the City Polytechnic of Hong Kong. The course designed by Professor Gold and Dr Julie Macfarlane was very different from that instituted in New Zealand in 1988.

Professor Gold and Dr Macfarlane designed a course which combined substantive law, transactions and skills, with each of these elements given its full weight. The course was to be conducted over a full academic year. In this we find a new formula for Professional Legal Education and one which could be adopted to give a new direction to Professional Legal Education in New Zealand in terms of the utilisation of skills and transactions.¹³

Given the structure of the City Polytechnic's course, it would be interesting to determine Professor Gold's prescription for a Professional Legal Education course in New Zealand today, some eight years after the publication of the Gold Report.

5 Reform

From this discussion, it is obvious that the place of skills and transactions is fundamental in the design of any Professional Legal Education course. Professional Legal Education courses can be constructed around one or other and they can be constructed around both. If it is accepted that both are essential to

successful legal practice, then courses should incorporate both. Professional Legal Education courses can also incorporate substantive law. The substantive law is very fully dealt with at degree level in New Zealand and does not appear to require incorporation in Professional Legal Education beyond summaries necessary for the performance of transactions and skills.

Reform raises two further questions. The first involves the length of a Professional Legal Education course, the other, the application of the cognitive processes of the mind. The two issues are inter-related.

The existing New Zealand Professional Legal Education course is conducted in a "block" over thirteen weeks. Transactional "block" courses in Australia have commonly been twice this length. At the City Polytechnic of Hong Kong, Professional Legal Education is conducted over a full academic year and does not follow the "block" format.

In New Zealand, the period of professional training needs to be considered in accordance with the requirements of the Law Practitioners Act 1982. In New Zealand, admission as a barrister and solicitor does not confer an immediate full right of practice, subject to one anomalous exception. (Students admitted as barristers and solicitors but taking out practising certificates as barristers sole are able to enter into practice on their own account in the capacity of barristers sole: s 55(2) Law Practitioners Act 1982.) Section 55 requires three years' legal experience, gained in a period of eight years. Legal experience is defined:

55. Restriction on right of practitioner to commence private practice – (1) In this section the expression "legal experience", or "experience", means experience of any one or more of the following kinds:

(a) Experience of legal work in the office of a barrister or solicitor or firm of solicitors in active practice on his or their own account;

(b) Experience of legal work in any of the State services (as defined in section 2 of the State Services Act 1962);

(c) Experience of legal work

in the office of a local authority or in the employ of a company or other body whether incorporated or unincorporated;

(d) Experience of full-time law teaching in a university;

(e) Experience as a member of the House of Representatives: – and includes any such experience before the commencement of this Act.

At its simplest, legal experience involves working in a law practice as an employed solicitor clerk. Once the minimum period has been satisfied, practitioners may enter into partnership or enter into practice on their own account. The only formal requirement at this stage ("good character" is a requirement for admission as a barrister and solicitor: s 44 Law Practitioners Act 1982) is

adequate instruction and examination . . . in the duties of a solicitor under this Act, and under any regulations or rules for the time being in force, relating to the audit of solicitors' trust accounts or to the receipt of money (s 55(2)(c) Law Practitioners Act 1982).

Section 55 of the Act is redolent of a bygone era. Since 1982, when the Act took effect, society has changed. Today there is an emphasis on excellence bred of training rather than on experience bred of time-serving. From the day a student successfully completes the Professional Legal Education course to the day that same student completes three years' experience, there is no requirement for that student to undertake any further training whatever. There is simply the need to pass the accounting test.

Such training as a new practitioner receives in the three year period becomes a matter of chance. Those fortunate enough to join firms which offer comprehensive training programmes to all their professional staff will receive thorough training and subsequent monitoring in their work-day performance. Some new practitioners will receive no training at all. Others will at least be given the opportunity of attending New Zealand and District Law Society seminars and workshops. The situation is entirely uneven. From all points of view, this is unsatisfactory. Public, profession and new-prac-

tioners alike are entitled to expect that those who seek to practise in their own right have reached a prescribed minimum standard. The only way to ensure that such a standard is reached is to have all practitioners undertake a consistent course of training, spread over their first three years in practice. Such training would involve examination and assessment to ensure that competence had been attained. Once all requirements had been satisfactorily completed, practitioners would be entitled to enter into practice on their own account. (The questions of "good character" and the ability to cope with the accountancy requirements of legal practice are referred to below.)

Training over this three year period would involve instruction and practice in both skills and transactions, with transactions dealt with in their own right, not just as a focus for skills.

The content of such a course raises the question of the cognitive processes of the mind.

All those who have worked as instructors in the Institute of Professional Legal Studies have experienced reluctant students who dismiss the course out of hand. Their criticisms relate to both method and content. In short, they cannot relate to the nature of skills-based training. It is dramatically different from anything they have experienced before and they find its impact on them unsettling. The phenomenon has been well described by M L J Abercrombie in her outstanding study "The Anatomy of Judgement" (Penguin, London, 1985), which developed from her work with medical students in London in the years after the Second World War. As M L J Abercrombie found, even the most recalcitrant student does benefit from the course, though it may be a long time before such a student realises it.

The problem is easily explained. As Wittgenstein writing in the *Tractatus (Tractatus Logico-Philosophicus)* (1921); revised edition: London, Routledge and Kegan Paul, 1974) would have it, meaning requires a picture of reality, or, in a more modern idiom, a window on reality. That is to say, something only has meaning for a person if that person can relate it to something they already know. This is their window on reality.

Although it is inevitable that some students will not appreciate what is available to them until it is too late and the opportunity is past, something can be done to improve the situation. It is a question of timing. This takes us back to the heart of the debate about transactions and skills and which needs to come first in terms of training. Proponents of solely transaction-based courses take the view that you cannot practise a skill until you can conduct the transaction it relates to. This argument is well expressed by John Nelson, then of the College of Law in Sydney, in his important work "New Directions for Practical Legal Training in the Nineties (College of Law, Sydney, 1988.) Supporters of the solely skills-based courses, would dismiss this argument as nonsense. In reality, both schools of thought are correct and there is a further dimension to the question which needs to be considered. It is the necessity for students to have a suitable window on reality, something in themselves to which they can relate their training.

The majority of Professional Legal Education students enter the Institute of Professional Legal Studies with a background of formal training derived from their degree courses. Some will have undertaken skills-based training within their degrees but the experience is likely to have been a limited one, probably restricted to only one or two subjects such as Negotiation or the new Legal Research and Writing course offered at the University of Canterbury. The result of this limited experience is that students on entering the Institute of Professional Legal Studies are likely to relate better to transaction-based training than to skills-based training. The explanation for this is in the nature of the work. Transactions involve the use of forms, and the application of Regulations. As such the work is more nearly akin to that experienced at degree level as it involves looking up information in books and then applying it.

Skills-based training is not concerned with statutes, regulations and case law. It is far more abstract. A student who has studied the Torrens System in Land Law can relate readily to transactional instruction covering the sale and purchase of a residential property. A student who has never dealt with the public may

experience very real difficulty in understanding why an interview, to be effective, needs to be carefully structured and conducted in accordance with a distinct programme.

6 A proposed Professional Legal Education course structure

The answer to the problem is to try to relate training and experience. To this end, it is possible to formulate a proposal for an effective Professional Legal Education programme. Such a programme could be structured in stages over the present three year period provided for in s 55 of the Law Practitioners Act 1982.

(a) The first stage

After completing a law degree, students would receive instruction, on a full-time block course basis, in transactions. Such transactions would cover both commercial/property law and litigation. The litigation part of the course would involve instruction in civil and criminal procedure.

On satisfactory completion of this part of the course (subject to good character), students would be eligible to seek admission as barristers and solicitors. The right of such admittees to take out practising certificates in their own right as barristers sole should be abolished. Students so admitted would then bear the title "trainee barrister and solicitor".

(b) The second stage

In order to proceed to rights of full practice, trainees would then have to obtain employment in law firms or in related areas, much as specified at present under s 55 of the Law Practitioners Act 1982. Those trainees proceeding to work immediately in the litigation field would then undertake a skills course in advocacy. Those not proceeding straight away into litigation work would not have to take this part of the course until later in the three year period. All trainees would have to take the advocacy course before gaining a right of full practice.

(c) The third stage

This stage would involve all trainees in undertaking training in the skills of interviewing, advising, negotiation and writing and drafting. Fact analysis would be dealt with as a part of the advocacy course. Analysis of

legal documents and law office management, currently dealt with as skills in the existing Professional Legal Education course, would be absorbed into the transaction-based part of the programme, as would professional ethics.

It is not proposed that trainees attend on a block course basis for skills training. Rather, full-time skills seminars, each spread over several days, would be run throughout the year. Trainees could attend at different times, as their experience in their offices developed to the point where they would benefit from the training. Training groups would be small, maximising opportunities for individual feedback by instructors to trainees.

(d) *The fourth stage*

The fourth and final stage would be the right to enter into full practice on the successful completion of the preceding three stages. Training in accounting method and trust account procedures should form a part of the trainees' transaction training but there may be policy reasons for requiring an examination on these topics at the end of the three years, before the right of full practice is attained.

All transactional and skills work performed by trainees would be examined and assessed. Some of the work would lend itself to formal examination, some to projects and others to performance. For example, a knowledge of the rules and regulations governing solicitors' trust accounts is best examined; the ability to prepare a statement of claim is best learnt by having the trainee draw one; the ability to conduct an interview is best tested by having a trainee perform one. There could be set times throughout the year when such examinations and assessments would be conducted and trainees would present themselves accordingly.

Training of this kind would cost money and would involve trainees who were not working in university centres attending the various segments of the course on a residential basis. All those trainees progressing through all stages of the programme would be in paid employment and, in consequence, in a position to meet the cost if it cannot otherwise be funded. Attendance would also require time away from offices but this just has to be accepted as a

necessary part of the requirements for attaining rights of full practice and is in no sense unreasonable.

Under this system of Professional Legal Education, training would, then, occupy a period of three years. At the end of that time, successful trainees would undergo a major change of status. They would be entitled to describe themselves as barristers and solicitors and they would acquire rights of full practice. These two elements would exist in tandem. There would be no compulsion for such trainees to go into partnership or to practise on their own account. Rather, their Professional Legal Education would be complete and they would be fully qualified, in every sense of the term.

7 Conclusion

It would be an understatement to say that the task before the Council of Legal Education is a demanding one. This article has not attempted to consider those matters specified in the Council's open letter to students. The questions of how the Professional Legal Education course should be delivered, by whom, and the quality and cost of the programme all need to be dealt with. At the heart of the whole matter, though, is the concept of Professional Legal Education itself, its function and structure. Whatever decisions the Council of Legal Education comes to, the need is for a Professional Legal Education course which enables intending practitioners to develop the confidence to conduct themselves competently in their professional lives, which serves the constantly changing needs of the legal profession and which enables the general public to place its trust in those who would practise law on their behalf. The task is, at the least of it, a demanding one. □

1 Instruction in Dunedin, Christchurch, Wellington and Auckland commenced on 8 February, 1988.

2 The philosophy and structure of the course are fully described by C S Cull and R J Scragg in "The Introduction of the Professional Legal Studies Course in New Zealand", (1988) Vol 6 No 2 *The Journal of Professional Legal Education* 117.

3 With the establishment of a full Law School at the University of Waikato, the course has been made available in Hamilton as well. See Professor Margaret Wilson: "The Making of a New Legal Education in New

Zealand: Waikato Law School", (1993) 1 *Waikato Law Review* 1.

4 See Maureen F Fitzgerald: "Stirring the Pot of Legal Education" (1993) Vol 27 No 1 *Journal of the Association of Law Teachers* 4 for an account of contemporary professional legal education in England and Wales.

5 A brief account of the history of Professional Legal Education in New Zealand is set out in Chapter 4 of the Roper Report: see fn 13 below. Associate Professor Peter Spiller has published a history of legal education in New Zealand. See: "The History of New Zealand Legal Education: A Study in Ambivalence" (1993) Vol 4, No 2, *Legal Education Review* 223.

6 Ibid.

7 Although this course was designed to be undertaken while students were employed in an office, experience in an office was not a compulsory requirement. As time went on, increasing numbers of students could not find positions in offices and were, in consequence, compelled to complete the course and seek admission to the profession without the benefit of such experience.

8 See Ch 16, "The National Economy and Business and Law in Auckland 1970-90" in *The Making of Russell McVeagh* by R C J Stone, Auckland University Press, Auckland, 1991.

9 His Honour Judge Satyanand has given an excellent description of the course in "Training the Lawyer for the Courtroom" [1987] NZLJ 343.

10 See fn 2 above. The book *Learning Lawyers' Skills*, edited by Professor Neil Gold, Karl Mackie and Professor William Twining, Butterworths, London and Edinburgh, 1989, is devoted to the subject of skills training for lawyers. See especially Parts 1 and 3.

11 Professor Gold is one of the editors of *Learning Lawyers' Skills* (fn 10) and is the author of chapter 11 of that work. Professor Gold has attended a number of law conferences in New Zealand and presented papers and conducted workshops at them.

12 The design team comprised Professor Andrew Price (University of Victoria, British Columbia), Neville Carter (College of Law, Sydney) and Ruth Windeler (The Advocates' Society Institute, Toronto, Ontario). Graham Viskovic (Auckland District Law Society) assisted the team. Andrew Pirie and Ruth Windeler had both worked with Professor Gold in Canada.

13 It must be acknowledged that the City Polytechnic course was subjected to strong criticism at the end of its first year of operation. The criticism was well aired in the *South China Morning Post* in the latter part of 1992. This criticism does not undermine anything said here, though. The criticism was not aimed at the concept of creating a course built around substantive law, skills and transactions. Rather, the criticism was aimed at the method of instruction adopted. Instruction took the form of "Problem Based Learning" rather than a traditional lecture method. Problem Based Learning involves students in "seeking out" information rather than having it delivered to them in lecture form. Students were divided into small groups of approximately eight members and were set problems to solve. Such exercises were known as PBL's, an abbreviation of "Problem Based Learning". Students had deadlines to work to and would have to

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Correspondence

Dear Sir,

Re Disputes Tribunal [1995] NZLJ 141

I have read Cynthia Hawes' "Case and Comment" on *Hertz NZ Ltd v Disputes Tribunal* (High Court, Wellington, CP 423/93, 16/12/94), Greig J). I am impressed by her argument that review of a Disputes Tribunal decision should be permitted when it finds liability for which there is no legal basis whatsoever. But I am nonetheless uneasy with the argument. The Tribunals are about dispensing rapid justice. They are empowered to have regard to the law but do not have to follow it (s 18 Disputes Tribunals Act 1988). I have always taken this as power to rule in a party's favour when the substantial law is their way but there is a technicality against them. (Perhaps failure to give the written notice required by the Fencing Act 1978 is an example.)

But I also take this as some ability to decide in accordance with the Referee's view of the overall justice of a case – even if the substantive law is against a party. *Hertz* may be such a case. The case involved a driver renting a car from Hertz, and having an accident in which the claimant's car was damaged. Among the facts was this. Under the rental contract Hertz would indemnify the driver, if it was found that the driver was at fault. So Hertz had decided to

bear this risk and may have insured for it (and did charge its customer for this). That potential fault could not easily come to trial (or even to the Tribunal) because the driver (a tourist) had long since left New Zealand. I did not see the parties or the evidence. But I am left to wonder that the Disputes Tribunal Act 1988 may be wide enough to allow a referee to calculate the odds of that liability being proven, and to decide that overall justice could best be served by deciding against Hertz.

To a similar end, a Referee had previously decided in favour of the claimant in *NZI Insurance NZ Ltd v Auckland District Court* [1993] 3 NZLR 453 (and noted by Professor Spiller at [1993] NZLJ 311) even though that result was against the applicable law. (The claimant paid a premium to a broker who went into receivership before passing it on to NZI. The claimant then paid a replacement premium to NZI to obtain cover. The Tribunal ordered a refund.)

But is that an unwanted result? Parliament wished society to be better off as a whole with a first level Tribunal dispensing rapid justice for small disputes, instead of these matters taking longer and costing more to resolve in a Court. This may involve just such problems as *Hertz*. It may be in accord with the conception of the Tribunals. So I am

satisfied by Justice Greig's exposition of how and why the Tribunals must be left to get on with matters even if at times their law is wrong.

Of course it is one thing to satisfy an individual claimant who may not appear before the Tribunal again. For those who may be termed frequent defendants, such as rental car firms and insurance companies, life with the Tribunal may not be easy. Hertz' plight is not costless to consumers. An economist will see that because Hertz and other rental firms are exposed to a wider risk they may have to buy more insurance, and that will tend to force rental rates up for all.

The matter may be for Parliament, not the Courts. Apart from that, at an organisational level one response is to improve the Tribunal's capability to apply law. Another must be to settle far more cases by agreement: (see *Review of the Operation of Disputes Tribunals from a Consumer Perspective*, Ministry of Consumer Affairs, Wellington 1994, 124 pp). An inability to achieve much of the latter has been a disappointing feature of the Tribunals. I hope that improves.

Leslie Brown

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present their work, as a group, at the conclusion of the time limit, commonly about a week. Instructors would then mark and give feedback on the work.

Hong Kong does not have one consistent method of Problem Based Learning for all law graduates: the course offered at Hong Kong University is different from the one offered at the City Polytechnic and relies essentially on the lecture and examination method of instruction. The radically different nature of Problem Based Learning led to unfavourable comparisons with the Hong Kong University course. Subsequently, the City Polytechnic course has been modified so that instruction involves a greatly increased lecture content. See Julie Macfarlane and Pat Boyle: "Instructional Design and Student Learning in Professional Legal Education", (1993) Vol 4 No 1, *Legal Education Review* 63.

The author of the present article, as a member of the staff of the New Zealand Institute of Professional Legal Studies, was seconded to the City Polytechnic of Hong Kong in 1991 to prepare the teaching materials for the Law of Succession.

14 The question of Continuing Legal Education is a separate matter and is not addressed in this article.

15 There is a body of opinion which favours the reduction of the number of centres at which the Professional Legal Education course is taught. The most extreme supporters of this view favour reduction to one location. The Council of Legal Education rejected this approach in 1993 when it refused to adopt the recommendations of Harvey McQueen in his "Report of a Review of the Branch Structure of the Institute of Professional Legal Studies" (1992). See Professor Margaret Wilson's article referred to in fn 3, above.

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convenience and overall justice of the case.

It is likely that a further refinement of the approach to be followed in these cases will necessarily be required from both the Employment Court and the Court of Appeal. □

1 For an analysis of the factors accepted as being possibly sufficient to justify the exercise of this jurisdiction, see (1995) NZBLQ Vol 1 No 1, p 14.

2 Sections 40 and 55 Employment Contracts Act 1991. For an example of a procuring of an effective reinstatement by way of the compliance order procedure see *Grant v Superstrike Bowling Centre Ltd* [1992] 1 ERNZ 727.