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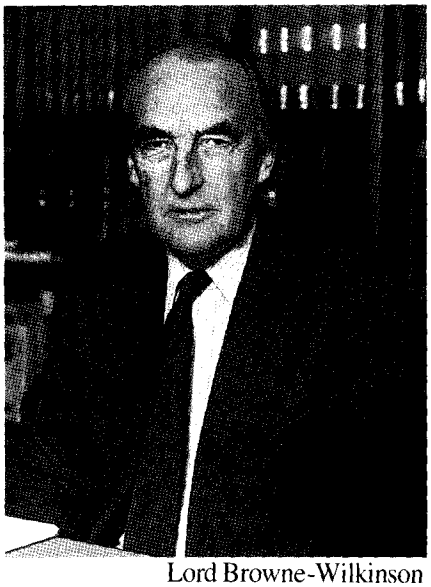
Law Conference 1996 in Dunedin

The Triennial Conferences of the New Zealand Law Society, appropriately serve three main purposes. The first is that they are a lot of fun. Secondly they enable those attending to learn about aspects of the law that deepen their knowledge in the areas in which they regularly practise, and broaden their knowledge in other areas. Thirdly, as a consequence of the other two, they remind those who are there that they belong to a learned profession with a unique ethos that serves an essential social purpose.

In 1996 the Conference is to be held in Dunedin at Easter from Tuesday the 9th to Saturday the 13th of April. The principal sponsor for this Triennial Conference is Trust Bank New Zealand. As usual there will be a wide variety of topics discussed. Also as usual there will be a number of important overseas speakers. The



Lord Browne-Wilkinson

member of the Judicial Committee of the Privy Council who will be attending is Lord Browne-Wilkinson. His Lordship was born in London in 1930. He was educated at Oxford and is a Bencher of Lincoln's Inn. He became a Judge in the Chancery Division in 1977, a Lord Justice of Appeal in 1983, Vice-Chancellor in 1985 and a Lord of Appeal in Ordinary in 1991. Lord Browne-Wilkinson is to present a paper on "Equity in a Fast Changing World". Among the topics expected to be covered in the session are the inevitable Mareva Injunctions and Anton Pillar orders, equitable rights of confidence, fiduciary duties in commerce, and the law of restitution and unjust enrichment.

Also from England will be Helena Kennedy QC. She is to speak on "The Illusion of Inclusion – Women in the Law". Helena Kennedy QC will speak on different

Helena Kennedy QC

aspects of this topic. She will look at the development of the law regarding women. This is the question of the substantive law. She will also speak on the separate, but related, issue of women in the profession. This is particularly apposite for a Conference being held in the city of Dunedin. It was there on 7 May 1897 that Ethel Benjamin was admitted to the legal profession in the Dunedin Supreme Court by Mr Justice Williams. This was only two months after the first woman in the British Empire, Clara Brett Martin was admitted in Canada. It was Ethel Benjamin however who was the first woman in the Empire to appear as Counsel in Court, and this was in Dunedin. (See the article on her at [1992] NZLJ 85).

There are some other Judges from different jurisdictions who will be speaking. The Honourable Madam Justice Beverley McLachlin is from the Supreme Court of Canada. Justice Gabriel Bach is from the Supreme Court of Israel. Justice Bach is to speak on "The Trial of Adolf Eichmann and other Genocide Trials". This address should be particularly interesting among other reasons because Justice Bach acted as a

Justice Bach

prosecutor in the Eichmann trial. The Justice was born in Germany in 1927 and studied law at University College London in the years 1947 to 1950. He was called to the Bar at Lincoln's Inn in 1950, which was some three years before Lord Browne-Wilkinson. Lincoln's Inn will be well represented.

A professor from the United States will be Professor Charles Alan Wright of the University of Texas. Professor Wright is President of the American Law Institute. The subject of his paper is "A Bill of Rights: Does It Matter?". The American Bill of Rights is of course rather different from the New Zealand Bill of Rights Act 1990. For one thing it is an integral part of the American Constitution and has been so since the ten Amendments that constitute it were ratified in 1791. Professor Wright was born in 1927 – in the very constitutional city of Philadelphia. He has been on the faculty of the University of Texas since 1955 and has been a professor there since 1980. Professor Wright has

Professor Wright

argued cases in the United States Supreme Court and in a number of Courts of Appeal and State Supreme Courts. In 1984 he was a Visiting Fellow at Wolfson College, Cambridge. In view of the extent of the jurisprudence already gathering about our own Bill of Rights Act it will be particularly interesting to hear an American commenting on this topic.

Many other current practical issues will be discussed. For instance Professor Cornish from Cambridge will present a paper on "A Super-Highway Code: IPR's Information Nets and Multi-Media"; Joanna Kalowski of Sydney will speak on mediation with a paper entitled "In a Manner of Speaking: A Cross-cultural View of Mediation"; Jane Fenton of Melbourne will speak on "The Most Effective Marketing – Making the Most of Your Existing Clients"; Mr Soli Sorabjee from India will present a paper on "Human Rights"; G Burgess Allison of the Mitre Corporation, USA will talk about "The Internet: A Report from the E-Frontier"; and Dr Richard Gates from Armidale, New South Wales will discuss the topic "The Things Lawyers Do To Themselves: Happy and Healthy or Wealthy and Dead?"

Language is the primary tool of lawyers. The first question must always be, "what do the words say?" when any legal question falls to be considered. In this day and age words are having imposed on them a heavy political freight, and are being subject to close political analysis and interpretation. Dr Jocelynne Scutt, a barrister from Melbourne will present a paper on those aspects of law and language that, she will argue, enforce and reinforce existing social power structures. Her paper will consider whether lawyers and Judges should engage in creative lawmaking to challenge existing power structures.

Dr Scutt

Dr Scutt practises more particularly in the areas of commercial law, trade and competition law and anti-discrimination cases. She has published prolifically and has campaigned widely for equality for women.

Another paper on language and the law is to be given by Dr Robyn Penman who is Executive Director of the Communication Research Institute of Australia at Canberra. She is a Doctor of Philosophy from the University of Melbourne and has the degree of Bachelor of Commerce in Applied Psychology from the University of New South Wales. She has been a Visiting Professor at the University of Massachusetts and a Visiting Senior Scholar at Linacre College, Oxford. Dr Penman has given lectures and conducted seminars in Psychology and in Communication at many Australian and American Universities, as well as at both Oxford and Cambridge in England. She has a very extensive list of publications to her name. She has given many addresses to seminars and conferences on psychological as well as

Dr Penman

communication topics. Dr Penman will look critically at the question of the adoption of plain language, and discuss whether it is an effective means to wider public understanding of legislation and legal documents.

In addition to the expected overseas speakers mentioned above there will be a number of other visitors. These will include Justice Peter Gray, Christopher Roper, and Noel Pearson all from Australia. There will of course be the usual substantial number of New Zealand Judges, practitioners and academics making contributions.

It is obvious that the programme as it is shaping up is a most stimulating one. There will be such a variety of speakers and of topics as should satisfy the interests of any practitioner. The social programme can be expected to be as rewarding as it has always been.

P J Downey

Recent Admissions

Barristers and Solicitors

Baker BG	Auckland	6 October 1995	Le Grice CF	Auckland	6 October 1995
Ball ME	Auckland	6 October 1995	Leydon KM	Auckland	6 October 1995
Barrett RJ	Auckland	6 October 1995	Lotu-iiga SM	Auckland	6 October 1995
Bayly SE	Auckland	6 October 1995	McKinstry T	Auckland	6 October 1995
Black PC	Auckland	6 October 1995	McSweeney K	Auckland	6 October 1995
Blomfield LJ	Auckland	6 October 1995	Madigan K	Auckland	6 October 1995
Byrne CM	Auckland	6 October 1995	Malcolm JJ	Auckland	6 October 1995
Capelle AF	Auckland	6 October 1995	Middleweek KA	Auckland	6 October 1995
Ceelen VJ	Auckland	6 October 1995	Miles KL	Auckland	6 October 1995
Cheung ES	Auckland	6 October 1995	Moore RM	Auckland	6 October 1995
Chin J	Auckland	6 October 1995	Mount SJMcK	Auckland	6 October 1995
Couch VS	Auckland	6 October 1995	Nicholson LJ	Auckland	6 October 1995
Currie JG	Auckland	6 October 1995	Norris JM	Auckland	6 October 1995
Davidson AL	Auckland	6 October 1995	O'Meagher CM	Auckland	6 October 1995
Donald LAP	Auckland	24 October 1995	Peacock MI	Auckland	6 October 1995
Dudek KJ	Auckland	6 October 1995	Perry PJ	Auckland	6 October 1995
Dutton AK	Auckland	6 October 1995	Petersen E	Auckland	6 October 1995
Edwards WC	Auckland	6 October 1995	Pye NJ	Auckland	6 October 1995
Embling WJ	Auckland	6 October 1995	Roberts RL	Auckland	6 October 1995
Fletcher JA	Auckland	6 October 1995	Royal K-L	Auckland	6 October 1995
Foley JM	Auckland	6 October 1995	Scott JW	Auckland	6 October 1995
Fotiades D	Auckland	6 October 1995	Singh RK	Auckland	6 October 1995
Gardiner DL	Auckland	6 October 1995	Smith CA	Auckland	6 October 1995
Goldwater EL	Auckland	6 October 1995	Smythe BJ	Auckland	6 October 1995
Grace SM	Auckland	6 October 1995	Sutherland EM	Auckland	6 October 1995
Greig JHR	Auckland	6 October 1995	Taylor LS	Auckland	6 October 1995
Harrod MB	Auckland	6 October 1995	Thoo SY	Auckland	6 October 1995
Haynes CI	Auckland	6 October 1995	Thorley MW	Auckland	6 October 1995
Hazelton AG	Auckland	6 October 1995	Twist JB	Auckland	6 October 1995
Hendriksen MJ	Auckland	6 October 1995	Von Tunzelman JG	Auckland	6 October 1995
Hewlett SL	Auckland	6 October 1995	Walsh BA	Auckland	6 October 1995
Hosking JM	Auckland	6 October 1995	Warren JE	Auckland	6 October 1995
Jackson HJR	Auckland	6 October 1995	Watkins PR	Auckland	6 October 1995
Jameson SI	Auckland	6 October 1995	Wensley DMA	Auckland	6 October 1995
Jefferson JS	Auckland	6 October 1995	Wharepouri AM	Auckland	6 October 1995
Jewell AD	Auckland	6 October 1995	White DO	Auckland	6 October 1995
Johnson KG	Auckland	6 October 1995	White DR	Auckland	6 October 1995
Keefe DM	Auckland	6 October 1995	Whitfield WG	Auckland	6 October 1995
Korpus A	Auckland	6 October 1995	Wilson PG	Auckland	6 October 1995
Ladd SJP	Auckland	6 October 1995	Woodhams JN	Auckland	6 October 1995
Lai JKY	Auckland	6 October 1995	Woods NW	Auckland	6 October 1995
Lamers B	Auckland	6 October 1995	Young JW	Auckland	6 October 1995

Case and Comment

Professional privilege reaffirmed

The House of Lords on 19 October 1995 in the consolidated cases of *R v Derby Magistrates Court* gave a decision on the question of professional privilege which is of considerable interest and has a New Zealand judicial connection. In the principal judgment given by the Chief Justice Lord Taylor of Gosforth, their Lordships overruled the decision of the Court of Appeal in *R v Ataou* [1988] QB 798, [1988] 2 All ER 321. In doing so they also reversed *R v Barton* [1973] 1 WLR 115, [1972] 2 All ER 1192. The decision in *Barton* was referred to in the New Zealand judgment of Cooke J at Napier in *R v Craig* [1975] 1 NZLR 597, which in turn was quoted from in *R v Ataou*. Indeed the very words of Cooke J were adopted by the English Court of Appeal in 1988.

In *R v Derby Magistrates Court* a young man, B, had been charged with murder and acquitted. He had made two contradictory statements to the police. In the first he admitted having committed the murder. In the second he denied this, but implicated his step-father. At his trial the defence was the second statement. Subsequently the mother of the deceased girl sued B and his step-father alleging assault and battery. She succeeded in her civil claim and the Judge indicated in his judgment he was satisfied the step-father had been the one who strangled the girl. The step-father was then arrested and charged with murder.

At the committal stage the Crown called B as a witness. In cross-examination he was asked about instructions to his solicitor between his making the first and the second statements. He claimed privilege. This was not allowed and witness summonses were issued against the solicitor, and against B requiring the production of all relevant "attendance notes and proofs of evidence". This was appealed to the Divisional Court by way of judicial review and subsequently the House of Lords gave leave to appeal.

The decisions in the Magistrates Court and in the Divisional Court were based on the 1988 Court of Appeal decision of *R v Ataou*. On the basis of that case the Magistrate held that he was obliged to weigh competing interests against each other. This was confirmed by the Divisional Court. In *R v Ataou* the Court of Appeal, reflecting almost exactly the words of Cooke J in November 1974, stated:

> When a communication was originally privileged and in criminal proceedings privilege is claimed against the defendant by the client concerned or his solicitor, it should be for the defendant to show on the balance of probabilities that the claim cannot be sustained. That might be done by demonstrating that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege. The judge must then balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it.

Lord Taylor after citing that passage went on to explain how that would be applied in the case their Lordships were considering. He said:

> Thus under the principle stated in *Reg v Ataou*, if it be correct, the judge is required to approach an application for production of documents protected by legal privilege in two stages. First he must ask whether the client continues to have any recognisable interest in asserting the privilege and, secondly whether, if so, his interest outweighs the public interest that relevant and admissible documents should be made available to the defence in criminal proceedings.
>
> So stated, the principle seems to conflict with the long established rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client: once privileged, always privileged. It also goes against the view that the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings, and whether by the prosecution or the defence, and that the refusal of the client to waive his privilege, for whatever reason, or for no reason, cannot be questioned or investigated by the court.

His Lordship then said he agreed that if *R v Ataou* was correctly decided then the Magistrate was entitled to take the view he did, and the balancing exercise he carried out was properly done. There could be no question of the appellant being tried again for murder and it was most improbable, His Lordship said, that he would be prosecuted for perjury. But, he then went on, the important question remains whether *R v Ataou* was correctly decided, and whether, when privilege is claimed there is a balancing exercise to be performed at all.

Lord Taylor traversed a large number of cases. The arguments of Mr Goldberg for the respondent, and Mr Richards as amicus curiae were not accepted. It was acknowledged Parliament had recently imposed restrictions on the right to silence of an accused, and there were statutory exceptions to the privilege against self-incrimination in the revenue and bankruptcy fields, but nevertheless legal professional privilege had been left untouched. His Lordship did add, "so far"!

Then it was argued that professional privilege should be a general rule but should not be absolute. Lord Taylor commented:

> But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.

Lord Taylor concluded by saying that privilege must be upheld, not for the sake of the appellant alone, but in what he called the wider interests of all who might otherwise later be deterred from telling their solicitors the whole truth. Consequently no exception should be allowed to the absolute nature of professional privilege, once this has been established.

The profession has every reason to be grateful for this firm, clear re-affirmation of the fundamental principle of legal professional privilege.

P J Downey

Contribution towards costs in custody and access issues

Burger-ringer v Burger-ringer (High Court, Auckland, HC 169/94, 3 August 1995).

In June 1995 a Full Court of the High Court considered the issue of contribution towards costs in custody and access disputes. A Full Court had been considered desirable because of the divergent views expressed by Family Court Judges over who should bear the costs for Counsel for the Child and specialist reports. On 3 August 1995 Barker and Anderson JJ gave their decision in *Burger-ringer v Burger-ringer* (High Court, Auckland registry, HC 169/94, judgment 3.8.95).

Facts

The parties had both sought custody of their two children and an order was made in favour of Mr Burger-ringer. Early in the proceedings Counsel for the Children had been appointed and psychological reports commissioned pursuant to s 29A and s 30 of the Guardianship Act 1968. The Family Court Judge ordered each party to reimburse in equal shares the costs of Counsel for the Children in respect of the excess of such costs beyond $15,000. The total costs were $24,908.59 thus each party was required to contribute $4,954.30. The Judge also ordered the parties to share equally the full costs of specialist reports amounting to $2,839.22, that is $1,419.61 each. The father appealed.

Section 29A of the Guardianship Act 1968 states that the Court may, if it is satisfied that it is necessary for the proper disposition of the application request a report.

Section 30 holds that a Court shall, if proceedings appear likely to proceed to a hearing appoint a barrister or solicitor to represent the child in custody/access issues. There is a proviso to the effect that the Court does not have to do so if it is satisfied that the appointment would serve no useful purpose. The section also provides that fees for Counsel for the Child shall be met by the state but the Court may if it thinks proper order any party to the proceedings to refund such amount as the Court specifies. Similarly, s 29A(6) enables the Court to order a party or parties to the proceedings to pay for specialists' reports.

Judgment

The Court took the view that whilst the welfare of the child is the first and paramount consideration it is not the only consideration. "The Court's power to make an order relating to costs, in the context of this legislation is not purely fiscal. It must be taken as a recognition of parental obligations in respect of children" (at 6).

Their Honours referred to *Fell v Fell* (1989) 5 FRNZ 576 where Judge von Dadelszen said:

> The child normally requires separate and independent representation . . . the parties have no say in the appointment itself, nor in who is appointed. Accordingly, it can be said that it would be unjust to require contribution in such circumstance. A "threshold test" needs to be applied.

Judge von Dadelszen went on to say that once Counsel for the Child has performed his or her "useful purpose" by making the Court aware of what should be done, then up to that point the Crown should pay. When that point is past and proceedings are unnecessarily and avoidably prolonged, payment by one or both the parties can be said to be inevitable, subject only to financial means. "So once the threshold is past, contributions become 'proper' in terms of the Act."

Barker and Anderson JJ preferred the view that "proper" permits the Court to review the financial ability of each parent to repay costs even when the dispute has been appropriately brought and resolved quickly with assistance of Counsel for the Child. To hold otherwise in Chief Judge Cartwright's (as she then was) view in *Gilkison v Denee* (Wellington, 26 August 1991) would be to allow both rich and poor parents to receive financial support from the Crown virtually automatically, once a decision has been made by the presiding Judge that Counsel ought to be appointed to represent their children. Her Honour took the view that if parents knew that they would have to pay they would be more likely to act reasonably in the interests of the children and less likely to prolong litigation unnecessarily.

With regard to s 29A report costs the Court adopted the approach in *P v P* (1990) NZFLR 65 where Judge von Dadelszen referred to the language of s 29A as providing for a primary obligation on the parties to pay such costs. His Honour held that there was a rebuttable presumption that parties should contribute towards the costs of report writers. This view was based on three factors:

(a) The Report is a part of the evidence and the writer a potential witness.
(b) The view of each party is required to be sought prior to the request for the report being made by the Court.
(c) The parties should normally bear the costs of placing evidence before the Court.

Other Judges in other cases had held that there is no presumption that the parties pay the costs of s 29A reports and that Counsel for the Child and s 29A reports were directed to the Courts' inquiry into the welfare of the child, such steps being taken in the public interest and not merely to enable the parties to resolve their dispute (see eg *Williams v Williams* (1988) 3 FRNZ 587).

Barker and Anderson JJ also believed that the Judges' discretion in making decisions about appointing Counsel and ordering s 29A reports should be unfettered (at 14) and that there is no statutory warrant for capping Counsel's fees. Furthermore their Honours could see no warrant for any such cap, saying (at 16):

> It is notorious that parties to custody battles are frequently intractable, emotionally labile and lacking in common sense or perspective. Counsel for the Child(ren) often need to spend a considerable time with the parties in the hope that some sensible solution can be achieved. How the amount of time needed for Counsel satisfactorily to complete his or her task can be predicted in advance is hard to envisage.

In the present case the Court held that Judge MacCormick was in error in adopting the "threshold test". However the contribution each party was ordered to pay was reasonable. The appeal was dismissed.

Comment

In *Burger-ringer* it appears that the parties were intractable and less than honest (at 17). Obviously if parties are going to waste the Court's time they should pay. On the facts it might be that their Honours were more than generous in ordering the parties to pay only the excess over $15,000.

In a user pays society it may be considered appropriate for parties in custody and access disputes to meet the costs involved especially if they have the assets or income to do so. A parent seeking custody cannot object to the appointment of counsel for the child or a specialist report yet that parent has no say in who is appointed or what the hourly rate will be. The Justice Department does not have the time, nor should it have the responsibility for keeping a check on these costs. With no cap on Counsel's fees an unstoppable momentum in costs can occur. By the time the parent is to make his or her submissions concerning his or her contribution towards costs to the Court the damage is done, a huge bill exists. If parents are to pay then surely they should have some say in who is appointed and how much that person can charge per hour. Rather than allowing the costs to mount up the parties should have been able to monitor the amount spent. The parties can always decide that they cannot afford the legal fees involved and give up, but once Counsel for the child is appointed matters are out of their hands.

In *Burger-ringer* the children were born in 1986 and 1990 and therefore one presumes that the Counsel for the child had a more onerous and time consuming job than she would have had had the children been old enough to articulate their wishes on custody and access. Even allowing for the bitterness of the parties and the age of the children a system that allows such large sums to occur cannot be one that has the effect of promoting the welfare of the child.

Nicky Richardson
University of Canterbury

Pregnancy or illness, and discrimination

The recent decision of the House of Lords in the case of *Webb v E M O Aircargo (UK) Limited* is of considerable interest on two grounds. The first is the difference in attitude to discrimination between the English legal system and the European Court of Justice. The second is the distinction between pregnancy and illness. The decision was given on 19 October 1995. The judgment of the Court, with which Lord Griffiths, Lord Browne-Wilkinson, Lord Mustill and Lord Slynn concurred, was that of Lord Keith of Kinkel.

The facts at issue were relatively straightforward. An employee, Mrs Stewart, became pregnant, and during her maternity leave a Mrs Webb was employed to replace her. Shortly afterwards Mrs Webb discovered that she too was pregnant and that her baby was expected at about the same time as that of Mrs Stewart. The air cargo firm then dismissed her. Mrs Webb claimed that her dismissal constituted discrimination against her on the ground of her sex. The matter was considered by an Industrial Tribunal, by the Employment Appeal Tribunal, by the Court of Appeal and by the House of Lords. It was held at each level that the dismissal did not constitute unlawful discrimination on the ground of sex in terms of the English Sex Discrimination Act 1975.

The reason given by Lord Keith of Kinkel in his original judgment, which is reported at [1992] 4 All ER 929, [1993] 1 WLR 49 was that although it would normally be unlawful discrimination to dismiss a woman because she was pregnant, and although the application of what were called the characteristics of childbearing and the capacity for childbearing would normally amount to the application of a gender-based criterion the decision in the appellant's case to dismiss her was not based on a gender criterion, since it was the appellant's non-availability at the relevant time which was the critical factor. Apparently the evidence had indicated that Mrs Webb was dealt with in the same way as a man would have been if he would be unavailable at the material time because of ill-health. It was held furthermore that the reasonable needs of the employer's business outweighed the discriminatory effect of the condition the employer had imposed, which was that the person filling the job should be able to perform the duties during the time of Mrs Stewart's maternity leave.

The decision of the English Courts had been based on the interpretation of the provisions contained in the Sex Discrimination Act 1975. Their Lordships decided nevertheless to refer the matter to the European Court of Justice for a preliminary ruling upon the true construction of Article 2(P1) of Council Directive of the European Community 76/207 of which Article 2 provides that there should "be no discrimination whatsoever on grounds of sex either directly or indirectly ...".

The question posed by the House of Lords included a comment that

> had the employer known of the pregnancy of the applicant at the date of appointment she would not have been appointed and also that the employer would similarly have dismissed a male employee engaged for this purpose who required leave of absence at the relevant time for medical or other reasons.

The decision of the European Court of Justice given on 14 July 1994 and reported in [1994] QB 718, [1994] 4 All ER 115, was that the treatment of Mrs Webb was discriminatory. The most interesting part of the decision of the European Court of Justice was the emphasis placed on an earlier decision of the Court where it "drew a clear distinction between pregnancy and illness even where the illness is attributable to pregnancy but manifests itself after the maternity leave". It was held that there was no reason to distinguish such an illness from any other illness. The important point made however was that pregnancy is a solely feminine condition, and in itself is not an illness. Consequently pregnancy could not justify dismissal simply because a woman was prevented on a purely temporary basis from performing the work for which she had been engaged. Pregnancy it was said, "is not in any way comparable with a pathological condition". The Court went on to state, in response to the question asked by the House of Lords, that

> The fact that the main proceedings concern a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment cannot affect the answer to be given to the national Court.

The European Court of Justice accordingly replied that the directive precluded the dismissal of Mrs Webb.

Much point was made in the final decision of the House of Lords about the reference in the decision of the European Court of Justice to the phrase that it was dealing with the case of an employee "who was recruited for an unlimited term ...". Lord Keith accordingly drew a distinction with the situation where the work is of a purely seasonal duration or where staff is required for some specific event, such as the Wimbledon fortnight or the Olympic Games. The European Court however had expressly declined to consider that question and so left it open.

It is interesting to note that Lord Keith did not refer specifically to the explicit distinction drawn and emphasised by the European Court between pregnancy and illness. The drawing of a clear distinction between pregnancy and illness is of course a basic issue with very far reaching implications in various areas of medical practice and law.

There is a sharp criticism of the European Court of Justice in *The Gazette*, the official publication of the Law Society in England, for 18 October 1995. Mr Cash MP, one of the Eurosceptics, maintains that the Court has a political agenda. He criticises the composition of the Court Some members of the Court, he says, have held only academic, political or administrative office. Mr Cash also complains of the secrecy of the Court's deliberations which means that no one knows how individual Judges have voted on particular issues.

P J Downey
Wellington

Afterword: There is an interesting report in the *Guardian Weekly* for 29 October 1995 on the question of sex discrimination. The European Court is reported to have held recently that it is contrary to European law to grant free medical prescriptions to women at age 60, but to men only at age 65. British practice was accordingly changed to give free prescriptions to men at the lower age. The British government could have raised the entitlement for women to 65 without discriminating in terms of the decision; but it understandably decided otherwise for political, not legal reasons.

The report said that the European Court has also held that it is illegal to have quota systems that give women priority for jobs and promotion. The Labour Party in England is now being taken to an industrial tribunal by two men who were rejected as Parliamentary candidates because the Party had instructed some winnable constituencies not to select male candidates. The report notes that they are likely to succeed if they go to the European Court if the English Courts fail them.

It is astonishing after all these years that it is still not appreciated that a prohibition of discrimination on the ground of sex does *not* mean a prohibition of discrimination only against women on the ground of their sex. This basic principle is of course one that should be as applicable say in the selection of Judges as in admission to partnerships in legal firms, or of equal opportunity in any other walk of life.

PJD

Queen bees sting youth

The sting of the queen bee is being felt in many law firms, according to reports at the London conference for women lawyers early in April.

Queen bees are women who, having scaled the ladder of success, refuse to offer any help to those on the way up. For obvious reasons, few delegates were prepared to stand up and finger their female superiors publicly. But there was much informal evidence of very unsisterly behaviour. One delegate complained that her female partner had referred to her slightingly in front of clients on several occasions. Another said that her female partner had refused to take seriously her complaints about sexual harassment by a client.

Panelist Jane Whittaker, immediate past chair of the Association of Women Solicitors, acknowledged the seriousness of the problem. "It is very difficult to cope with a woman who is against you. They tend to play a little dirtier than men and they are harder to read".

Law Society Gazette,
p 8, 12 April 1995

Sixth Conference of Chief Justices of Asia and the Pacific

By Rt Hon Sir Thomas Eichelbaum, Chief Justice of New Zealand

This article reports on a meeting of Chief Justices of the Asia-Pacific region held in Beijing at the time of the 1995 LAWASIA Conference. The meeting considered a number of topics including alternative dispute resolution, appointment of Judges, judicial corruption, and Court procedure among others. Particularly important was the adoption of a Statement of Principles of the Independence of the Judiciary on 19 August 1995. This statement is published in full at the end of Sir Thomas Eichelbaum's article, as a matter of record. This is followed by an earlier LAWASIA Report on the same question which is referred to in the preamble to the 1995 Statement of Principles. The earlier report appears at p 360.

This meeting was held in Beijing from 16 to 21 August 1995, in conjunction with the 14th LAWASIA Conference held on the same dates. As well as having their own separate sessions, delegates to the Chief Justices' meeting were able to attend the LAWASIA Conference's opening and closing ceremonies and there were some social engagements in common. The countries at the Chief Justices' meeting were Australia, Bangladesh, Hong Kong, India, Indonesia, New Zealand, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Mongolia, Myanmar, Nepal, New Caledonia, Singapore, USA, Vanuatu, Viet Nam, Sri Lanka and China — a range of populations from 200,000 to 1.2 billion! In most cases countries were represented by their Chief Justices.

Subjects on the agenda included recent developments in alternative dispute resolution, reform of procedure and civil litigation, women and the law, the recruitment and appointment of Judges, the Courts and culture, judicial corruption, and the role of Courts in relation to economic development. I mention the following by way of random examples of matters of interest here:

(i) Throughout the region there is increasing reliance on alternative dispute resolution. In some countries it has been taken to the stage of a "gatekeeper" role, ie, as a condition precedent to access to the Courts it is necessary to certify that the dispute has been to mediation. In some instances, Judges are trained as and act as mediators, but other countries take the view that this is not part of the judicial function. Others again are using retired Judges for this purpose. Another development relating to mediation is that some judiciaries are using it, with perhaps surprising success, at the appeal stage.

(ii) The concept that the judiciary should have some control over its budget is taking hold in the region. For example Papua New Guinea now has a separate annual appropriation based on a budget prepared by the Chief Justice. Some countries have a provision (contrary to New Zealand practice) that once funds have been allocated to the judicial system they cannot be reclaimed, and may be carried forward from year to year.

(iii) Difficulty in controlling the wasteful use of Court time is a general frustration. Singapore, which has arguably the most efficient system in the region, is contemplating the system of a "time package" to be allocated to each party, fixed after careful consultation before commencement of the case, which may be used by the respective parties in any way they wish but may not be exceeded.

(iv) China has decreed fixed time limits for the disposal of litigation, eg civil cases to be completed within three to six months, extensions being permitted only with the approval of the President of the Supreme People's Court. Judgments are required within one month of the hearing.

(v) Training of the judiciary is now generally accepted as a necessity for the preservation of judicial independence, rather than, as was once thought, an intrusion on it.

(vi) Those countries or states which have established a media relations officer or similar regard it as a successful and worthwhile innovation. One of the significant papers, presented by Justice Robert Nicholson of the Federal Court of Australia was in relation to the media and Court proceedings. An expanded version of his paper has been published in the Journal of Judicial Administration (Vol 5 No 1, August 1995 p 1).

The most important event of the Conference was the adoption of a Statement of Principles of the Independence of the Judiciary. Having the language agreed and the statement adopted by such a disparate group, with in some cases rather different political attitudes to those of western democracies, was a major achievement much of the credit for which goes to the energy and diplomacy of the Chief Justice of Western Australia, David Malcolm.

It is of interest if not concern that in respect of judicial administration, the New Zealand situation does not meet the requirements of paragraphs 36 and 37 of the statement. At least we can say that with the establish-

ment of a separate Department for Courts we are closer to conformity than previously.

New Zealand has been represented at four of the six conferences of Chief Justices of the region held from 1985 onwards. The diversity of cultures and judicial systems represented make the meeting a fascinating one but despite the differences there is a good deal of commonality in the problems facing the judiciaries, and I have found the opportunity to exchange ideas and solutions on common problems a valuable experience. The meeting also enables us to enhance our relationships with the judiciaries of some of our Pacific neighbours. Thanks to the efforts of Chief Justice Malcolm, who is the Chairman of the Judicial Section of LAWASIA, Nicholson J who acts as Secretary, and the Judges and staff of the Supreme People's Court of China, the programme was well organised and worthwhile and the delegates were looked after appropriately throughout. ❑

Beijing Statement of Principles of the Independence of the Judiciary

Preamble

WHEREAS in the *Charter of the United Nations* the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

WHEREAS the *Universal Declaration of Human Rights* enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law,

WHEREAS the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* both guarantee the exercise of those rights, and in addition the *Covenant on Civil and Political Rights* further guarantees the right to be tried without undue delay,

WHEREAS the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

WHEREAS rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

WHEREAS judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

WHEREAS the Sixth United Nations Congress on the Prevention of Crime and the treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

WHEREAS the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985, adopted the *Basic Principles on the Independence of the Judiciary* by consensus,

WHEREAS the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended the *Basic Principles on the Independence of the Judiciary* for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country.

WHEREAS on 17-18 July 1982 the LAWASIA Human Rights Standing Committee met in Tokyo, Japan and in consultation with members of the Judiciary formulated a *Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* ("the *Tokyo Principles*") in the context of the history and culture of the region,

WHEREAS the 5th Conference of Chief Justices of Asia and the Pacific at Colombo, Sri Lanka on 13-15 September 1993 recognised that it was desirable to revise the *Tokyo Principles* in the light of subsequent developments with a view to adopting a clear statement of principles of the independence of the Judiciary, and considered a first draft of a *Revised Statement of Principles of the Independence of the Judiciary* and requested the Acting Chairman of the Judicial Section of LAWASIA to prepare a second draft of the *Revised Statement* taking into account the views expressed at the 5th Conference of Chief Justices and comments and suggestions to be made by the Chief Justices or their representatives, and

Noting that the 6th Conference of Chief Justices of Asia and the Pacific is being held in Beijing in conjunction with the 14th Conference of LAWASIA, the primary object of which is:

> To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region.

The 6th Conference of Chief Justices of Asia and the Pacific:

Adopts the *Statement of Principles of the Independence of the Judiciary* contained in the annex to this resolution to be known as the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*.

Annex

Statement of Principles

Judicial Independence

1 The Judiciary is an institution of the highest value in every society.

2 The Universal Declaration of Human Rights (Art. 10) and the

International Covenant and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent Judiciary is indispensable to the implementation of this right.

3 Independence of the Judiciary requires that;
(a) the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
(b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

4 The maintenance of the independence of the Judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the Rule of Law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

5 It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary.

6 In the decision-making process, any hierarchical organisation of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with article 3 (a). The Judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.

7 Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

8 To the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.

9 Judges shall be free subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

Objectives of the Judiciary

10 The objectives and functions of the Judiciary include the following:
(a) to ensure that all persons are able to live securely under the Rule of Law;
(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
(c) to administer the law impartially among persons and between persons and the State.

Appointment of Judges

11 To enable the Judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12 The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13 In the selection of judges there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

14 The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in other, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, different procedures and safeguards may be adopted to ensure the proper appointment of judges.

15 In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16 In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17 Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

Tenure

18 Judges must have security of tenure.

19 It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure.

20 However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21 A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office.

22 Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge.

23 It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and its use other than for the most serious of reasons is apt to lead to misuse.

24 Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

25 Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.

26 In any event, the judge who is sought to be removed must have the right to a fair hearing.

27 All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.

28 Judgments in disciplinary proceedings, whether held *in camera* or in public, should be published.

29 The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

30 Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the Judiciary, such consent shall not be unreasonably withheld by an individual judge.

Judicial Conditions

31 Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

32 Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Jurisdiction

33 The Judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

34 The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

Judicial Administration

35 The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36 The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role.

37 The budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

Relationship with the Executive

38 Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39 Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

40 The Executive authorities must at all times ensure the security and physical protection of judges and their families.

Resources

41 It is essential that judges be provided with the resources necessary to enable them to perform their functions.

42 Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

Emergency

43 Some derogations from judicial independence may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. In such times of emergency the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of *habeas corpus* or similar procedures.

44 The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

It is the conclusion of the Chief Justices and other judges of Asia and the Pacific listed below that these represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary. ❑

Judicial Independence Report of LAWASIA in 1982

In the Statement of Principles of the Independence of the Judiciary adopted by a meeting of the Chief Justices of the region at the LAWASIA Conference held in Beijing from 16 to 21 August 1995 and published at p 356, reference is made to a 1982 LAWASIA Report on the same subject. This was a report of a meeting of the LAWASIA Human Rights Standing Committee held in Tokyo on 17 and 18 July 1982. It is published here, together with the recent judicial statement, for the purposes of record. The 1982 Report is of its time in some ways, but the principles stated in it remain valid. Members of the Committee were drawn from many countries in the region and did already or have since come to occupy important positions. One member became Chief Justice of the Philippines, one became Minister of Justice of Thailand, one was an Appeal Court Judge from New South Wales and one became United Nations Rapporteur on judicial independence. The meeting was chaired jointly by Mr Fali Nariman of India and myself, – P J Downey.

A Report of a Seminar held in Tokyo on 17th–18th July 1982

On 17th-18th July, 1982, the LAWASIA Human Rights Standing Committee met in Tokyo, Japan for the purpose of discussing the application of the principle of the Independence of the Judiciary in the context of the history and culture of Asian countries. The meeting of the Standing Committee was held in private.

The Committee was honoured by the presence at its meeting of Chief Justice Chandrachud of India, Chief Justice Fernando of the Philippines, Chief Justice Samarakoon of Sri Lanka, and President Suchiva of the Supreme Court of Thailand. It was also honoured by the distinguished presence of the Former President of the Supreme Court of Japan, former Judge Ekizo Fujibayashi, former Supreme Court Judge, former Judge Sakamoto and former Judge Takeda, and the former Chief Justice of the Nagoya High Court, former Judge Yorihiro Natio. The meeting was also attended by eminent Japanese lawyers and professors, including the former Dean of the Law Faculty of Tokyo University, Professor Mikazuki.

Having had the benefit of the experience and wisdom of these eminent jurists and the advantages of their insight into the functioning of different judicial systems and drawing upon the collective experience of members of LAWASIA in the region, the LAWASIA Human Rights Standing Committee at its subsequent meeting in Tokyo formulated the following principles and conclusions.

1 The judiciary is an institution which has, and is seen to be of the highest value in the societies in the countries of the LAWASIA region;

2 The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its high function;

3 It is the duty of the judiciary to respect and observe the proper objectives and functions of the other institutions of government; it is the duty of those institutions to respect and observe the proper objectives and functions of the judiciary.

4 The objectives and functions of the judiciary in these countries include the following:
   (a) to ensure that all peoples are able to live securely under the rule of law;
   (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights within its own society;
   (c) to administer the law impartially between citizen and citizen and between citizen and state.

5 To enable the judiciary to achieve its objectives and perform its functions, it is essential that those appointed as judges be

chosen with due regard to their independence, competence and integrity.

6 It is fundamental to the preservation of the independence of the judiciary that it be freed from threats and pressures from any quarter.

7 It is also essential that the judges be provided with the facilities necessary to enable them to perform their functions.

8 It is the duty of the institutions of government to ensure that the judiciary occupies, and is seen to occupy, the position in its society which will enable it to maintain its proper dignity and standing in that society and to achieve its objectives and perform its functions.

9 It is equally the duty of each member of the judiciary to conduct himself/herself in all things in such a way as is consistent with the dignity and standing of his/her office and as will promote the achievement of the objectives and the performance of the functions of the judiciary to which he/she belongs.

10 *Appointment of Judges*:

(a) There is no single mode of appointment of judges which is essential to their proper appointment. However, the mode adopted should be such as will best promote the appointment of proper persons to the office of a judge, will provide a safeguard against appointments being influenced by inappropriate factors, and will be seen to be directed to the appointment of judges of independence, capacity and integrity.

(b) The structure of the legal profession, and the source from which judges are taken within the legal profession, differ in different societies within the LAWASIA region. In some societies, the judiciary is a career service, in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, different procedures and safeguards may be seen as of assistance in ensuring the proper appointment of judges.

(c) The Committee has observed that, in some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose.

(d) The Committee recommends that the appointment of a Judicial Services Commission, or the adoption of a procedure of consultation with the organised associations of lawyers should be adopted as a means of safeguarding the proper appointment of judges.

Where a Judicial Services Commission is adopted for these purposes, it should be representative of the higher judiciary, and of all concerned in the administration of justice, to an extent that will ensure that its independence and integrity are safeguarded, and are seen to be safeguarded.

11 *Tenure*:

(a) The independence of the judiciary must be secured by security of tenure.

(b) The Committee recognises that, in some countries, the tenure of judges is subject to confirmation from time to time by an electorate or otherwise.

(c) However, the Committee recommends that all judges should be appointed for a period related to the attainment of a particular age and that that period should be applicable to all judges exercising the same jurisdiction.

(d) Judges should be subject to removal from office only for proved incapacity, serious criminal default, or serious misconduct, such as, in each case, makes the judge unfit to be a judge.

(i) The Committee recognises that, by reasons of differences in history and culture, the procedures appropriate for the removal of judges may differ in different societies. It recognises, in particular, that removal by parliamentary procedures have traditionally been adopted in some countries. However, the Committee believes that in some areas of the LAWASIA region, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and the use of it other than for the most serious of reasons is apt to lead to its misuse, and to encourage its use where it should not be used. The Committee believes that there is, in some areas of the LAWASIA region, a clear consensus within the legal profession that such procedures should be under the control of the senior judges of the particular society.

(ii) Where it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for his/her removal, for the purpose of determining whether the formal proceedings for his/her removal should be commenced. Formal proceedings for that purpose should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them. Such formal proceedings should not take place in public except with the agreement of the Chairman of the body conducting those procedures and of the judge in question.

(iii) The abolition of the court of which a judge is a member should not be accepted as a reason or an occasion for the removal of a judge.

12 *Relationship with the Executive*:

(a) The Committee is aware of instances of threats and pres-

sures make or applied to judges – for example:

(i) judges have been transferred from one court to another, or suspended from office for wrong reasons;

(ii) the remuneration or facilities of a judge have been affected because of decisions given by the judge;

(iii) the value of judicial salaries has not been maintained.

(b) Powers which may affect judges in their office, their remuneration or their facilities, must not be used so as to threaten or bring pressure upon a particular judge or judges.

(c) Inducements or benefits should not be offered to or accepted by judges which affect or are apt to affect the performance of their judicial functions.

(i) The Committee has been made aware of instances of inducements or benefits offered to judges. Examples have been given where, during or after the tenure of office the judge, appointments or emoluments have been offered in circumstances in which the judge may have been or may reasonably be thought to have been influenced by them.

(ii) The judiciary and the other institutions of government should be conscious of the fact that whether what is done in fact induces a judge to act otherwise than he/she should, it is essential that what is done be not such as to be seen to be an inducement or a benefit to a judge for such a purpose.

(d) It is at all times the duty of a judge to decide matters coming before him/her on his/her own view of the facts and in accordance with the law. It is the duty of the other institutions of government to ensure that he/she is in a position so to do.

13 *Remuneration and Facilities*:

(a) The Committee is aware of instances, in the LAWASIA region, where the facilities which are now provided to judges and to the court system are below what is the minimum acceptable level at which judges and courts can carry out their functions properly.

(b) The Committee recognises that there may be economic circumstances in which it is impossible for facilities to be provided to judges and to the court system at what would otherwise be an appropriate level.

(c) However, a proper system of courts and the proper performance of the judicial functions are each essential to the maintenance of proper values, the rule of law, and the attainment of human rights within a society. The Committee therefore recommends that the provision of such facilities be seen as having a priority of the highest order in the ordering of each society.

It is the conclusion of the Committee that these represent the minimum standards necessary to be observed in order to maintain the independence of the judiciary and the functioning of an effective judiciary in the LAWASIA region.

❑

Recent Admissions

Barristers and Solicitors

Cabealotu J T	Hamilton	22 September 1995	Mitchell C F	Hamilton	22 September 1995
Coxhead C T	Hamilton	22 September 1995	Muldowney L F O	Hamilton	22 September 1995
Davies F J	Hamilton	22 September 1995	Nicholas S M	Hamilton	22 September 1995
Dunlop M R	Hamilton	22 September 1995	Peters J J	Hamilton	22 September 1995
Efaraimo E	Auckland	27 July 1995	Phee B L	Hamilton	22 September 1995
Goddard P J	Hamilton	22 September 1995	Quinn K D	Hamilton	22 September 1995
Gzell I V	Auckland	30 June 1995	Roberts F M	Hamilton	22 September 1995
Hammond S P	Hamilton	22 September 1995	Savoa C	Hamilton	22 September 1995
Hannam-Williams JC	Hamilton	22 September 1995	Seagar G I	Auckland	21 July 1995
Harding D	Hamilton	22 September 1995	Shannon S C	Hamilton	22 September 1995
Hu Y	Auckland	4 September 1995	Smith M A	Auckland	21 July 1995
Joyce T K	Wanganui	29 June 1995	Sullivan P G	Hamilton	22 September 1995
Kupka A	Hamilton	22 September 1995	Teow S C	Hamilton	22 September 1995
Lean J M	Hamilton	22 September 1995	Terrens A J	Hamilton	22 September 1995
MacKay J D	Hamilton	22 September 1995	Tindall M A	Hamilton	22 September 1995
Mason L D	Hamilton	22 September 1995	Warder K J	Hamilton	22 September 1995
Miller C J	Hamilton	22 September 1995	Yates P A	Hamilton	22 September 1995

Fast ferries decision: Seeing sense in its wake

By Stephen Kos and Steve Bielby, Russell McVeagh McKenzie, Bartleet and Co, Wellington

The authors were counsel for Tranz Rail Limited (formerly New Zealand Rail Limited), one of the two fast ferry operators involved in the Fast Ferries *case. It is not normal policy to publish articles by Counsel about cases they have been directly involved in. An exception has been made because of the extent of the interest in this case and the importance of the decision. Also, an article critical of the decision, by Mr Bruce Pardy was published at [1995] NZLJ 202, and this article is in part a response to the earlier one.*

Introduction

The decision of the Planning Tribunal in what has come to be known as the *Fast Ferries* case (*Marlborough District Council v New Zealand Rail Limited* [1995] NZRMA 357) has attracted considerable commentary and controversy, including an article by Bruce Pardy in the *New Zealand Law Journal*.[1] aA feature of the commentary to date, like the interests represented in the proceedings, is widely varying expectations of the Resource Management Act 1991 and its sustainable management purpose. Unfortunately, commentary on the case has seldom been based on an accurate picture of the effects of fast ferry operations or the totality of the evidence heard by the Tribunal.[2] Comment has frequently been based on the more spectacular claims made by fast ferry opponents, which were then widely reported in the news media – claims which ultimately were found wanting by the Tribunal. Two examples demonstrate how this has arisen:

(a) The suggested solution: The applicants continued to pursue "slow down" orders (to 18-20 knots) right to the end of the hearing – notwithstanding unanswered scientific evidence that this would actually cause *worse* wash effects.

(b) The outcome: Again, right to the very end, the fast ferry opponents believed they would succeed. (This was partly as a result of an indication by the Tribunal towards the end of the applicant's case that there was a "more than 50% chance of an order being granted".) Doubtless the decision came as a bit of a shock to them. It did not, however, to others, who had seen the force of the operators' expert evidence, with a significant shift of the balance of the case over the last week or so of the hearing.

Some of the criticism which has been made of the Tribunal's decision has been most ill-informed. A principal purpose of this article is to present "the view from the other side" as the return of Tranz Rail's *Condor 10* for the 1995/96 season approaches. Before discussing the legal issues involved, we first review the facts of the case.

Background

During the summer of 1994/95, two fast ferries commenced operations on the established interisland ferry route from Wellington to Picton through Tory Channel and Queen Charlotte Sound. This has been a shipping route for ferries and other commercial vessels at least since 1925 (when the first regular ferry operations commenced). Vessel wakes have been an issue from time to time over many years. The *Rangatira*, used occasionally in the 1950s, reportedly generated a nine-foot wake. During the 1980s, when the current conventional vessels were introduced, concerns were voiced by residents parallel to those which gave rise to this proceeding. Reference is made to wake issues in the proposed Marlborough Sounds Maritime Planning Scheme, notified in 1988.

The case involved a critical issue for New Zealand, namely its interisland links. Was the technology underpinning these links to remain unchanged – notwithstanding the adoption of high speed craft on so many other ferry routes internationally? Such craft represent major advances in vessel design and are no more than a response to needs or wishes of the travelling public who in the late 20th century insist on less time-consuming conveyances – whether they be ships, planes, cars or trains. As it was put on behalf of New Zealand Rail Ltd in the course of the hearing:

> No more futile gesture could be imagined than setting a nation's face against advances in transportation technology. Faster and larger capacity planes and boats are an inevitability – because of the public quest for efficiency in transportation. To turn a fast ferry into a fast-fast-slow ferry[3] is a foolish fox-trot. The same recessional tune would leave us with coal smoke belching, counter-sterned ferries like the *Tamahine* and cloth-covered open cockpitted Tiger Moths.

There had been calls over a number of years from the public for improvements to existing interisland services. The introduction of two fast ferry services, was heralded as the first serious competition in interisland passenger services, following the established pattern of competition in freight traffic.

The existing environment of the ferry route through the Sounds has been affected by decades of shipping operations. Apart from ferries, cruise vessels, the Navy, and other

interisland freight operators regularly use the Tory Channel and Queen Charlotte Sounds. Port Marlborough has plans to develop the existing Port of Picton into the adjacent Shakespeare Bay, with the recently finalised Marlborough Regional Policy Statement confirming Picton as the export/import port for the region. Although Tranz Rail will be the only fast ferry operator during the summer of 1995/96, two other operators have announced intentions to compete the following summer.

The two fast ferries began to operate prior to Christmas 1994. They travelled at speeds of 37-38 knots. The Tranz Rail *Condor 10* was a twin-hulled catamaran capable of carrying in excess of 500 passengers and 82 motor vehicles. The Sea Shuttles' *Albayzin* was a single-hulled vessel able to carry a similar number of passengers, but fewer vehicles. Owing to mechanical problems, the *Albayzin* made few sailings during the summer season.

A critical requirement of both vessels was that they be able to operate in two quite different marine environments, both the sheltered Sounds and the frequently rough conditions in Cook Strait. A naval architect told the Tribunal that although new designs could potentially reduce wash, this was at the cost of significantly reduced rough weather capability.

Measurements showed that both fast ferries produced similar wash, although each vessel had its own characteristics. Actual effects on the Sounds could not be modelled in advance. The key difference between the wash of the fast and conventional ferries was greater wave power or energy, although the height of waves was not significantly different. Indeed, the largest vessel waves were found to result from the interaction of waves from two passing conventional ferries. Further, the majority of fast ferry waves had limited additional effect at the beach, with greater effects being felt on a minority of occasions and at particular locations, depending on such factors as tide, beach angle in relation to the ferry path and distance of the ferry path from the beach.

The only controls on existing ferry operations are speed controls in the immediate area of the ports and navigation controls, both under the Harbours Act. Whilst such navigation and safety controls on commercial shipping are common, generally, parallel controls under the Resource Management Act or former environmental legislation have never existed. Yet some ferry opponents claimed the fast ferries required a resource consent.

The Marlborough District Council was the principal statutory authority under the Resource Management Act. The Council had long experience of residents of the Tory Channel complaining about wash effects when conventional ferries were introduced. No vessel had ever required a resource consent to operate in the Sounds. The Council sought clarification from the Tribunal by way of application for a declaration on the status of fast ferry operations.

Not satisfied with this, a residents' group, together with a Trust representing local iwi, applied for interim and substantive enforcement orders. In this they were joined belatedly by the Minister of Conservation. The balance of this article considers:

(1) the initial (interim orders) hearings;
(2) the Council's declaration proceedings; and
(3) the substantive enforcement order proceedings.

Initial hearings

The initial hearings addressed applications for urgent interim enforcement orders. Led by the residents' group, allegations were made about destruction of the environment and property. Attempts were made to have orders granted on an urgent ex parte basis. The Tribunal refused to grant interim orders without undertakings as to damages.

The Tribunal's caution was vindicated by the outcome of the subsequent substantive hearing, the Judge noting:

> A final comment I wish to make is that this case epitomises the danger in the making of interim orders without undertakings as to costs. Had I succumbed to the considerable pressure placed upon me to grant an interim order, the damage to the operators and to Sea Shuttles in particular would have been devastating and irreparable. ([1995] NZRMA 384.)

Having refused to grant interim orders, the Tribunal proceeded to hear the declaration proceedings and substantive enforcement order proceedings together.

Declaration proceedings

Declarations sought by the Marlborough District Council essentially asked the Tribunal to determine whether the activity was lawful or permitted as of right. Much attention was focused on subs 12(1) of the Resource Management Act, which provides that:

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

This attention was perhaps surprising, given that this subsection was undoubtedly directed at activities of a directly impacting nature, such as excavation and dredging, rather than disturbance by vessels. Shipping is principally dealt with by s 12(3), which essentially provides for this to occur as of right, unless new regulation is included in regional coastal plans. The New Zealand Shipping Federation and other recreational and commercial shipping organisations joined the fast ferry operators in expressing concern that a broad interpretation of subs 12(1) could affect a wide range of normal and accepted shipping and boating activities. Many of these technically might breach subs 12(1) of the Resource Management Act on such an interpretation.

The Tribunal held that indirect disturbance of the foreshore by vessel wash did come within the ambit of subs 12(1). Accepting that this conclusion is technically correct

on the plain meaning of its words, there can be little doubt that this outcome was never contemplated by Parliament.

The risk then was that s 12(1) could be interpreted as a sweeping new control on any "disturbance" which had any "adverse effect", no matter how minor. The Tribunal properly took a pragmatic approach, in which it perceived from s 12:

> ... a logical transitional structure which also has the benefit of pragmatism in that it is based on practical consequences rather than theory, and takes into account the every day practicality of those engaged with the important business of transportation by sea and, in particular, transportation between the two major islands of New Zealand.
>
> That approach to the provisions of the RMA shows that the Act was not intended to create a major upheaval to the activities of persons carrying on lawful activities by rendering that which was previously lawful unlawful as at 1 October 1991. The legislative intention which emerges is that lawful activities may continue subject to an examination of remedial adverse effects caused by that activity. That transitional period is covered by various statutory provisions which deems certain documents to be plans either regional or district in the meaning of the new Act. These documents are not documents of sophistication in the context of the new legislation because they were never prepared with the precise terms of the RMA in contemplation but many of them contain elements of the concept of sustainable management which had evolved over years.
>
> Thus activities and plans which may have imperfection about them continue during an amnesty period subject to adequate environmental performance. ([1995] NZRMA 363-4.)

In this case, the only relevant plan was a proposed Maritime Planning Scheme notified under the former Town and Country Planning Act 1977. This was deemed, by s 370 of the Resource Management Act, to be a proposed Transitional Regional Coastal Plan. This was accepted by all parties to be of little or no weight, a position which had been previously held to be the case by the Tribunal.[4] Some criticism has attached to the Tribunal for its treatment of this plan. However, it is suggested the Tribunal's approach was correct, for two reasons. Firstly, although of little relevance or weight (the Tribunal calls it an "abandoned document"), the proposed Maritime Planning Scheme was properly notified and continued to determine the status of all activities in its area. This had also been accepted in the earlier Tribunal decisions. Secondly, the fast ferry operators, as much as their opponents, were potentially victims of the weaknesses in the plan, in so far as the continued lawfulness of fast ferries and other normal shipping activities relied upon the proposed plan.

Put simply, the suggestion of the fast ferry opponents was that not only fast ferry operations, but all conventional ferry and many other shipping activities, would have needed a resource consent. This was patently unsupportable. Counsel referred in ironic terms to commercial shipping operators (including international shippers) having to stop outside the heads of Tory Channel and radio to the Council to see whether a resource consent was required before entering. Lest it be suggested that only fast ferries were affected, it was noted during the proceedings that cruise vessels, the Navy, commercial freight vessels and others commonly transit the Sounds, some having significantly larger wakes. Such considerations clearly underpin the Tribunal's avowedly pragmatic approach.

Similarly, the Tribunal properly rejected arguments that even if the proposed plan permitted conventional ferries, it did not anticipate or provide for fast ferries. The proposed Marlborough plan (like every other proposed regional coastal plan) contains broad permitted activity categories. It was never intended to, nor could it, restrict permitted activities to vessels operating at the time of the plan, nor to certain named vessels. Neither the proposed Maritime Planning Scheme nor any other in New Zealand has sought to regulate individual vessels in this way. Again, s 12(3) of the Resource Management Act places an onus on regional councils to regulate expressly any surface water activities. They otherwise continue to be permitted as of right. The Marlborough District Council has subsequently notified a new proposed Regional Coastal Plan (as part of the proposed Marlborough Sounds Resource Management Plan) which makes the existing ferry route a "national shipping route" on which all commercial shipping is expressly made a permitted activity.

The Tribunal accordingly concluded on the basis of the proposed Maritime Planning Scheme that fast ferry operations were lawful. It arrived at the same conclusion by reference to the transitional provision for existing coastal activities in s 418(6B) of the Resource Management Act. This provides for the continuation of "any activity lawfully being carried out in the coastal marine area before the first day of October 1991". For the same reasons given in respect of the proposed plan, the Tribunal was properly not prepared to limit the "activity" to individual vessels or types of vessels.

In his article at [1995] NZLJ 202, Mr Pardy suggests this conclusion is "startling" in so far as it "will significantly increase the number of activities which are excluded from duties and restrictions in the Act". With respect, this fundamentally misconceives the nature of the Resource Management Act, particularly in relation to the coastal marine area. As illustrated above, s 12(3) of the Resource Management Act provides for activities in the coastal marine area to continue, unless they are the subject of express regulation. This is hardly surprising given the nature and importance of shipping, and that it has not been regulated generally in the past by plans. As recognised by the Tribunal's pragmatic approach, neither s 12 nor the transitional regime was intended to make major or immediate changes (certainly not to require resource consents generally for commercial shipping). Further, s 418(6B) is not an "existing use" provision incorporating a test of "same or similar in character, intensity and scale".

The outcome of the declaration proceedings was a ruling that fast ferries could generally operate as of right, although no formal declarations were granted. This was subject to the general duty in s 17 of the Resource Management Act to avoid,

remedy or mitigate any adverse effects on the environment, which covers otherwise lawful activities. This duty was accepted by the fast ferry operators and was a core issue in the substantive enforcement order proceedings which were heard next by the Tribunal.

Enforcement order proceedings

The Tribunal noted that the landowners, Te Atiawa and the Minister of Conservation all claimed they did not wish to stop the operations of fast ferries, but merely wished to slow them down or otherwise control adverse effects. The case for the fast ferry operators, supported by scientific and naval architecture evidence, was that both vessels were designed to operate at speeds of around 37 to 38 knots and that significant reductions in speed would have greater wash effects, unless speeds were reduced to around 12 knots – which would have essentially nullified any value associated with a fast ferry service.

The Tribunal grouped enforcement orders under ss 17 and 314 into two categories. The first category, under ss 17(3)(a) and 314(1)(a)(ii), could require an otherwise lawful activity to cease, but only if:

> ... it is or is likely to be noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.

Sections 17 and 314 (like s 12) refer to "adverse effects" without qualification. This leads to potential uncertainty and leaves it to the Tribunal to determine the level of significance which must obviously be attached to adverse effects, at least to avoid trivial or inappropriate cases. The Tribunal characterised "cease orders" as requiring a "top-level of adverse effect".

This category is to be contrasted with the second category – what the Tribunal called "mitigate orders" – under ss 17(3)(b) and 314(2)(b)(ii), by which the Tribunal may require steps which it considers necessary in order to avoid, remedy or mitigate any actual or likely adverse effects on the environment. The Tribunal held that it would not impose a condition aimed at avoiding, remedying or mitigating an adverse effect if the condition was such as to result in cessation of an activity which might not be causing a serious effect. In this case, the effect of the evidence for the fast ferry operators was that an order such as that sought by the applicants (to slow the fast ferries significantly) would have the effect of stopping them, in as much as no practicable or economic service could be run on the slower basis sought.

The Tribunal concluded that there was no "top-level effect" such as to justify a cease order. It was also not satisfied that a mitigation order would be effective to address any adverse affect. Indeed, although referring to "effects" and "change", the Tribunal did not find there were adverse effects.

Evidence

The Tribunal considered a large amount of evidence from local land owners, tangata whenua, business people, boat operators, marine farmers and experts on the physical and biological environment. The Tribunal and counsel made a tour of inspection of the coastline.

The land owners' case was marked by extreme allegations of destruction. Remarkable hyperbole was offered in submissions, likening the ferries' effects to Hiroshima, Chernobyl, the *Exxon Valdez* disaster, the destruction of the Amazonian rainforest, and the like. After hearing all the evidence and visiting the Sounds, the Tribunal concluded:

> Looking at sections 17 and 314 I am unable on the evidence to find that the activity is noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment. I have fully traversed these matters in the course of this decision and find the effects are not of a serious nature as contemplated by this subsection, and, furthermore, that the Cook Strait Ferry Service itself is one of national importance and should not be the subject of a cessation order on the basis of the inconclusive and subjective evidence. Public perception of the activity as shown on television is selective and not a fair indication of the activities of fast as opposed to conventional ferries. ([1995] NZRMA 383.)

Similarly, the applicants presented video evidence to the Tribunal which it held "may or may not have been over-dramatised".[5] The Tribunal recorded a further concern that:

> There is a possibility that the fast ferries are blamed for everything.[6]

In contrast, Tranz Rail's "warts and all" video evidence included simple and accurate comparison images of waves from the conventional and fast ferries, including waves striking the beach and boatshed of one of the chief resident objectors. The Tribunal stated:

> I was impressed by a video presented to me on behalf of NZR by Mr Kennedy. This showed the beach where Dr and Mrs McMillan have their home. Visually the dramatic wave effects from Condor 10 were not greatly different from that of the Arahanga which passed shortly after. Both exhibited characteristics which caused waves to break with high spray against the boat-shed on the beach. The video of the Arahanga in isolation would have equal visual drama to any of the television or video presentations I have seen.[7]

The Tribunal noted that the operators were anxious to mitigate any adverse environmental effects and accepted evidence that the precise effect of wave action of individual vessels on the Sounds could not have been anticipated before the service commenced.

Dynamic equilibrium

Some comment has attached to the Tribunal's reliance upon the concept of "dynamic equilibrium". In particular, Mr Pardy suggests that an "altered ecological equilibrium" is inconsistent with the sustainable management purpose of the Resource Management Act. Again, the detailed evidence before the Tribunal leads to quite a different conclusion.

The concept of "dynamic equilibrium" refers to the fact that beaches are constantly in a state of change in which the "wave environment" and other forces determine the material which comprise beaches, their "profiles" (or steepness) and whether they are eroding, stable or accreting at any time.

Evidence in relation to this matter was presented for Tranz Rail by Professor Bob Kirk, New Zealand's leading coastal processes expert, and his colleague Dr Martin Single, both of the Geography Department of Canterbury University. Their evidence was that beaches are the most dynamic and changing environments in the world. The environmental equilibrium predating the fast ferries was determined not just by natural processes but by adjustment to the successive introduction of commercial and recreational vessels, as well as widespread human activity, such as forestry, marine farming and habitation.

Significantly, Professor Kirk had been retained by the Marlborough District Council during the early 1980s to advise on similar issues (including complaints of residents) resulting from the introduction of the current conventional ferries. He had also supervised key postgraduate study in the 1970s on the effects of conventional ferries. The evidence of Professor Kirk and Dr Single was that the beaches along the ferry route were already highly modified (including by residents' homes, boatsheds and jetties, forestry, farming, etc). They were adjusting to the fast ferries by natural processes in the same way they had done for other vessels, and other activities, over the previous decades. At the time of the proceedings, their evidence was that the adjustment of beaches to fast ferry wash had largely taken place already.

This evidence flatly contradicted the cases for the Minister of Conservation and the other applicants, which essentially relied upon an assumption that the existing equilibrium of the Sounds was both fixed, "natural" and was being adversely affected by fast ferries. The Tribunal concluded:

> ... that the character of the shoreline as it previously existed has been modified, but the physical modification is tailing off and substantial further changes are unlikely. Apart from disturbance of fauna and flora in the inter-tidal and sub-tidal zones, the area still presents a natural appearance. It would be idle to suggest that the ferries, fast or conventional, have made a substantial difference to the natural character of the shoreline as seen by observers or as experienced by users. The natural character in a visual sense has been modified to a greater degree by structures such as jetties, boatsheds and houses. ([1995] NZRMA 376.)

Marine biology

The fast ferry wash created greater power or energy which impacted on a shallow sub-tidal band around the foreshore. Scientific surveys showed increased strandings of marine life from that narrow band. There was some dispute between biological experts as to the extent of these effects.

Experts for the applicants initially sought to assert that "decimation" of marine life was occurring. However, this did not stand up under scrutiny. For example, claims of "classic resource depletion" by one expert based on limited surveys was contradicted by repeat surveys carried out by Tranz Rail's scientific advisers from the Cawthron Institute during the course of the proceedings. The same expert accepted under questioning that allegations of "decimation" were at best "localised". The uncontested evidence of Tranz Rail's experts was that the majority of marine life (including all that below the subtidal band as well as the bedrock shores, which comprise a majority of the Sounds) was essentially unaffected.

Critically, the overwhelming evidence was that whilst strandings of marine life had temporarily increased, there was no question but that these would tail off and that populations were sustainable. The Tribunal noted:

> One other generally accepted conclusion ... was that the marine population of the area affected by the ferries was not affected, and the sustainable management of the resource as a whole was not under threat. ([1995] NZRMA 378.)

Sustainability

Like most activities, fast ferry operations do have effects on the environment. However, the Tribunal concluded these were consistent with the sustainable management purpose of the Resource Management Act and did not merit intervention by way of enforcement order.

In his article, Mr Pardy seeks to interpret the concept of "sustainable management" to mean "ecological sustainability", which in turn is said to mean "the ability of an ecosystem to continue indefinitely in its present state" and "the absence of permanent change caused in an ecosystem by human activity". In this context, a new dynamic equilibrium is said to be the "antithesis of ecological sustainability". This view not only represents a serious reinterpretation of sustainable management but demonstrates a purely conservationist approach to both the legislation and the case. In respect of the latter, it fails to recognise the inherently dynamic nature of the physical coastal environment, the natural processes involved in adjusting it to maintain an equilibrium, and the existing modification of the Sounds by human activity.

One of the principal concerns of the draftspersons of the Resource Management Act and Parliament (debated through the Resource Management Law Reform and Bill stages) was to provide both for environmental protection and for use and development of resources. Mr Pardy's interpretation achieves no such accommodation of the interest and would preclude even the most ordinary of human activities. Put simply, it would not only preclude existing conventional ferry operations, other commercial shipping and recreational boating, but also virtually all the principal components of modern living (including the dwellings, boating, farming, marine farming, etc which are a part of life in the Sounds). The reality of the Resource Management Act is that it does not, and plainly cannot, preclude all activities which have effects, or which change or modify the environment in some sense. Nor does it preclude all adverse effects. Enforcement orders are available to halt activities which have "top-level" adverse effects (those which are "noxious, dangerous, offensive or objectionable to such an extent that they have an adverse effect on the environment") or to avoid, remedy or mitigate adverse effects of activity.

It was accepted in the proceedings by all parties that the sustainable management purpose of the Resource Management Act includes "ecological bottom lines" in s 5(2)(a) – (c). It was further accepted that the achievement of these

bottom lines was not a matter for balancing. The Tribunal's decision is based on this approach.

However, the purpose of the Act in s 5 is "promoting" sustainable management. That includes "managing the use, development and protection of natural and physical resources" and enabling "people and communities to provide for their social economic, and cultural well-being and for their health and safety" while achieving those ecological bottom lines. The "environment" is defined in s 2 to include "social, economic and cultural conditions".

Put simply, the Resource Management Act can, and must, provide for real activities and some associated effects of modern society. The Tribunal's decision merely confirms that, like many other shipping and other every day activities, the effects of fast ferries did not warrant intervention by enforcement order and that they are consistent with sustainable management.

Other Part II matters

The Tribunal's decision contains a number of other key statements in respect of the principles in Part II of the Resource Management Act. The concerns of Maori, including in relation to sacred sites under s 6(e) occupied a large part of the hearing and are considered in detail in the Tribunal's decision.

The Tribunal held that the activity of shipping, particularly ferry operations, was an appropriate use of the coastal environment in terms of s 6(a). The Tribunal referred with approval to the "nationally suitable or fitting" test in *New Zealand Rail Limited v Marlborough District Council* (1993) 2 NZRMA 449. The Tribunal also used that case as authority for the proposition that s 6 of the Act does not exhaustively define all matters of national importance and held:

> ... it is therefore possible to hold that a particular activity assumes such importance in the context of the sustainable management of New Zealand as a whole, that it can, of itself, assume national importance. That is not to say that the activity can override the primary purposes of the Act as enshrined in section 5 but is indicative [of] the fact that in certain circumstances the matters expressed in Part II as being of national importance or to which the Tribunal must have particular regard, can be balanced against a specific activity which is proved to be of national importance in any particular case. I find the interisland link is such an activity. ([1995] NZRMA 372.)

Conclusion

The Tribunal's decision represents a careful and balanced approach to reconciling the national interest in interisland ferry links with strongly voiced conservation concerns. The Tribunal's role in this regard and its ability to absorb and analyse large quantities of extremely technical scientific evidence is particularly worth commenting on. They confirm the ongoing value of the Tribunal as a specialist body particularly given that recently it has been the subject of review.

The parties in the proceedings, and also subsequent commentary, represent the diverse range of interests which will inevitably be brought to significant environmental issues. It is easy for the purpose and other provisions of the Resource Management Act to be selectively interpreted in such contexts to meet particular agenda. The Tribunal fairly records that it faced a dilemma in seeking properly to take account of all interests and potential solutions. The Tribunal properly looked to voluntary assurances by the fast ferry operators to seek to avoid, remedy or mitigate effects. Tranz Rail is undertaking such actions preparatory to the return of the *Condor 10* this summer.

The enforcement order provisions of the Resource Management Act were essentially validated in so far as they allowed environmental concerns to be aired before the Tribunal. However, after careful consideration (and rejection of more extreme claims and litigation pressures from the applicants) the effects of the fast ferries were found not to warrant intervention.

The best environmental outcomes are unlikely to be determined by contentious proceedings of this nature. Consultation and the proposed Marlborough Sounds Resource Management Plan review process are more likely to be fruitful avenues for all community interests to be considered in deciding how environmental effects of New Zealand's vital interisland ferry links are to be addressed in the future. ❑

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1 [1995] NZLJ 202. See also: P Milne and J Tiller. "Making Waves: the fast ferries decision" (1995) 1 BRMB 146.
2 Judge W J M Treadwell, sitting as a Judge alone pursuant to s 309 Resource Management Act.
3 A reference to the suggested "slow-down" order covering the Tory Channel leg of the voyage.
4 See, for example, *Aqua King v Marlborough District Council* Decision W77/94; *Regular Developments v Marlborough District Council* Decision W130/94.
5 Decision W 40/95, at 31 (unreported part of decision).
6 Ibid.
7 Ibid.

Basis of bankruptcy

Originally, probably, bankruptcy was simply a way to stop an insolvent from continuing in business. (The word "bankruptcy" has Latin roots, the breaking of the bench from which a trader plied his trade.) The need to offer an equitable adjustment of the rival claims of creditors must quickly have followed. The aims are now strikingly broader. The time may well have come to reconsider.

You can hear the arguments. Giving credit is one of the risks of business. You do it voluntarily; in the marketplace there is no reason why one person should have greater protection than another. The truth is that companies are not all of the same size: in order to survive, small businesses are often obliged to give large ones credit, whether they think it prudent or not.

The current emphasis on job protection as an aim of insolvency law is blinkered. The threat of any major collapse is the domino effect, bringing down creditors who cannot afford to suffer the losses. Those creditors also have employees. Is it sensible – let alone fair – to save jobs within an unsuccessful business by jeopardising those in successful ones?

Trevor Aldridge
Solicitors Journal
29 September 1995

The Strange Case of Mary Shelley

The 1995 Kennedy Elliott Memorial Address to the Wellington Medico-Legal Society

By Sir John Jeffries, Police Complaints Authority, formerly a Judge of the High Court, Wellington

This article was originally given as a talk to the Wellington Medico-Legal Society. It has been kept in the form in which it was given. It is also to be published in the New Zealand Medical Journal. *The article deals with the topic of human body organ replacement.*

James Whistler became somewhat irritated at Oscar Wilde's popular lectures on aestheticism and decided to restore balance by giving one of his own. He spoke at a London theatre late at night on the theory that lectures held earlier in the evening fail because everybody is thinking about dinner. To speak at 6 with drinks at 7 is to pre-ordain failure.

The title of the address, which is a nod to Conan Doyle, to a medico/legal meeting needs some explanation at the beginning. A momentous event in this century emanated from South Africa when Dr Christian Barnard performed the first heart transplant. I remember the reported remark of Louis Washkansky when after the operation in December 1967 he recovered consciousness saying "I am the first Frankenstein!" Unfortunately he died 18 days later before he could develop that insightful remark. That event of great consequence was less than 28 years ago but as Louis correctly observed, a metaphorical forerunner was Victor Frankenstein's creature.

All would agree that the medical world is not free of myth and metaphor and it is probably for that reason of all transplants the heart one still grips the imagination more than others. A myth of the heart is that it is the organ most closely associated with emotion and love. Kidney transplants preceded the first heart transplant but the impact was not the same. Now many of the major organs, except the brain, seem capable of transplant. It is a matter of opinion but the discovery of DNA in 1953 and heart transplant in 1967 must rank among the greatest achievements of this century.

Mary Shelley, I suggest, was a strange case in the sense it is impenetrably puzzling how a teenager in the early years of the 19th century could have conceived and written a novel such as she did. Was it for her just a Gothic horror story; or did she even at a level below full consciousness sense what could be in store for mankind?

In June 1816 during a miserable summer in Geneva, marked by incessant rain, Mary found herself in the company of Percy Shelley, Lord Byron, and a young physician named John Polidari who wrote a tale entitled The Vampyre. Mary was aged about 18½ years and did not marry Shelley until December of that year. To be in the intimate company of Shelley speaks for itself, but Mary had impeccably qualified antecedents in an intellectual sense. Her mother was Mary Wollstonecraft who today would be described as a powerful feminist. Her father, William Godwin, was a radical philosopher and personal friend of Shelley. With such parents the premature development of an imaginative intellect is entirely understandable.

The telling of ghost stories was a common pastime and whilst huddled inside Byron's Villa Diodati around a fire these three literary giants and Polidari agreed each would compose a ghost story and read it to the others. All did but only Mary's Frankenstein endured to strike a chord that resonates today even stronger than it did after publication in 1818. It was an instant success and made Mary even more famous than her husband. It has never been out of print in 177 years. For 30 years of the 19th century Frankenstein was the most popular novel of the English speaking world. It has been translated into at least 29 foreign languages. It has been made into 31 Frankenstein films between 1910 and 1976. The last as recently as 1994 with Kenneth Branagh as Dr Frankenstein. I understand the cognoscenti still regard the 1931 version starring Boris Karloff as the creature the greatest.

In the next few minutes I am going to make some culpably superficial remarks about Mary's novel but concentrating on how it effectively raised in a stunning way medico-ethical problems since mankind has started seriously to sport with life.

I ask those of you who know the novel well to forgive me for briefly outlining the story.

Victor Frankenstein, a student of natural philosophy in Geneva, constructs a creature (it is never named) in the semblance of a huge, physically powerful and egregiously ugly man. A central conflict of the novel which Mary never comes near to resolving is that the creature is universally repugnant to all other human beings, including Frankenstein himself, but until absolutely corrupted by rejection has a basic goodness which would be admired by most other human beings.

In desperation the creature emerges and corners Frankenstein and in a persuasively argued plea gets him to agree to construct for him a mate. Frankenstein at first agrees and begins but then recants and destroys his work before completion, saving a permanently disastrous result.

The creature wreaks the most terrible revenge upon Frankenstein

which includes murdering his bride on their wedding night. Frankenstein determines to destroy the creature and then begins one of the most exciting chases across the world ending in the Arctic wastes with Frankenstein's death brought about by the creature who immediately despairs of his creator's passing and disappears further north into the frozen wilderness seeking his own annihilation.

In the author's introduction to the Standard Novels edition Mary explained the genesis of the story by first asking herself the question we all still ask: "How I, then a young girl, came to think of and to dilate upon so very hideous an idea?" The answer she furnished was to describe a conversation between Shelley and Lord Byron to which she said she was a "devout but nearly silent listener". It was a philosophical discussion on "among others the nature of the principle of life, and whether there was any probability of its ever being discovered and communicated". She then went on to describe her waking dream in this way:

> Night waned upon this talk, and even the witching hour had gone by, before we retired to rest. When I placed my head on my pillow, I did not sleep, nor could I be said to think. My imagination, unbidden, possessed and guided me, gifting the successful images that arose in my mind with a vividness far beyond the usual bounds of reverie. I saw – with shut eyes, but acute mental vision – I saw the pale student of unhallowed arts kneeling beside the thing he had put together. I saw the hideous phantasm of a man stretched out, and then, on the working of some powerful engine, show signs of life, and stir with an uneasy, half-vital motion. Frightful must it be; for supremely frightful would be the effect of any human endeavour to mock the stupendous mechanism of the creator of the world.

Mary's Frankenstein is the greatest cautionary tale warning mankind of the unexpected and possibly disastrous consequences of medical experimentation. At this level it is without equal in all of literature.

I now leave the interpretation of literature which does not lend itself to the true/false analysis of fact to medical science which most certainly does and it is probable I will get something very wrong.

At the cross-over point of this address a signpost may be appropriate. From now on I seek to portray a layman's view of transplant surgery and the ethical, socio/economic issues which follow from these advances of medical science. All members of society will be affected by them to a greater or lesser extent, to properly honour the memory of the person after whom the address is named I think there ought to be a remedial input with suggestions for consideration. If in the medico/legal context it is the medical profession that makes the advances it is then the obligation of the legal profession to agitate for orderly progress through the law.

As medical science delves deeper and deeper into assisted reproduction technology, genetic engineering, tissue and organ transplant, the hubris of euthanasia, to name a few obvious examples, it seems the ethical and moral consequential problems are at least equal to the undoubted benefits that are bestowed.

Time allows only the briefest look at one of these subjects: implants and transplants. Even then because of the breadth of the subject and my own deficiencies I must stay close to the surface.

I imagine there are few substantial ethical or moral issues with implants. Most regard it as a matter of personal choice. There seems general acceptance of implants such as teeth, hip and knee joints, heart valves (human and animal tissue as well as manufactured material), pacemakers, bone supports, synthetic arteries and now mechanical heart implants. This has been characterised by some as spare parts surgery with the industrial age making its contribution. Accepting there are no other issues such as informed consent implants may be left to one side.

Solid organ transplants present us with ethical and socio/economic issues and for reasons I will mention later I think we are hardly yet standing at the doorway. To bring some limitation into these remarks I am referring mainly to heart, lung, liver and kidney transplants. Blood transfusions and corneal grafts have a fairly long medical history attended by little controversy except for some religious groups. Bone marrow transplants similarly. I suppose one reason why blood transfusions and bone marrow transplants are non-controversial is because they are drawn from a renewable source. However bone marrow transplant is attended by some risk and pain.

My research reveals that in 1954 Dr Joseph Murray performed the first successful living related donor kidney transplant between two brothers who were identical twins and accordingly no graft rejection occurred. There were some spectacularly unsuccessful attempts, the first early in the 1950s. Dr Murray was awarded a Nobel Prize for his work. In 1967 Dr Folbert Belzer developed a renal preservation machine. In that year the first heart transplant took place in December in South Africa. As already mentioned, that was the transplantation that gripped the world's imagination. There immediately followed a spate of heart transplants around the world which gradually reduced in numbers because of rejection problems but have since picked up to be more or less commonplace owing to the success of a range of immunosuppressive drugs that have lengthened life and the quality of it. In New Zealand I understand kidney, heart and lung transplants are not irregularly performed but liver transplants have not yet been done.

All the main organs with which I am dealing are non-renewable for the living donor. Lungs and kidneys are paired and a living donor may give one and live. Heart and liver are non-paired non-renewable organs and therefore absenting altruistic suicide are out of the question. There is now a major qualification on this in regard to liver which I will reach.

For living donors of paired organs there are obviously ethical considerations of importance as there are straight medical questions such as cross-matching, risk under general anaesthesia for the donor, and blood clotting. All these factors must be brought together and dealt with as a proportionality issue by qualified medical personnel. Furthermore prioritisation of recipients for the scarce resource of available organs is tricky and a small country like New Zealand gives only a minimal chance of very well matched grafting.

There is another ethical/medico problem concerned with transplants from cadavers. The success rate for kidneys is not yet equal to the rate of inter vivos donations between matched relatives. An important complication is that the solid organs must be freshly taken at the point of death and that raises a major issue of brain dead diagnosis. In addition the most careful attention must be paid to the wishes of relatives. The Human Tissues Act of 1964 and the Code for Transplantation of Cadaveric Organs of 1987 I think may need re-evaluation to keep pace with the speed of developments. There are also some troublesome cultural issues. An interesting new development in some countries is the advent of so called living unrelated transplantation where the kidney of a husband or wife is donated to the transplantation. This gives very good results, better than cadaver transplantation.

We are now left with the non-paired non-renewable organs, heart and liver, that at present can only come for all intents and purposes from an accident victim or possibly a brain tumour death but I am not qualified to go further.

At this point I want to directly face the medical phenomenon which at this state of medical knowledge controls more widespread organ transplant and that is organ rejection by the recipient body. That medical phenomenon has been described by the organ transplant team of Massachusetts General Hospital in a publication called "Organ Transplants" as the immune barrier. The inviolable rule of human biology is that save identical twins every organ transplanted from one body to another will give rise to a rejection response. The present medical answer is immuno-suppression by drug therapy. The trick is to balance immuno-suppressive drugs against leaving the recipient body able to maintain adequate immune function to protect the body from infection and disease.

There are a wide range of such medications of which cyclosporine made the most significant advance for organ transplant after its first use in November 1983. The MGH team say this drug was largely responsible for an enormous increase in the number of transplants being performed and the success of these operations. This is especially true in the field of heart and liver transplants for both long and short term survival. The cost in 1991 for a year's supply was about US$6,000 for the one drug.

I have tried to avoid too many figures and tables but the relationship between cyclosporine and the increase is quite startling and serves to endorse the point I intend to make that once rejection is solved effectively there will be an enormous increase in pressure for transplants with consequent downstream cost results especially on the health system. From 1984 to 1991 heart transplants in the United States increased from 346 to 2127, liver transplants from 308 to 2946 and pancreas transplants from 87 to 535. The number of lung transplants increased from 11 in 1987 to 400 in 1991. Survival rates have also reached acceptable levels with one year patient survival rates of 95% for kidney, 80% for heart, 70% for liver and pancreas, and 75% for lung.

I am not qualified to make even a wild guess but judged by the progress in the last 15 years with the rejection problem I imagine that in say another 10 years a solution, or near solution, may be achieved. The path may be through immuno-genetics which concerns the relationship between genetic makeup and immune response. Transplant rejection is the outstanding problem but new techniques could establish a persistent state of tolerance to the transplant making on-going immuno-suppressive medication unnecessary. I will return to the ethical problems which will inevitably follow the conquering of organ rejection.

I will try to summarise the themes of this address and draw some tentative conclusions. I have already commented that medicine is subject to myths, metaphors and legends as much as any learned body of knowledge and perhaps even more so. Mary Shelley did not create these problems, of course, but blessed with intuitive genius she warned of consequences when mankind becomes a surrogate creator in one form or another. A contemporary literary analyst of Mary's Frankenstein describes its main theme as the aspirations of modern masculinist scientists to be technically creative divinities. The creature addressing Frankenstein said "How dare you sport thus with life? Do your duty towards me, and I will do mine towards you and the rest of mankind". In an article called "Sporting with life: Frankenstein and the responsibility of medical research" Professor Lester Friedman said that remark by the creature rises to a level of moral understanding unsurpassed by any other figure in the novel by lecturing his maker on the responsibilities of creation. Professor Friedman also said ". . . Frankenstein does become an irresponsible medical researcher, for his work fails to take human consequences into account".

Focusing directly on the solid organ transplant I think there are two areas of many that deserve special comment. The first is the excess of demand over supply for solid organs. The second is cost and proportionality in the health system. The combined effect of these two imperatives in organ transplants carries its own de facto rationing system which is heavily in favour of the higher socio-economic group.

Excess of demand over supply

Although there are prospects I will refer to shortly effectively at present the solid body organs can only be obtained from another human body. The almost exclusive source of supply is from accident victims in one form or another. There is some amelioration for paired organs but shortage for heart and liver remain. It has been said in one publication that all solid transplantation has become a victim of its own success. The improved grant and patient survival rates have led to strong pressure for organs. As the population becomes more receptive to organ donation after death and perfection and organisation of multiple organ retrieval some relief of the shortage will be achieved. I have read that up to six teams of surgeons may attend one body for organ retrieval.

As a practical illustration of the speed of change I offer the following. A highly qualified liver transplant surgeon in the United States, wrote in October 1994 that surgeons were exploring the application of segmented liver transplants and even living related transplants. New Zealand's only liver transplant surgeon Mr Peter Johnston told me yesterday that living related liver transplantation is advancing rapidly and is now more than an experi-

mental option. It is being used regularly by some groups in the USA, Germany and in Japan where brain death is not recognised, and consequently there is no other source of liver grafts.

Some of the solutions that have already been found for these dilemmas are appalling. The kidney trade already established in poorer countries such as India and Pakistan is well documented. I leave this gruesome subject with an extract from an article of March 16, 1995 of *The Syracuse Herald-Journal*:

> Supply and demand created a marriage of unequals – wedding wealthy but desperate people dependent on dialysis machines to those in India ground down by helpless poverty.

I return to mention the proposal I referred to above about organ shortage. An article in *The Times* of London of 13 September 1995 announcing the start of human clinical trials in xenotransplantation – transplants between species – gave some figures of the shortage. In Great Britain there are almost 6,000 people on an official waiting list for organs and 30,000 are waiting in the United States. Fewer than half will receive the organs they need. I understand from a New Zealand surgeon somewhat comparable rates would apply in New Zealand.

The Times article states the first organ transplants from pigs to human beings are expected to begin next year which could signal an end to the global shortage of human donors. It is being achieved by injecting human genes into pig embryos. The genes are responsible for the proteins that coat the surface of cells and can switch off the rejection process. Trials with heart transplants from pigs to monkeys have been very encouraging and as human beings are closer to pigs than monkeys the results in human beings are thought will be better. It would be five years before animal transplants would be generally available. A leading transplant surgeon and consultant to Freeman Hospital, Newcastle, Mr Michael Thick, said:

> The transplant community is waiting with bated breath for the case to be proved in clinical trials. We have all suffered from not being able to put in enough transplants.

It is to be noted the Health Secretary immediately announced the establishment of an Ethics Committee to monitor the transplants.

Cost and proportionality

The second area for comment is cost and proportionality in the health system. The exercise of establishing an objective cost of transplants seems almost as complex as a transplant itself. The medical success rate obviously puts strain on the cost of health services. Without further analysis I ask you to accept the proposition that a single transplant in the retrieval of the organ, the surgical and hospital costs of the transplant, and the ongoing maintenance for immuno-suppressive drugs is immense.

I am very reliably informed that for New Zealand unfortunately there is no comprehensive cost effectiveness study but it should be pointed out that the cost of kidney transplantation and subsequent drug maintenance is very much less than the cost of maintenance on any form of dialysis. The cost of maintaining a person slowly dying from liver disease is also significantly more than that entailed with an appropriately timed liver transplant. Also, many successful transplant recipients are able to return to work and thus pay taxes again.

Apart from proportionality issues strictly within a hospital's transplant programme there are huge proportionality issues for a government in allocation of taxpayers' funds on its health service. How much money should a government allocate to headline medical services such as transplants and dialysis at the expense of the underlying health service requirements of a country's people? Public debate on dialysis in New Zealand surfaced earlier this year but quickly deteriorated into peripheral skirmishes about possible breach of patient privacy by the Minister of Health. Far more satisfying to the media to fashion the debate as some sort of a blame issue and preferably lay it at the door of a Government minister.

Despite the doom laden soothsaying there is no force I know of that can prevent the march of medical science which embraces organ transplant. There are strong parallels with the splitting of the atom and production of weapons capable of ending civilisation. If society were able to manage rather than mis-manage organ transplant I think there is enormous potential for good. Overseas developments must impact on New Zealand but the question we must ask is: are we fully prepared?

Unquestionably pressures in the United States are greater but the first legislative step of a congressional act was taken with the National Organ Transplant Act signed into law by President Reagan in 1984 and the Required Request Law in 1986. The problems of assisted reproductive technology and patients in persistent vegetative state to name two other issues cry out for legislation. Two weeks ago the Medical Council publicly called on the Government to legislate on assisted reproductive technology. The response to this now longstanding problem was more obfuscation. In a paper I delivered to the Neurological Society of Australasia over two years ago I called for legislative clarification of circumstances in which doctors may kill. It is under consideration in England following a case of PVS that went to the House of Lords in 1993. We have had a similar case in New Zealand.

There is a further development that I understand is growing and that is the now significant exchange of services and organs with Australia. Livers retrieved in New Zealand can be flown by private jet to the East Coast of Australia in time for a transplant. The time frame is absolutely critical. It is a fundamental ethical issue there be no aspect of charge or sale of organs. Experience suggests as this beneficial co-operation further develops more protocols may need to be implemented.

I think it is here that the lawyers in the medico/legal equation can begin the debate in earnest and the Triennial Law Conference in Dunedin next year could be a starting point. An alternative would be for the Medical Council and the Council of the New Zealand Law Society to establish a joint permanent standing committee whose request any government would find it difficult to resist. Such a committee should not be expected to produce the report or legislation but to act as a lobby, or ginger group, to keep the problems steadily before Government. I understand there is a precedent for a joint standing committee of this type. It is fair to point out to the lawyers that it is the

doctors who work at the coal face of transplantation and face directly the ethical issues and even the push to get ahead of the law. The lawyers must accept their share of the burden to keep the law and medical practice in balance.

Sir Roy Calne, the doyen of transplant surgeons of Cambridge, England, wrote in September 1994:

> In the future, no doubt, other organs will be transplanted – and perhaps complex tissues such as limbs. The grafting of gonads, which is technically possible, will be a topic for discussion and argument. New ethical dilemmas will be introduced.
>
> Organ transplantation has been exciting and many patients have been restored to normal life. It is important not to forget, however, that many others have suffered and died after organ transplants, and that with cadaver organ donation there is always the tragedy of the donor's death, being usually untimely in a young person . . .
>
> Work in progress world wide is directed to the eventual establishment of tolerance in the clinic so that recipients of organ grafts will not have to submit to a lifetime of potentially toxic drug dosage. A shortage of organs for transplantation and the ethical dilemmas make organ transplantation an unusual and worrying field of medicine.

Well, I think I have said enough.

That really concludes my address but I want to finish with a coda that retains the theme of the use of prosthesis and inventiveness. It also shows how easily a respectable person may stumble into culpable homicide. I am about to read to you an account from the Edinburgh *Evening News* of August 18, 1978.

> While they were waiting at a bus stop in Clerimston, Mr & Mrs Daniel Thirsty were threatened by Mr Robert Clear. "He demanded that I give him my wife's purse," said Mr Thirsty. "Telling him that the purse was in her basket, I bent down, put my hands up her skirt, detached her artificial leg and hit him over the head with it. It was not my intention to do any more than frighten him off but, unhappily for us all, he died." □

Judicial hazards

Tom's [Lord Denning's] skill with litigants in person has known no equal. They almost queued up to have the opportunity of appearing before him, and those who did it on more than one occasion, he would recognise with a cheerful "Ah Mrs Brown! We haven't seen you for some time. What do you think we can do for you today?" The majority of the applications were hopeless, but those who failed went away entirely content that Tom had done the best he could for them. How different was the position after he left.

His successor, understandably anxious to try to cope with the ever-increasing size of the lists, sought to short-circuit these applications. In future they would no longer be heard by the full court of three, but by a single judge sitting in chambers – that is in private. His decision in certain matters would in future be final.

It was my lot to hear one of the first of the applications under the new regime. A very dominant and fiery lady had achieved some success in a case she did in person in the House of Lords, and this had whetted her forensic appetite. She started fresh proceedings, which disclosed no reasonable cause of action and were accordingly struck out. She appealed to the judge in chambers but lost and then sought to reverse his decision in the Court of Appeal. This would have come on before Lord Denning in open court sitting fully robed with two of his colleagues. Under the new system it came on in chambers. I remember going into his court which, by reason of being in chambers excluding the public, seemed like an old theatre which had for years been shut down. In bounded the lady, who looked around the empty court with some astonishment, if not indignation, and then explained the nature of her appeal. I, seeking to emulate my master, said that I had read all her papers with great care but that unfortunately I could not do anything for her, since her claim disclosed no cause of action known to the law, and was therefore doomed to failure. I therefore would have to dismiss her application, but in so doing I would be saving her considerable future anxiety and expense. To which she said "Just you?" "Yes" I said, "just me". "Well I want to go to the full court" she said. To which I answered "I am very sorry Mrs A but there has been new legislation and my decision is final". And then, again trying to emulate my master, I said: "Mrs A, please understand, I have a great deal of sympathy with you. You have lost your position as headmistress of (whatever the school was) and I notice that some 20 years ago you lost your position as maths mistress at another school." "Did you say you were sorry for me?" said Mrs A. "Yes, indeed I did", I said, again trying to exude the sympathy that Tom would have done. "Really?" she said. "Some 20 years ago when I was the maths mistress, weren't you Mr Desmond Ackner QC?" "Yes" I said, my heart beginning to sink. "I've got a copy of an opinion signed by Mr Desmond Ackner QC, advising the governors of the school to terminate my employment as a maths mistress." "Mrs A", I said wearily, "I haven't the slightest recollection of that particular matter, but of course you must have a fresh Lord Justice of Appeal to hear your application." One like you?" she said with some contempt. "Yes" I said, "that is so, give or take a little." "Well, you're all *biased*!" she said, and swept out. I often wondered how Tom would have handled the situation, but I am sure he would have been a great deal more successful than I was.

Lord Ackner
New Law Journal
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Further news from Emgeoo (MGU)

By Nigel Jamieson, Law School, University of Otago

Two previous articles on Mr Jamieson's experiences in Moscow early in 1995 have been published at [1995] NZLJ 219 and 326. Mr Jamieson attended a course at the university in Moscow known as Moskovskii Gosudarstvenii Univyersityet Imeni MV Lomonosova called Emgeoo after the acronym of its initials MGU.

Bumps in the night

"From things that go bump in the night", so goes the auld Scots prayer, "May the good Lord deliver us." For many readers what we have already written about the Soviet look-alike of our own new-age legal system will be no more than a bump in the night. To avoid the scandal of exaggerating this message to prophetic proportions some will feel the writer just needs treatment – by a Commissar of Juristic Indigestion.

It is only now having travelled from Wanganui's Public Library to Moscow's Sheremetyevo Airport that I remember having come here to study, among other things, the language of Russian legislation. I could do so much more efficiently if there were fewer gunshots during the night. We joke among ourselves that the cooks are out hunting up breakfast. One morning we are put to the test when a group of grey-coated, machine-gun toting constables join us in the cafeteria for sour cream and sausages. During the Chechan uprising the threat of terrorism in the streets appears quite real. Even the monasteries have armed militia so we are happy to share our sosiski and sour cream with those who keep the peace at Emgeoo. *Ochen vkusno* – very tasty!

Those who have read what's new at Emgeoo in an earlier issue of this journal will recall the Lomonosovian wanderings of our group across Siberia to get here. Crossing large continents differs from the hit or miss of straight-line travel required to touch down on small islands. As with travelling from Moscow to Rome but then back over Moscow again to get from Rome to Tokyo, continental travel, unlike continental legislation, involves a lot of circumlocution. Sometimes this circling around is as desultory as one's earlier hanging around waiting for the collapse of communism. This means that lawyers especially will be mistaken for spies – but Twining's view of spies from *Blackstone's Tower* has already been answered.

There will be some folk for whom things never go bump in the night. For them the collapse of the Soviet Union was always predictable. Now that Soviet might is miniscule they simply say "I told you so!". For them the new Russia cannot be identified strongly enough to warrant more than a sideways shrug. Perhaps they are the same folk for whom an increasing dependence on purpose and object clauses in current legislation insists on everyone coming straight to the point. They see no need to discourse on selling Siberian mammoth in the Moscow meat markets, the likelihood of touchdowns from outer space in the Siberian tundra, or the vagaries of legal education in the lower South Island. This is because what merely once was the marginal note has now become the screaming headline. In telling all with its first and last breath the tabloid press has reversed the role of communication and substituted sensation for reasoned discourse even in legislation. Without the tabloid press still screaming "Reds under the bed" however, there is a real risk that for lack of looking, we ourselves have become increasingly Red – at the same time as the former Reds are being bled increasingly White.

No common lawyer can ignore the mesmeric force exerted by the crystal clear voice of Soviet legislation. We ourselves began this paper by writing about the need for plain speech in Taranaki. Glasnost is a very old concept of Russian legislation beside which all other Russian literature is – in being widely discursive, increasingly desultory and wanderingly infinite – drafted in a completely circumlocutionary style. This is the context of Russian literature at large. It is an opaque and snowed-over landscape in which every legislative text takes its place as a clear-iced exception to the rule. Those who lose patience with the desultory wandering of the present paper miss the point of it. In Continental Russia, unlike those small islands in the world of common law, it is writing round and round and round about a heavily defended stronghold that breaches its walls and brings it down. Direct frontal assaults only supplant old occupiers with new ones as kings of the same old castle. This walk-about technique (which has now secured the *Mabo* decision for the Australian aborigine) once worked well in our own literature at large. It even radically changed our legal system. Compare the rabid but crystal clear opposition of James Fitzjames Stephen to Dickens' discursive diatribe against the legal system in *Little Dorrit* and *Bleak House*. And Stephen is right – much of what Dickens wrote by way of social realism is strongly subversive of established law and order. Not for nothing did Dickens' novels hold high standing in the former Soviet Union. Much of the dispute between Stephen and Dickens goes to explain Posner's "misunderstood connection" between law and literature. As against Stephen as a law reformer there is every reason for the use of circumlocutionary prose in leaving room for justice and mercy when changing fundamental values. The oceanic format of the long drawn-out whaikorero on the Maori marae is a home grown instance of the same mammoth wanderings engaged in by Russian literature at large. When we trust ourselves to the same marae merry-go-round, we are, in keeping with the common law, employing the same circumlocutionary communication to fend off what Maggs

has noted, and every Maori knows, as "being a risky business".

It was Solzhenitsyn who, by using fiction to oppose Stalinist oppression, developed the discursive technique to perfection in his novel *One Day in the Life of Ivan Denisovitch*. Perhaps you don't recall my having said so already once before – it has taken me a lifetime to learn that repetition and not innovation is the teacher's stock in trade. During one mere day, Solzhenitsyn brought together, very diffusely and with a perseveringly sad attachment to the current literary style of "village prose", an immense amount of disparate material, drawn from all the four winds of Russian history, geography, language and law. The result was to give a political forcefulness to the literary antithesis of the straight from the shoulder State legislative style. More was to follow – and that even from authors who had begun by suppressing and denigrating the work of Solzhenitsyn.

In the same short timespan of Denisovitch's day, but now satirically re-titled *The Day Lasts More Than A Hundred Years*, Aitmatov (who had originally suppressed Solzhenitsyn's work) carried the same village prose technique to the desultory extreme of incorporating space fiction. The barren wilderness of a Soviet railwayman's life in a Turkic enclave (enlivened for the decadent West only by the explicit sex of rutting camels) would be forcefully challenged by intergalactic space travel. Of course this desultory, wide-ranging, and all-encompassing literary technique is nothing new to the common law draftsman. He traditionally uses the same scatter gun which he aims and fires with all the skill of a sharpshooter. The effect of this apparently randomly chosen, trivially expressed, excessively discursive prose in Solzhenitsyn and Aitmatov's hands, had the legislative effect of bringing down the Soviet Union. As for the continuing common law, we suggest that any culture long accustomed to the scattergun in the hands of a legislative sharpshooter takes grave risks in pretending that the same scattergun can shoot just as accurately in the hands of an amateur.

Ever since *The Lay of Prince Igor* celebrated the Russian equivalent of the Battle of Hastings Russian literature has been the force majeure of world politics. The Russian novel in particular has played this role. After Solzhenitsyn, this so-called fictitional genre takes an unexpected twist. Aitmatov emerges from counter espionage against Solzhenitsyn to use Russian literature against its own avowed political purposes. He turns what was left of Russian by Turkic culture to be an instrument of oppression against itself. Aitmatov, who first suppressed Solzhenitsyn, is not a Russian but a Kirghiz. He uses a Kazakhstan setting to send up the shortcomings of Soviet imperialism, yet at the same time composes what is hailed as "the best novel to appear in the Russian language since the heyday of Solzhenitsyn". It could be said that he is only doing what Oscar Wilde, George Bernard Shaw, and James Joyce did with the English language for Ireland.

Aitmatov's literary influence on constitutional law is of especial interest for Maori-Pakeha relations in Aotearoa. The result for the former Soviet Union as for ourselves is a prime example of political paradox. In the same way as a Kirghiz author perfects the Russian language to turn Soviet rule against itself so, too, our own indigenous activists in Aotearoa use the English language rather than their own mother tongue to stake their claim to Moutoa Gardens and Tamaki Girls College. When launching his land claims on television Ken Mair does not use Maori. When picking a bone of contention with the Crown, Sir Tipene O'Regan speaks the Queen's English. The reports of our Waitangi Tribunal, like Aitmatov's novels, rise to new literary heights. All of a sudden, the whole of Aotearoa is expressing, not just an intellectual, but a heart-felt commitment to the search for justice in pure English prose. The forcefulness of Maori protocol is being rebirthed through Pakeha protocol. The policy of cultural assimilation through universal education is really working! Would we Pakeha, being the equivalent of old guard communists in Aitmatov's new-look Kirghiztan, now regret teaching English to the Maori? If so it is because our culture has grown so soft and flabby that we have forgotten our own ideals, and now oppose our invigoration by that other culture whom we taught.

Historical revision or revisionist history

In a two-part paper on the last Indian Summer of Soviet Law Reform [1995] *Statute LR* 68-89 and 125-143 the writer compared the growing conflict between the Soviet Union's fossilised view of world events with the speed at which State views could be changed to implement much needed law reform. The resulting crisis between long established legal history and the forcefulness of Gorbachev's law reform ended by tearing the former Soviet Union apart. There is a lesson from this kind of catastrophe whether it be the collapse of communism or the demise of the Crown. To think that what causes the collapse of communism when done in the name of communism could not bring about the collapse of capitalism when done in the name of capitalism, is to hide our heads in international tribalism. The present crisis of conscience in the former Soviet Union over social welfare equates with exactly that experienced by the West in relying on increased private enterprise to provide the answer. Both East and West recognise their own legacy of guilt from the Cold War, but by appeasing it in only material terms, appear unable to resolve it. What marks both spheres of interest during this crisis are the same three things. First, there is a loss or reversal of those traditional values once secured and enforced at a grassroots level by the State; secondly, an altered perception of the past as conveyed by a radically revisionist history of the present; and thirdly an exceedingly dynamic legal response by way of eliminating old juristic values and instituting new ones without much attention being paid to the continuity of law.

In the West we are apt to mistake the collapse of communism for something that explains itself. A careful examination of the collapse as an issue of comparative law suggests otherwise. Few legal systems could stand up to the width and depth of legal change, coupled with the speed at which this was being implemented, during the final few years of the Soviet system. A similar sense of jurisprudential panic already expresses itself here in a rising discontinuity of law. Thus the demise of the Crown raises the issue of responsibility under the Treaty.

The privatisation of state owned enterprises raises the issue of public property. Private monopolies wipe out a century of legislative endeavour in taking over from public utilities. The policy of user pays raises the issue of public interest and what happens to the proceeds of publicly funded assets. Mixed-member representation raises the issue of democratic government being based on the traditional balance achieved by a forceful and uncompromising opposition to the party in power. As the end of the millennium approaches, the red-herring of republicanism is increasingly postulated as the means of achieving a brave new world.

Looking to the future in Aotearoa affords no greater prospects for the continuity of law than it did for the collapsed Soviet Union. The long-looked for Moscow Spring only led to a last Indian summer for Soviet law reform. Will the same hyper-dynamic forces of legal change work out differently for the West in general and New Zealand in particular? Like any atomic reactor, once the critical mass of legal change is reached, there may be no way of avoiding another Chernobyl. When prime ministers of two western-styled democracies such as Australia and New Zealand actively promote their own personal views of republicanism, they far exceed the legal discontinuity of any Gorbachevian proposal. The good news from Emgeoo is that just as Gorbachev brought about the collapse of communism by doing his utmost to uplift it, so our antipodean prime ministers could be strengthening the monarchy by doing their utmost to undermine it.

Sovfilm – and after

A generation ago, one would have gone to the flicks to get away from it all. Now the battle for Bosnia is fought in one's own living room. The smaller screen has proved the more insidious infiltrator of our thoughts and emotions, so that once again a new generation goes to the flicks to get away from it all.

From Bolshevik beginnings the Soviet legal system used the cinema as a law enforcement agency. Lenin sent mobile cinemas round eastern backblocks to enthrall the minds of restless citizens. Until we watch *Cinema Paradiso*, we forget how Hollywood did the same for the West with the western. Sometimes it is extremely difficult to distinguish between Uncle Sam and Uncle Joe. They each have our interests so much in mind. During World War II, when we were cobbers with the Soviet Union, both Britain and New Zealand also employed the silver screen to disseminate information. The appropriate ministry sent mobile cinemas round the streets where, standing at the back of a van we watched the nation at war being projected onto a translucent screen.

Not far from Emgeoo on Sparrow Hills stretch the acres of filmsets emulating Hollywood. One would expect this lifestyle to soar skywards as the iron curtain goes up. When a repressed society is ultimately relieved, however, all sorts of unforeseen things happen. The high walls and security systems of Hollywood's Beverly Hills still repeat themselves here in continuous, although typically Slavic-style fences. Apart from the same pawarfare that can divide studio from studio even within the same nation, however, the unremitting seriousness of Sovfilm has taken a nose-dive. Competing television which drove western cinema to rely more and more on crude sensation does not pose the same catastrophe for this country. Indeed, the relaxed pleasure of advert-free Soviet television is also disappearing from the small screen. On the contrary it is the competition of the foreign film that poses problems. All of a sudden, Russian cinemas, including the big one in Emgeoo, have full houses only for foreign films. *Scorched by the Sun* would be one exception, but even the film societies are screening slush like *Patriot*. The Yanks hire out Sovfilm studios to retake another *Police Academy*. And local films ape foreign films by substituting sensation for narration with ever increasing sex and violence. As with the West the sex is euphemistically said to be simulated, so we may take the violence for real.

We sit down to watch a video film entitled *The Passion of Angelique* which one of our group mistakenly brought home from Moscow. My wife who only pretends to be feminist when caught on the losing side of any family argument, finds it hilarious – but doesn't ever want to see it again. From the mere male point of view, the Rabelasian sex scenes are so startling that I miss every word of the Russian dialogue – which was the sole point of watching the film. Among other things, it is about a woman dentist who keeps on having a sexual climax when extracting men's teeth. The toothache I have suffered since leaving Moscow should only be considered a symptom of the male menopause.

Going to the flicks soon became a form of worship all over the world, but more, especially in the Soviet Union where many leading churches became leading cinemas. The mysterious fellowship of the darkened room, broken by revelations from the silver screen, elicited a star-struck worship for the Soviet equivalent of Errol Flynn, Elizabeth Taylor, Cary Grant, and Marilyn Monroe. Without a similar set of ongoing miracles the churches simply could not cope. And where, as in the West, a knowledge of church history was made to substitute for what could actually happen through faith, why that faith was as dead as a doorknob compared to what was already happening on the cinema screen. In the East as in the West the mainline churches had grown grotesquely moribund. Rediscovering what it takes through faith to make miracles happen on the street and in the home, at school or in the operating theatre, requires a very different kind of espionage from the voyeurism of going to the flicks, watching television, or even attending church.

The former Soviet Union, like the old oracle at Delphi, would have been the foremost of world centres at which to study that process for the dissemination of information called spying. One could joke about the way in which facing eastwards would turn so many westerners into double agents. While in Moscow I attended the Russian Diplomatic Academy which in being one of the best guarded institutions by "the big house" of the KGB, possibly had riskier functions than those of diplomacy. The topic for discussion was whether I would do a doctorate in the politics of comparative legislation. For all I know this is the KGB equivalent of being asked by MI5 to "take tea with the Treasury Solicitor".

The proposal poses deep personal problems for me. The most forceful is that it offends against the fifth commandment since my father who

had a doctorate always warned me against making the same mistake. (Being now in Russia, we take the fifth commandment to be numbered according to the Orthodox, who follow the Jews in according the fifth to honouring one's parents, rather than way out West where to break the fifth commandment would instead mean murdering them.) Although the status of many doctorates has now been reduced to that of a five-fingered piano exercise in securing appointment and promotion, one meets statistically few scholars who have recovered from the process. Just recently I went to a higher education seminar at which I was the only mister present among the doctors who was not a surgeon. With nothing to testify to by way of fractured family life or thwarted research, I became very sad to find myself the happiest one there. The general consensus, judging by the incessantly plaintive conversation on the topic was that one couldn't be a scholar without showing lifetime symptoms of post-doctoral trauma. This is now doubtlessly built into the career aspirations of every academic in the way that my old Polish music teacher used to describe the streets of Berlin as being "where every second dog was a doctor". The legal profession has so far remained immune from this lemming-like urge, but international scholarship is rapidly reaching the ridiculous stage where it takes two doctorates to distinguish doctors from dogs and dogs from doctors.

The fifth commandment still poses problems for me in enrolling for a doctorate with Russia's Diplomatic Academy. Besides which, of course, there is also the risk of failure. The problem of whether supervisors and assessors agree with my assessment of Soviet legislative policy is no different from problems with supervision and assessment in the West. I have acted as assessor where candidates have been at odds with supervisors more than once, and the one doctoral thesis in which my assessment agreed with all other assessors against the candidate turned out to be a case in which the candidate was so far ahead of his time that no one but he could understand the thesis. C S Lewis said much the same as Lloyd George knew my father – beware of all but the bachelors when it comes to degrees.

Doctorates in the newly emerging Russia as successor to the Soviets are still State controlled. They are not so lightly given as different domestic institutions diversely grant them in the West. As one would expect of any State which worships work, honorary degrees are outlawed as corrupt. One's candidature requires symphonic concert hall performance rather than backroom scale study. The symphonic performance is both monitored and measured at both institutional and national levels. One's thesis has to be sent to eighty or ninety scholarly institutions around the Russian Federation, each of which has the right to comment on or oppose the candidate's work. In the case of continuing conflict the outcome may be decided by a group of so-called "black assessors". Our own New Zealand Qualifications Authority unwittingly expouses the Soviet model. The issue is whether standard specifications encourage or discourage original thought. Perhaps simply because of the linguistic challenge I would like to have a go at the standard Soviet model in its own country of origin. I know I do so at the risk of double post-doctoral trauma. After all, our entire examination system was borrowed by the British from China. If I can live like a Chinese mandarin for twenty years in New Zealand, I ought to be strong enough to survive as a Soviet doctor.

Decline and Fall

One of the problems of every European empire in its day of decline arises from its initial assumption of the role and rule of Rome. Bryce compared Britain's grandeur with that of Rome and concluded by asking which of these rival legal systems would triumph over the other. For at least a millennium it looked as if the common law would win, but the new millennium reverses the odds. It now looks as if the reception of Roman law via the European Community into Britain is finally assured. Britain sought to avert its own imperial end by examining its civil servants on Gibbon's *Decline and Fall* but their attention was diverted away from the bread and circuses by the Second World War.

Moscow has long claimed, after the fall of Justinian's Constantinople, to be the world's third Rome. Many books have been written to advance this cause. "That freedom of conscience, including the right to confess any religion or carry on atheistic propaganda" under article 52 of the Soviet Constitution upheld the claim by building Lenin's holy reliquary, as if it were St Peter's, on Red Square. The Christian heartbeat felt throughout the State – apart from coronary occlusions suffered under the Tartar and Soviet yokes – substantiates this claim, no less than the artistic, architectural and cultural heritage of cathedrals, monasteries, museums and reliquaries of Christian faith throughout the city. Merely stepping into Saint Peter's Roman sandals is not going to secure his anointing however. Moscow without a love for Kiev and Saint Petersburg, like London without a love for Edinburgh, or Christendom without Constantinople, is liable to enter the doldrums and disintegrate from within. Meanwhile the race to return the capital of Russia from Moscow to Saint Petersburg is already running. Stalin once dreamed of making the citizens of Saint Petersburg commute to Moscow, but now the capitalists of Saint Petersburg (among them many dollar millionaires) reverse the direction of travel. We meet a big banker, with his rich entourage, on the Saint Petersburg railway platform. He is suspiciously like the old Soviet caricature of a Wall Street broker. Big bankers the world over have an arrogance that makes the daily worker worry for his small savings.

Moscow still has that cosy feel that one could identify with Glasgow of a generation ago. The communal fug of a cosmopolitan city is very different from the fresh clean air, whether blowing off the Firth of Forth on Edinburgh or from the Finnish Gulf across Saint Petersburg. The cleaned up Glasgow of today, however, is every bit as much Scotland's capital as Edinburgh, and were Scotland to emerge from under the English yoke tomorrow, why all the old municipal rivalries would break out once more, not perhaps as bad as between Belfast and Dublin, but just as intense as between Moscow and Saint Petersburg. It is a sign of this continuing rivalry that younger Muskovites still refer to Petersburg as Leningrad.

As we wait in Leningrad Station for the train to Saint Petersburg we

wonder whether it will be the famous *Red Arrow*. This is the equivalent of Britain's *Royal Scotsman* or New Zealand's *Southerner*. The station concourse is as big as a football stadium. The temptation to footloose youngsters like ourselves is to do four laps round the surrounding kiosks until we drop. Roger and Tristan come back with a computer game which they have bought between them. They are now exhausted but there are no chairs. Those with luggage like ourselves have privileged seats but other intending passengers just hang around the walls. The atmosphere is drab but also tense so nobody feels like playing hacky-sack. They say the train is late, but I who have not slept for several nights find that the whole station is moving off, and right on time.

"Stay close", we are told "this is a seedy area. Anything can happen". Despite the warning, those with youthful innocence still wander off. I stay with the bags, busily counting and recounting twenty suitcases, and miss the mugging round the corner. "Lay off!" screams Ann as a mafia-like mob fell a youth with a kidney punch and a broken jaw. The suitcases still add up to twenty so I study my boots. They have been squeaking ever since I left Auckland. "Cowards", I tell them, but they know who's boss and won't answer back for as long as I keep still and stop moving. "Look, there's the pool of blood" points out Ann as we round the corner to get to the platform, but I barely hear what she says above the persistent squeaking of my footwear.

"What's happening here?" squeals my rapidly advancing right boot. "Who are these people?" he insists, pretending to police the issue. "Just people" growls my left boot. "Reveal the truth. Try my toecap. Put in the boot . . ."

I sigh from the agonised depths of my russified soul. Poor right boot is so outspoken in his speech but such a coward in his conduct that all he does is squeak about justice and truth. Listen to him – his voice is always so painfully high, altissimo castrati, he was hurt in his youth. He is but a nominal Christian and needs to be resoled.

"Lead with the left" groans my other boot, who doesn't move any more than his colleague to the right, but stays quite static.

> Keep your head down . . . and watch your step. These people look like mafia – don't they? Very well dressed . . . quite respectable people really . . . and they have the situation well in hand . . . Stability not justice is what we need . . . A bit of commonsense practicality does wonders for the truth. Don't worry about legality. It's an open market in which justice finds its own self-regulating level . . . Who can say who the real rulers of society are . . . whenever society is on the boil the scum rises to the top . . . Lead with your left and let me do the squeaking for you . . .

Ah – how I love my left boot. His basso profundo is so manly, so solid, so reliable. He has never been hurt in his life. It's just a pity that he's so slow off the mark, always dragging both feet. If only he could see the truth as quickly as right boot then he would be able to make his own mark for stability.

Of course my boots are not just squeaking but translating from the issues raised by the Russian Federation's 1991 Concept of Judicial Reform. This is a new high for universal jurisprudence and just to show that left boot is not allowed more of his own way than right boot one can quote from Stephen Thaman's translation of the Federation's grandiloquent conclusion.

> Where stability is more important than truth, and legality more important than justice, a court of professionals is enough. But when the application of the law gives rise to more horror than the commission of the crime – if the defendant is convinced of his innocence, if society is not able to stand aside and trust the state to make decisions – that is the place for the jury.

Only an O J Simpson trial could raise doubts.

Once on the train, the security guards come round. They promise individual protection for an extra dollar per person. Our guide, who has a gun, tells them we paid for protection when we bought the tickets. We buy a bottle of champagne from the discreetly smiling coach attendant and, in a flurry of falling snow, pull out for Saint Petersburg. The carriage so I am told is often bitterly cold but this time it is close and stuffy. I develop a tremendous empathy for my fellow colleague earning his daily bread in this rough and ready way. He is a family man and what worries him most is the ready cash he has to carry. Soon we are baring our souls to each other after the traditional switch from champagne to vodka. Our eyes glaze over as we plumb the depths of Dostoevski, but now and then we try to tell each other a joke, just as we punctuate our vodka with peanuts to remain at the ready. *Northern Lights* is half and half champagne and vodka; and *Fires of Moscow* is half and half brandy and vodka; or should the champagne and brandy be the other way round? Tell us another! Wait a moment – there's trouble down the corridor! No . . . no . . . it's all right. Someone trying to get a good night's sleep has been mixing his drink with sleeping pills – *Saint Petersburg Special*!

Calvary and Resurrection

Our arrival in Saint Petersburg after the intensely hot overnight trainride from Moscow is marred by the absence of what all twentieth century travellers take for granted – hot water. We work our way through the sights – a bus ride round the city, a tour of the Hermitage, a visit to the famous statue of Pushkin's poem of *The Bronze Horseman* on the banks of the Neva commemorating Peter the First, and a trip through the Tsar's Palace outside Saint Petersburg. We take everything quietly in our stride until we learn that the absence of hot water in our hotel is the result of a breakdown in the nearby nuclear reactor. It is not just our own hotel that lacks hot water but the whole city. That evening we read a newspaper report debating whether we are in the middle of another Chernobyl. Who would associate a country's Calvary with its absence of hot water? We sigh in the typically Russian way before going out to dine in a restaurant where Pushkin last supped before being shot dead in a duel with his wife's lover. Most of us find this cafe terribly expensive, which indicates how quickly we have acclimatised to thinking in roubles. Economic jurisprudence is so much simpler to pick up and understand than linguistic or sociological jurisprudence. Apart from those who have been trained as

economists to overlook the obvious, you just look in your wallet.

The highpoint of our last night in Saint Petersburg is following in Lenin's footsteps across the Baltic Sea. Like any issue of jurisprudence there are preliminary matters to be determined. As between the locals and ourselves we cannot agree that the Finnish Gulf is part of the Baltic Sea. "Never mind", we say "just take us there". This is easier said than done because to reach the coast means taking the bus onto some of the Saint Petersburg islands. The only route lies across bridges that are lifted at times and tides that could cause us to miss our Moscow train.

When we do arrive at the coast we find that the Baltic Sea, or at least the Finnish Gulf, is completely frozen over. The youthful innocents among us are all set to follow Lenin's footsteps for far off Finland, but eventually they heed our cries and settle for a game of hacky-sack five yards off shore. Because every floor lady who has seen them playing in the hostel has shouted "on the street, on the street!" the game is now known among us as *na-oolitse*. We trust that old guard communists will overlook the affront to Leninism in playing na-oolitse where Ilich Ivanovich walked across the Baltic Sea – or was it merely the Finnish Gulf?

We get back from the Saint Petersburg islands in time to catch the Moscow train. On my son Tristan's count, our return from Saint Petersburg means we have been to Moscow three times – once when we arrived from New Zealand via Tokyo; secondly in returning from a place called Zagorsk, now revived as Sergei-Pasad; and lastly in returning from Saint Petersburg. We, too, with the locals can say "The third Rome still stands", but this time round we would have like to have learned still more of the language.

It is not just the sights but the sound and smells of Moscow that have stayed in our minds. Because Minsk was rebuilt to emulate Moscow, my three months in Minsk have make me feel just as at home here. One of the small thrills of a wartime holiday as a child was to travel with my aunt or granddad on the Glasgow underground. That would have been before the Clydeside bombing. Beleaguered Moscow would then be proudly extending her underground while the war raged overhead. Occupied Minsk would be reduced to rubble before rising again, this time with her own smaller version of Moscow's metro – shallow enough to shake the suburbs. For me the speluncean sights, sounds, and smells of these vastly different locations still share the same preternatural intensity. Muscovites smile or shrug as they see me filming the trains. They don't see me shudder to think of how nearly the Slav succumbed to Nietzsche's Superman. Perhaps the survivors mistake me for a drug addict as I drink in the strange dark smell of decaying marble. Even this far underground it serves as a memorial to the countless dead. "Who's the crazy man", they ask "who smilingly rides the escalators?" The blast of hot air as you first enter the subway fogs up your winter spectacles straight away. You don's see the beggars and you trip over the invalids. And you hold off breathing for as long as you can the mixed smells of pickled garlic and wet wool. Down on the platforms the air is electrified and enlivened with ozone. In the middle of a Moscow winter it is worth more than a summer in Sochi to find a nice subway station. Poor people try to tuck themselves away before the metro closes to survive the night. Here is a speluncean society that lives and breathes on underground sounds and sights and smells that are far removed from the fresh air. As an antipodean of Glaswegian descent I feel as if I had been born here, and very much at home, but also very very sad.

Deep in the Moscow metro (much deeper than that of Minsk) is the accustomed place of worship for communism. Each metro station is a shrine to Soviet religious feeling. Under that much quoted article 52 of the Soviet Constitution conferring freedom of conscience, Soviet jurisprudence imposed State atheism. Down the Moscow metro, even today when those old forms of worship lie abandoned, none can deny the religious forcefulness of atheism. Every metro station has its idols. I cannot help but hold a soft spot in my heart for that of Byelorus. But I know, as a result of having once worshipped false gods that I dare not look back too longingly even on old Byelorus. I board the train from Byelorus to Universitet, once more before I board the plane from Moscow to Dunedin, just to hear the homely metro voice intone – "Be careful. The doors are closing".

The travelling lawyer is given to reverie in ways that can not happen at home. Is Robert Kagan right when in deciding *what to do when there is too much law to study*, he says that ". . . dollar for dollar, scholar for scholar, the greatest contributions to understanding legal processes . . . come from cross-national comparative studies"? This conclusion seems to support Twining's view from *Blackstone's Tower* of the overloaded common lawyer as the international traveller. As you read this last line, I shall be setting out my spy kit for another month of study at Emgeoo early in the new year. It contains polypropylene underwear, vitamin tablets, a Swiss knife to cut salami, and an electric jug to boil tainted water. Everyone's their own spy these days. If the Fifth Column allows me to reconcile the Fifth Amendment with the Fifth Commandment I shall take the opportunity to settle my thesis topic with the Russian Diplomatic Academy. I hope to hear the same old sound of the Kremlin clock, drink in the same sights of Emgeoo lit up at night, and either push aside or snuff up the same old smells of the third Rome's metropolitan at least once more before the common law if not the whole world collapses.

Meanwhile I need to hear again, the last echo of the world's longest lasting social welfare system – "Be careful. The doors are closing". Like Harold Williams from Inglewood I prefer the Russian wilderness to my own one. This time I shall take my wife. She speaks in tongues – so why not Russian, although she has been brought up on North Shore and does not share my preternatural nose for the Moscow metro. She will love the fresh wind off the Finnish Gulf instead, where in Saint Petersburg I hear the hotels again have hot water. The good news from Emgeoo, on which even my squeaky boots maintain a hallowed silence, is that by reintroducing the jury system, Russian jurisprudence has expressly confirmed the need for truth and justice. A Court of professionals is not enough. By reconstituting the jury system Russia has unreservedly declared justice to be a public asset. ❑

Banking law reforms:
Changes to cheques law and repeal of the Banking Act

By Sachin Zodgekar, analyst, Banking System Department, Reserve Bank

This article describes the changes to banking law which were introduced through the enactment of the Banking Law Reform Bill.

I Introduction

The enactment of the Banking Law Reform Bill on 30 June 1995 implemented some important changes to banking law, particularly in relation to cheques law. These changes were recommended by the Reserve Bank. (The Bill was enacted as the Bills of Exchange Amendment Act 1995, Banking Act Repeal Act 1995, Evidence Amendment Act (No 2) 1995, and the Reserve Bank of New Zealand Amendment Act (No 2) 1995.)

The new legislation makes three principal changes to the law:

- First, it provides for a non-transferable cheque through amendments to the Cheques Act 1960. A non-transferable cheque is one which can only be paid into the account of the named payee. It cannot be endorsed to a third party.

- Second, it permits "truncation" of cheque processing – also through amendments to the Cheques Act. This means that banks are able to pay cheques on the basis of information received electronically and can therefore avoid having to physically transport cheques from the collecting bank to the paying bank to facilitate payment.

- Third, it frees banks from a range of administrative requirements by repealing the Banking Act 1982.

These reforms have considerable practical importance for the banking industry and the general public because of the prevalent use of cheques. Although the usage of cheques is declining, they remain the most popular payment method in New Zealand. Around 370 million cheques were processed by banks in New Zealand last year (see: *New Zealand Bankers' Association Annual Review 1994*).

This article outlines the policy rationale behind the changes, the effect of the changes, and potential issues to which the reforms give rise.

II Background

Banking law working group

The banking industry was closely involved in the development of the reforms. The proposals were developed through the Reserve Bank's Banking Law Working Group. This Group is convened by the Reserve Bank and made up of representatives from the Bank, New Zealand Bankers' Association, Ministry of Commerce, and the Ministry of Justice.

The Working Group was formed in 1992 to review aspects of banking law to make the law consistent with modern banking practices, more understandable to users of the banking system, and better meet the needs of bank customers. It was recognised that the legal framework applying to the banking system was, in some respects, outdated and not conducive to the efficient operation of the system.

Cheques law review

The introduction of non-transferable cheques and truncation represents the completion of the first stage of a two-stage cheques law review process. In August 1993, the Working Group released a discussion paper outlining the Group's preliminary thinking on the broader issues involved in reviewing cheques law and the nature of the potential changes which could be made (Banking Law Working Group (1993) *Review of the Law Relating to Cheques*, Discussion Paper, August 1993). The purpose of the paper was to seek the views of a wide range of interested parties on the broader issues and possible directions for reform.

The responses to the paper revealed that many regarded the creation of a non-transferable cheque and truncation as being the immediate priorities for reform. The Working Group therefore decided that non-transferability and truncation were of sufficient practical importance to proceed with immediately as a first stage, ahead of a broader review of cheques law.

The Working Group then released its second discussion paper on cheques law in August 1994 (Banking Law Working Group (1994) *Proposed Changes to Cheques Law*, Discussion Paper, August 1994). The paper set out detailed proposals on amending the Cheques Act to provide for a non-transferable cheque and to facilitate truncation. Overall, the submissions received on the paper indicated strong support for the proposals.

Banking Act review

The review of the Banking Act 1982 stemmed from the view that banks should, to the extent appropriate, be subject to the same legal framework as that which applies to other commercial enterprises. The review also recognised that the Banking Act was creating inefficiencies in the operation of the banking sector. The Working Group released a discussion paper in June 1993 which set out its preliminary recommendations in relation to the Act (Banking Law Working Group (1993) *Review of the Banking Act 1982*, Discussion Paper, June 1993). The submissions on the paper strongly supported the Working Group's view that the Act was largely redundant and should be repealed.

III Non-transferable cheques

New provisions, ss 7B and 7C, have been introduced into the Cheques Act 1960 to provide for a non-transferable cheque. Under the new s 7B, where a cheque is crossed and bears across its face the words "not transferable" or "non-transferable", or "account payee" or "a/c payee" either with or without the word "only", it is recognised as being non-transferable. This will mean that the cheque is valid only as between the parties to it and cannot be transferred by the payee to any other person. In short, only the named payee can be credited with the funds represented by the cheque.

Delayed commencement

These new sections do not come into force until 1 January 1996. The delay is to allow time for the banking industry and the Reserve Bank to promote awareness and understanding of the new crossings. It is important for banks and cheque users to come to terms with the new crossings so that they are utilised effectively.

Reasons for the change

One reason behind the change is to avoid the current confusion surrounding cheque crossings. It is widely believed that the crossings which are currently used prevent the transfer (ie endorsement) of a cheque. In fact this is not the case, and the law therefore provides less protection against fraud than cheque users expect.

The effect of crossing a cheque "not negotiable", under s 81 of the Bills of Exchange Act 1908, is simply that no person to whom the cheque is endorsed has any better title to the cheque than the person transferring it. The addition of the words "account payee" or "account payee only" does not provide complete protection either. Although those words have gained some acceptance at common law, as constituting a valid direction to a bank to collect the proceeds of the cheque only for the payee's account, they do not conclusively prevent a cheque from being transferred and are not recognised in the Bills of Exchange Act (see: *Manthel Holdings Ltd v Broadlands Finance Ltd* (unreported, Supreme Court, Wellington, A559/77, 14 May 1979) and *New Zealand Law Society v Australia and New Zealand Banking Group Ltd* [1985] 1 NZLR 280).

The new provisions will bring the law more into line with public expectations by providing unambiguous statutory recognition of a non-transferable cheque. However, the crossings currently recognised in the Bills of Exchange Act will not be abolished and cheque users will, therefore, retain the ability to write transferable cheques where this is desired.

Another reason for the reform is to prevent cheque fraud by making it more difficult to misappropriate cheques. If a thief seeks to obtain payment on a stolen non-transferable cheque by forging an endorsement on the cheque and attempting to pay it into his or her account, the bank should refuse to accept the cheque. Similarly if a stolen non-transferable cheque is fraudulently endorsed to a third party who seeks to pay it into his or her account, the bank should again refuse to accept the cheque. In both cases, it will be apparent to the bank from the crossing on the cheque that it is "non-transferable" and can therefore not be accepted for payment into any account other than that of the named payee. In fact, in the latter case, the third party should not accept an endorsement of a non-transferable cheque in the first place.

Attempted endorsements

The new provisions clearly set out the legal position where there is an attempted endorsement of a non-transferable cheque. The new s 7B(3)(a) states that such an endorsement "is not effective to transfer ownership of the cheque". The section then goes on to specify what the position of a bank is in relation to attempted endorsements.

If a collecting bank gives effect to a purported endorsement, and collects the proceeds of the cheque for the endorsee, it is deemed to "not act in the ordinary course of business and without negligence" to that extent. This means that, in an action against the bank by the true owner, it is precluded from claiming the defence to liability in s 5 of the Cheques Act because to claim that defence the bank must have acted "in good faith and without negligence". In this case it would probably result in the bank being liable to the named payee for conversion of the cheque.

However, if the collecting bank ignores the purported endorsement, and collects the proceeds for the payee, it is deemed to act "in the ordinary course of business and without negligence" to that extent. The purpose of this is to ensure that the bank is protected by the defence in s 5 against any possible liability which could arise due to the bank not giving effect to the endorsement.

Usually it will be the collecting bank which is responsible for ensuring that the cheque is paid to the true owner. But, to the extent that it may be necessary for the paying bank to bear this responsibility in some situations, s 7B has parallel provisions relating to the paying bank's liability. In particular, the paying bank is deemed to not act in the ordinary course of business and without negligence if it pays a non-transferable cheque in accordance with a purported endorsement. This is designed to prevent the possibility of a bank claiming protection against liability under s 2 of the Cheques Act, which provides a defence where a bank has paid an unendorsed or an irregularly endorsed cheque "in good faith and in the ordinary course of business", where it has paid the cheque to the endorsee contrary to the non-transferable crossing. It may otherwise be possible for a bank to argue that a purported endorsement constitutes

an "irregular" endorsement in terms of that section.

In essence, the policy behind these provisions is, first, to ensure that a bank faces absolute liability to the extent that it pays or collects a non-transferable cheque in accordance with an attempted endorsement. And second, to protect a bank from liability to the extent that it ignores a purported endorsement in paying or collecting a non-transferable cheque.

In this respect the new provisions are more specific than the United Kingdom provisions on non-transferable cheques, introduced into the Bills of Exchange Act 1882 (UK) by the Cheques Act 1992 (UK). The United Kingdom provisions do not state what the effect of an endorsement intended to transfer a non-transferable cheque is. Neither do they clarify the extent to which a bank can claim a statutory defence to liability where it has given effect to an endorsement on a non-transferable cheque. The United Kingdom provisions only deal with the situation where a bank has ignored an endorsement. Section 81A(2) states:

> A banker is not to be treated for the purposes of section 80 above as having been negligent by reason only of his failure to concern himself with any purported indorsement of a cheque which under subsection (1) above or otherwise is not transferable.

This subsection does no more than clarify that a bank is not negligent for ignoring an endorsement on a non-transferable cheque.

In the relatively short period of time in which the United Kingdom provisions have been in operation (since 1992), the effect of an endorsement on a non-transferable cheque appears to have not yet been fully considered.

The reason that the new legislation departs from the United Kingdom provisions is because these were thought to be unnecessarily uncertain – they do not give clear guidance to banks on how to deal with a non-transferable cheque which has been endorsed. It was thought better for the legislation to clearly state that an endorsement is not effective to transfer a non-transferable cheque, thereby providing certainty for banks and also ensuring that there is no room for non-transferability to be undermined.

The position of trust account operators

The New Zealand Law Society sought an exemption from non-transferability to allow solicitors, accountants, and other trust account operators to lodge cheques made out to a client as payee into their trust account for the credit of that client. The concern was that without an exemption current arrangements by which payments are received by solicitors on behalf of clients would be upset. In particular it was argued that many estates and trusts, which are administered by solicitors and do not have their own bank accounts, will be put to the inconvenience of having to open and operate separate accounts.

Nevertheless, the Finance and Expenditure Committee rejected the submission largely because of a concern that providing an exemption would unduly weaken the protection which non-transferability will provide. Compared to the inconvenience which may be caused, it was thought to be more important for the drawer of a cheque to have the ability to ensure that the cheque is paid directly to the named payee and not into a solicitor's, or other operator's, trust account.

In order to avoid potential difficulties, solicitors will need to put in place arrangements which enable them to receive payments on behalf of their clients. Solicitors should either seek to ensure that transferable cheques are used or that cheques are made out to their firm, rather than to their client, where it is intended that the funds be paid into the trust account to be held on the client's behalf.

Exception to non-transferability

The new provisions provide for one narrowly confined exception to non-transferability. It will be permissible to transfer a non-transferable cheque where

- it has been presented for payment and dishonoured by non-payment, and
- the transfer is for the purpose of recovering payment of the amount of the cheque.

This exception was considered to be justified to enable debt collecting operations to continue to operate effectively. Many retailers and other businesses rely on these services to enforce payments owing under dishonoured cheques. In these situations, payment is usually enforced by the debt collector taking a transfer of the dishonoured cheques and then re-presenting them or taking legal actions on them in their own name.

These measures cannot be efficiently utilised unless the legal ownership in a dishonoured cheque is transferred to the debt collector. Without the exception, an endorsement of a dishonoured cheque to the debt collector would have no effect and the debt collector would therefore have no right to sue the debtor under the instrument (the cheque) or apply pressure by banking the cheque into its own account for re-presentment.

Potential difficulties

There may be initial teething problems with non-transferable cheques – for example, where the name of the payee is misspelt or a cheque is made out to the wrong payee. In some cases, the bank will be able to solve the problem by making inquiries of the drawer as to the correct payee. In other cases, it may be necessary for the drawer to write a new cheque. However, most of these problems can be avoided if cheque-users are properly informed of the new cheque crossings. In any case, the advantages of having a safer payment instrument should far outweigh any problems which do arise.

IV Cheque truncation

New provisions, ss 7D and 7E, have also been introduced into the Cheques Act to provide for the truncation of cheque clearing procedures. These sections came into force immediately upon enactment.

Reasons for the change

This change is designed to reduce the costs incurred by the banking industry and increase the efficiency of cheque processing. Banks have for many years undertaken the inefficient and costly exercise of

transporting vast numbers of cheques to the bank branches on which they are drawn in order to make proper presentment of the cheques for payment. This was done because s 45 of the Bills of Exchange Act was regarded as imposing an obligation on the collecting bank to physically present the cheque to the paying bank for payment (see: *Barclays Bank Plc v Bank of England* [1985] 1 All ER 385 and *H H Dimond (Rotorua 1966) Ltd v Australia and New Zealand Banking Group Ltd* [1979] 2 NZLR 739, 740).

Under the new provisions there is no longer any need for physical presentment. Cheques may be presented by the collecting bank delivering the particulars of a cheque by electronic or other means to the paying bank. This will lead to significant cost savings and efficiency gains for the banking industry and should also benefit customers through shorter clearance times for cheques.

Requirements for truncation

The new s 7D provides for truncation by allowing the collecting bank to present a cheque by "delivering to the paying bank particulars of the cheque by electronic or other means in accordance with the rules of an inter-bank clearing system". The only real requirement is for truncation to take place through an inter-bank clearing system which is governed by written agreement between the relevant banks. Beyond that, the legislation is essentially permissive. Truncation may take place between branches of the same bank as well as between different banks. There is no requirement to truncate.

Accordingly, the details of how a system should operate, and how the risks and responsibilities should be allocated between the paying and collecting banks, have not been specified in the provisions. In order to provide flexibility these have been left for the industry to formulate.

In addition to providing for truncation, s 7D also restates, with some minor amendments, the rules relating to the presentment of cheques for payment which were formerly contained in s 45 of the Bills of Exchange Act. Section 45 no longer applies to cheques.

Duties and obligations preserved

The new provisions make it clear that truncation does not alter the duties and obligations of the paying bank. There are three aspects to this. First, s 7E states that a paying bank will not be relieved of any liability, in respect of the payment of a cheque, merely because that cheque was cleared in truncation mode.

Second, the paying bank is under the same obligations, in terms of scrutinising the cheque and making inquiries, that it would have been under if the cheque had been presented physically. This means that, where a cheque has been presented in truncation mode, the bank will be treated, for the purpose of determining its liability, as if the cheque had been physically presented even though the bank has not actually sighted the cheque. Therefore, a bank will not be able to escape liability for payment without mandate, for example where the drawer's signature is forged or the cheque has been fraudulently altered, by arguing that it had no opportunity to examine the cheque because it had been presented in truncation mode. However, this should not lead to any significant increase in the risks faced by banks because even under current physical cheque clearance procedures banks pay many cheques without scrutinising them.

The third aspect is that s 7E makes it clear that the paying bank is not precluded from claiming one of the defences to liability, contained in the Bills of Exchange Act, merely because of having agreed to a cheque being presented in truncation mode. The section states that the paying bank "is not negligent and does not act otherwise than in the ordinary course of business" by reason only of having determined that a cheque or a certain class of cheques be presented in truncation mode.

Right to request further information

In order to balance this preservation of liability, the paying bank is entitled to obtain further information about a cheque that has been presented electronically. The paying bank can require the collecting bank to provide it with the cheque itself or with further particulars about the cheque.

The effect of making such a request is not to delay presentment of the cheque. Presentment will have already occurred when the particulars of the cheque were initially delivered through the inter-bank clearing system. However, where a request has been made the bank will have a reasonable amount of time to examine the cheque and make reasonable inquiries to determine whether it should be paid.

V Repeal of the Banking Act

Reasons for its repeal

The Banking Act 1982 was repealed on 30 June 1995. The Act imposed certain administrative requirements which were inconsistent with the open and competitive modern banking environment. While the requirements would have been necessary at the time the legislation was originally passed in 1908, when there were far fewer banks operating in New Zealand, most of the requirements no longer served any purpose. For the most part, the matters dealt with in the Banking Act are now adequately covered in other legislation, which is not specific to banks, such as the Companies Acts 1955 and 1993.

Requirements removed

The repeal of the Banking Act frees banks from unnecessary regulation and allows for more operational flexibility. The main requirements which have been removed are listed below:

- The requirement for bank branches to be open from 10 am to 3 pm during week days.
- The requirement to obtain the approval of the Minister of Finance for the temporary closure of a bank branch.
- The requirement to obtain the approval of the Minister of Finance for the appointment of a bank holiday.
- The requirement to obtain the written approval of the board of directors for the transfer of bank shares on which there is outstanding liability.

- The requirement for a bank to produce banking records for inspection, in accordance with a court order made under a specific power, in legal proceedings to which the bank was not a party.

The first three requirements listed above were considered to be no longer necessary to ensure access to banking services. There are now significant commercial pressures on banks to ensure that customers have access to banking services whenever they are needed and further to provide higher levels of service. The fourth requirement, for board approval for the transfer of unpaid shares, is no longer needed for the purpose of preserving the capital integrity of a bank. The Reserve Bank's capital adequacy requirements, which were introduced after the enactment of the Banking Act, oblige registered banks to maintain a minimum level of paid-up capital. Furthermore, the boards of locally incorporated banks registered under the Companies Act 1993 have the ability, under s 84(5) of that Act, to prevent the transfer of shares on which there is an outstanding liability. The last requirement listed above, which provided an avenue for parties to proceedings to inspect banking records, was thought to be unnecessary given the substantial powers which the Court now has, under Part III of the High Court Rules, to order discovery against a range of third parties.

Provisions retained

Some provisions of the Act have been retained. The provisions relating to presenting evidence of banking records in Court (ss 5 and 6) have been transferred into the Evidence Act 1908 as ss 47A, 47B and 47C. No substantive changes were made to these provisions.

The provision relating to the storage of banking records (s 12) has also been retained. It was transferred into the Reserve Bank of New Zealand Act 1989 as s 156A. Two changes have been made from the old provision in order to recognise technological developments and permit greater flexibility. First, the requirement for the originals of banking records to be retained for two years has been removed. Copies of records may now be kept in electronic or other form from the time the originals come into existence. Second, a bank may arrange for another bank or some other party to retain its cheques on its behalf. This change foreshadows the introduction of truncation, under which cheques will not normally need to be transported back to the paying bank.

VI Further law reform

Cheques law review: stage two

Stage two of the cheques law review will involve a broader examination of cheques law encompassing a wide range of issues, such as the question whether the law should impose a time limit within which a bank must decide whether to pay or dishonour a cheque. Consideration is being given to whether stage two should lead to the drafting of a comprehensive new Cheques Act, separate from the Bills of Exchange Act, rather than by way of amendments to the existing statutory framework. The Reserve Bank plans to undertake this second stage of the review in 1996.

Netting and statutory management

Prior to stage two of the cheques law review, the Bank intends to review the law affecting the legal enforceability of certain netting arrangements involving banks and other counterparties in the face of statutory management or liquidation. The Bank also intends to review its statutory management powers under Part V of the Reserve Bank of New Zealand Act 1989. It is expected that a discussion paper in relation to both these reviews will be released in early 1996.

VII Conclusions

The enactment of the Banking Law Reform Bill was a significant contribution towards promoting a legal framework which is consistent with the sound and efficient operation of the banking system. The changes which have been introduced hold considerable benefits for banks, and for users of the banking system. For banks, the changes allow for cost savings, efficiency gains, and increased operational flexibility. For users of the banking system, the changes provide greater security against cheque fraud and the prospect of receiving more efficient banking services. ❑

Recent Admissions

Barristers and Solicitors

Barclay TD	Christchurch	13 October 1995	Marshall EJ	Nelson	13 September 1995
Blake JT	Christchurch	13 October 1995	Mortlock JPL	Christchurch	13 October 1995
Chesterman JC	Nelson	13 September 1995	Nelligan JA	Christchurch	13 October 1995
Chow BK-O	Christchurch	13 October 1995	Odams GJ	Christchurch	13 October 1995
Ewer KA	Christchurch	13 October 1995	Parris CJMT	Christchurch	13 October 1995
Farrelly A-ME	Christchurch	13 October 1995	Quinn AJ	Christchurch	13 October 1995
Fletcher GD	Christchurch	13 October 1995	Rhodes NPC	Christchurch	13 October 1995
Frew KA	Christchurch	13 October 1995	Robertson SJ	Christchurch	13 October 1995
Gardner G	Christchurch	13 October 1995	Sibley DMN	Christchurch	13 October 1995
Henderson BF	Christchurch	13 October 1995	Simpson M-AM	Christchurch	13 October 1995
Horgan PD	Christchurch	13 October 1995	Stapleton AB	Christchurch	13 October 1995
Jones KR	Christchurch	13 October 1995	Thompson BJ	Christchurch	13 October 1995
Kelly CM	Christchurch	13 October 1995	Whitaker SF	Christchurch	13 October 1995
Lo Ming DHJ	Christchurch	13 October 1995	Woolerton JA	Christchurch	13 October 1995