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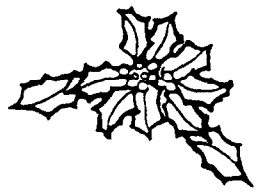


Yes, Virginia, there is...

Casual browsing has its rewards. Looking through a book about Christmas recently I came across the famous article in the New York *Sun* of 1897 in which the editor replied to the inquiry of a little eight-year-old girl and said:

> Yes, Virginia, there is a Santa Claus.

This is a sentence that has entered into American folklore. The letter from Virginia O'Hanlon, who died only 15 years ago, and the editor's reply, were published every Christmas time after 1897 by the *Sun* until the newspaper folded in the 1950s.

While I knew the particular sentence well enough because of its common use as a reference phrase in American writing, I had not read the full reply. This editorial response to Virginia's question of whether there is a Santa Claus is appropriately sentimental and simplistic; but it does contain a profound thought, one that illuminates the continuous validity of fairy tales and of imaginary tales like novels, and the permanent appeal of rhythm, metaphor and imagery that are the constituent elements of poetry.

Justice too is one of those elemental things that deep down we know to be more than a word, more than an idea. The history of philosophy for centuries was concerned with this problem, that of universals. Plato's solution was his theory of forms, that are real though immaterial. The realist school, on the other hand, has always maintained a materialistic sense of life and seen references to abstractions, such as justice, as being unreal human inventions. The moderate realists from Aristotle, through Aquinas and the Schoolmen have argued for a position that tries to combine aspects of the idealist view and of the mechanistic view.

In jurisprudence, of course, the issue is of direct relevance to the relationship, if any, between justice and law. Some, like the American legal positivists and pragmatists, conscious or unconscious disciples of Compte and Pierce, see no necessary connection. For them the law is merely a declaration of what is practical and expedient by the current power elite, whether a political party or a faction within a political party. In effect this is the position, when reduced to its bare bones, of both Rawls and Dworkin, despite their differences. The argument on the relationship between law and morality as exemplified at the end of the 1950s and the beginning of the '60s, by Devlin and Hart expressed the issue starkly. The influence of Hart now seems all-pervasive in New Zealand. This has become more obvious in the past few years. Some politicians advocating change seem to label a particular issue as a moral one, *and therefore*, they say, the law should not be concerned with it.

A pluralist society of tolerance and accommodation is different from one that claims that it is neutral in all moral matters. That this extreme idea of a neutral value-free social, and therefore legal, system is an absurdity,

This editorial was published nine years ago in the December issue of *The New Zealand Law Journal* at [1986] NZLJ 397. It is being republished because of all the editorials that I have written during the last thirteen years it is the one that has had the warmest response. It shows obvious signs of its time in the comments about the Royal Commission on Social Policy. I did consider deleting that passage but eventually decided to leave it as it stood. Apart from anything else the very existence of the Report of that Royal Commission seems to have disappeared from the public consciousness which, frankly, I do not find surprising for the reasons that the editorial indicates. The editorial is now reprinted however for its continuing relevance to the three ghosts that haunted Ebenezer Scrooge — the Spirit of Christmas Past, the Spirit of Christmas Present, and the Spirit of Christmas Future.

P J Downey

may be illustrated by the proposed Royal Commission on Social Policy. This can be seen, from one point of view, as an attempt to create a new secular set of social values. The idea that a Royal Commission can establish a new set of values as the basis for social policy is as entertaining as it is naive. It is significant, and would be farcical were it not so obviously depressing, that two of the members of the Royal Commission are psychologists – members of what is sometimes described, whatever may be the personal views of those involved, as the modern priesthood of secular rationalism. Surely one would have been enough.

Perhaps we will yet see our own antipodean version of the French Revolution when in 1793 the Cathedral of Notre Dame was "consecrated" to the worship of Reason with what the Cambridge Modern History describes genteelly as "much childish profanity".

Presumably Waitangi Day or some other suitable occasion, like the opening of Parliament, can have its public ceremonies reshaped and made "relevant" so as to be a ritualistic expression of our new revolutionary set of secular social values when these are presented to us. Then the Government Printer could arrange for the report of the Royal Commission to be engraved in stone as a suitable replacement for the tablets of Moses! Well, this is after all the season for whimsical fantasy!

One can only wish Mr Justice Richardson and his fellow Commissioners well as they set about the construction of a New Zealand version of that new order that has so entranced and inflamed social theorists from Rousseau through Marx to Mussolini; not to mention many earlier examples of a fascination with the idea of Utopia, from the seriousness of Plato to the satire of Thomas More. By comparison with such illusory dream-worlds, what this Royal Commission produces will surely be much more pedestrian and pragmatic. For your own peace of mind at least let us all hope that this will be so.

But in the meantime, and while we may, let us remember Santa Claus and the "reality" that the editorial writer Francis Pharcellus Church described when he wrote his reply to the worried little Virginia O'Hanlon back in 1897.

What Church had to say about Santa Claus echoes what many still feel about justice in the world as expressed in law, for they know that there is a seamless web of justice more beautiful and therefore more enduring than power, a web "which not the strongest man, not even the united strength of all the strongest men that ever lived, can tear apart".

Christmas is the time for simplicity, for a childlike willingness to enjoy the gift of life, to accept things and to recognise the common humanity of us all without undue subtlety, without fine distinctions, without being tendentious, without refined argument or logic-chopping. So here in the spirit of Christmas joy, and in celebration of the abiding reality of all the virtues, including justice is the letter from Virginia in 1897, and the warmly enduring, sentimental editorial response.

P J Downey

Dear Editor:
I am 8 years old.
Some of my little friends say there is no Santa Claus.
Papa says "If you see it in the 'The Sun' it's so."
Please tell me the truth, is there a Santa Claus?

Virginia O'Hanlon,
115 West 95th Street,
New York City.

Reply by Francis Pharcellus Church

Virginia, your little friends are wrong. They have been affected by the skepticism of a skeptical age. They do not believe except they see. They think that nothing can be which is not comprehensible by their little minds. All minds, Virginia, whether they be men's or children's, are little. In this great universe of ours man is a mere insect, an ant, in his intellect as compared with the boundless world about him, as measured by the intelligence capable of grasping the whole of truth and knowledge.

Yes, Virginia, there is a Santa Claus. He exists as certainly as love and generosity and devotion exist, and you know that they abound and give to your life its highest beauty and joy. Alas! how dreary would be the world if there were no Santa Claus! It would be as dreary as if there were no Virginias. There would be no childlike faith, then, no poetry, no romance to make tolerable this existence. We should have no enjoyment except in sense and sight. The external light with which childhood fills the world would be extinguished.

Not believe in Santa Claus! You might as well not believe in fairies! You might get your papa to hire men to watch in all the chimneys on Christmas Eve to catch Santa Claus, but even if they did not see Santa Claus coming down, what would that prove? Nobody sees Santa Claus, but that is no sign that there is no Santa Claus. The most real things in the world are those that neither children nor men can see. Did you ever see fairies dancing on the lawn? Of course not, but that's no proof that they are not there. Nobody can conceive or imagine all the wonders that are unseen or unseeable in the world.

You tear apart the baby's rattle to see what makes the noise inside, but there is a veil covering the unseen world which not the strongest men, not even the united strength of all the strongest men that ever lived can tear apart. Only faith, fancy, poetry, love, romance, can push aside that curtain and view and picture the supernal beauty and glory beyond. Is it all real? Ah, Virginia, in all this world there is nothing else real and abiding.

No Santa Claus! Thank God he lives, and he lives forever. A thousand years from now, Virginia, nay, ten times ten thousand years from now, he will continue to make glad the heart of childhood.

Christmas Messages

From the Attorney-General, Hon Paul East

I am grateful to have this opportunity to extend to all members of the legal profession my best wishes for the Christmas season.

1995 has seen some major changes to the political landscape. Preparation for MMP is now well-advanced and I am sure that next year a good deal of time will be spent putting in place the building blocks for this new electoral system. It is interesting to note that we have already moved towards MMP with the Government now holding a minority of seats in the House of Representatives.

During the course of the year, I have had the privilege of presenting New Zealand's case against French nuclear testing to the World Court at The Hague. Although our chances of success were never highly rated, it seemed that most New Zealanders were of the view that every effort should still be made to pursue the matter before the Court. The Court, in a majority decision, ruled against New Zealand. However the Court proceedings served to underline the strength of the opposition to French nuclear testing in the South Pacific from New Zealand and other South Pacific countries.

In September, I again returned to the World Court to present submissions with regard to the legality of nuclear weapons. In this case, New Zealand took a different tack to many other Western nations and argued for a clear ruling from the Court stating that it is illegal to use or threaten to use such weapons. The World Court had been asked to provide this advisory opinion to both the World Health Organisation and the United Nations General Assembly. The opinion is expected early in the new year.

During 1995, the Solicitor-General prepared a report on the future of the Privy Council and this report was subsequently published. Submissions have been received from many interested parties and the Government is presently considering the report in the light of those submissions. It is expected that a decision on this important issue will be made in the very near future.

1995 will be recalled as a year which saw a considerable change to the makeup of the senior judiciary in New Zealand. I refer in the first instance of course to the appointment of two women to the High Court bench and I extend my congratulations to Sian Elias and Lowell Goddard on this significant achievement. Notable changes have occurred in the Court of Appeal too. Justices Henry and Thomas have become permanent members of the Court. Also the announcements have been made that Justice Hardie-Boys is to be the next Governor-General of New Zealand, and Sir Robin Cooke is to be made a Life Peer. I am pleased to express the satisfaction of the government at these two appointments, and to congratulate the Judges who have been so honoured.

I take the opportunity of this Christmas message to extend my grateful thanks to the President and other Law Society office holders who have assisted me in my role as your Attorney-General. I am also well aware of the considerable assistance that the profession has provided to Parliament in the area of law reform. On behalf of my Parliamentary colleagues, I thank all those society members who have made submissions to select committees during the course of the year.

I look forward to working with the profession as we face new challenges in the year ahead. I extend to you all my best wishes for Christmas and the New Year. ❑

A Christmas epistle from the President of the New Zealand Law Society, Austin Forbes

"Print what you like – we have very good lawyers"

A question asked with increasing frequency these days in the profession is whether the practice of the law is still a profession or whether it is now essentially a business.

Professionalism and integrity are notions that do not always sit happily with the increased commercialism of legal practice and the application of modern business principles.

Last year New York's oldest law firm, Lord Day & Lord, shut its doors. Took its shingle down. It had simply ceased to be a viable business.

It had failed in the pursuit of new business and clients. Its credit control was appalling. Bills were sent annually and a reminder the following year if they remained unpaid. The firm failed to recognise that client loyalty is not what it used to be. The firm was neither a large, full-serviced one or a specialised, "boutique" practice.

The partners found that the coin of the realm was no longer "loyalty, practicability and continuity" but "money, money, money and money". Partners were traditionally paid largely according to longevity rather than their fee production or the business they brought in. The rent for the firm's newly-leased premises was US$6m annually.

Much of the firm's work was of the one-time only type with costly learning curves. "Too many green cows with purple spots as opposed to

cookie-cutter transactions" said one of the firm's partners at the time it shut up shop.

Put shortly, the firm failed because it has not woken up to the new world. What the partners liked about it were the very reasons why it could not last. The firm's ethos was a romanticised one.

This may not seem to be a particularly optimistic message but there are lessons here for firms in New Zealand. They must meet the challenge of change and how to manage it. Change can provide an opportunity to meet the demands of the modern consumer society for quality legal services which are efficiently priced and delivered.

The survival of the profession requires that the practice of law as both a profession and a business must be harmonised. The two cultures have to be blended. The dictates of the business market cannot be at the expense of professionalism and competence but the reverse is equally true.

Don't worry too much about all this over the next few weeks. All practitioners should have a good break. It is what you and your clients need.

Spread the word. Lawyers are victims too and we do have feelings, at least on Christmas Day.

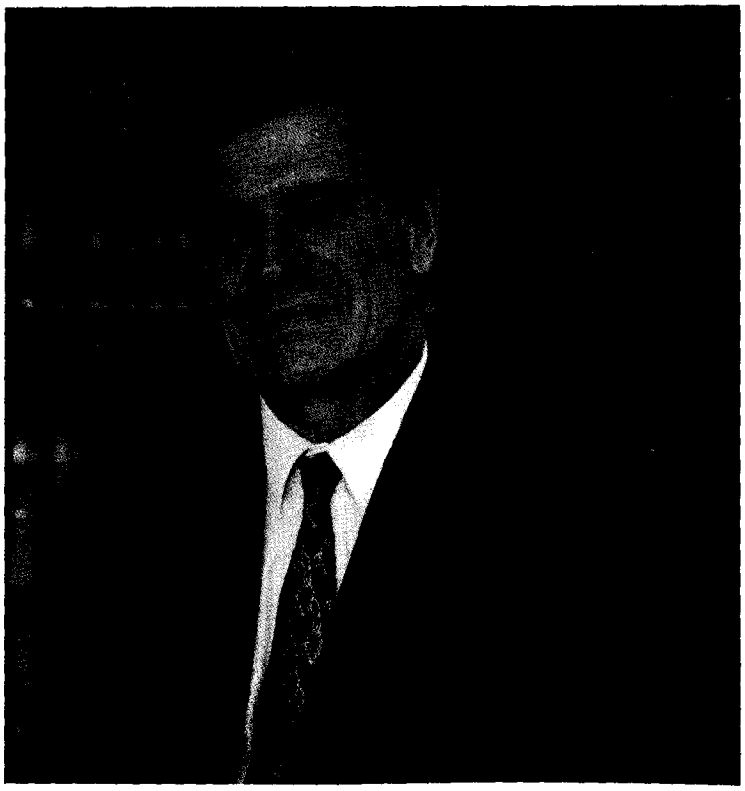
I recommend that next year clients in the retail trade in ginger beer and smokeballs are best avoided.

My wish is that in 1996 the doctrine of renvoi becomes a vibrant facet of all firms, from Kaikohe to Lumsden.

And remember, do unto yourself what you would have others do to you. ❑

Judicial appointments

William David Baragwanath, QC



The Attorney-General has announced the appointment of William David Baragwanath as a Judge of the High Court. The new Judge was born in Balclutha on 3 August 1940, but he has lived most of his life in Auckland where he attended Auckland Grammar School from 1954 to 1958 before going on to the University of Auckland. His Honour graduated LLB from Auckland University in 1964 and then attended Balliol College, Oxford from which he graduated in 1966 with the degree of Bachelor of Civil Law. He went to Oxford University as a Rhodes Scholar. In 1983 he was awarded a Fulbright Travel Award and attended the University of Virginia.

On his return from Oxford in 1966 the new Judge became a partner in the firm of Meredith Connell & Co for which firm he had worked as a law clerk earlier on. He remained with that firm until 1977 when he became a Barrister Sole and in 1983 he became a Queen's Counsel. His Honour has been an Examiner in the Law of Procedure and has lectured in Administrative Law as well as Civil Procedure.

The Judge has taken an active part in professional affairs. He was a Member of the Council of the Auckland District Law Society from 1983 to 1988. He is a Member of the International Commission of Jurists and also of the Association Française d'anthropologie du Droit.

His Honour has written various reviews and given lectures on a number of aspects of law. He has published sundry essays on legal topics concerned with freedom of information, Constitutional Law and Jurisprudence. He was Counsel assisting the Royal Commission of Inquiry into the Erebus disaster in 1980. The new Judge been engaged as Counsel in a wide number of significant cases over the years including three cases before the Privy Council; and he has been Counsel for Maori interests in land, forest and fishing litigation.

His Honour is married to Susan Cave Melville. He has four children Lucy, Natalie, Paul and Emily by his first marriage; and he has two stepchildren Jonathan and Simon by his second marriage. His Honour includes among his non-professional interests yachting and travel (particularly in Europe). ❑

Lowell Patria Goddard, QC

The Attorney-General Hon Paul East has announced the appointment of Lowell Patria Goddard QC, the Deputy Solicitor-General, to be a Judge of the High Court of New Zealand. Justice Goddard was born in Auckland on 25 November 1948. She was educated at Corran School for Girls before attending Diocesan High School for Girls in Auckland. She graduated LLB from Auckland University in 1974 and was admitted to the Bar in 1975. After her admission she worked as a Staff Solicitor with the firm of Turner Hopkins and Partners and then in 1977 she went into practice as a Barrister Sole. In May 1988 she was appointed Queen's Counsel at the same time as Sian Elias, QC who is now also a Judge of the High Court.

In September 1989 Her Honour moved to Wellington where she joined the Crown Law Office as Crown Counsel and as head of the Criminal Law Team. In 1990 she was appointed Crown Solicitor for Nelson as part of her responsibilities in the Crown Law Office. In August 1992 she was appointed Deputy Solicitor-General for New Zealand.

The Judge has specialised in Criminal Law. When in practice she appeared for defendants in many cases, and later as Crown Counsel she has also appeared in important cases in the Court of Appeal and the Privy Council.

Her Honour was Senior Counsel assisting the Commission of Inquiry into cervical cancer chaired by Dame Silvia Cartwright who is now also a Judge of the High Court. Her Honour has spoken on numerous occasions at various legal functions and seminars. Most recently she was one of the speakers who presented papers in London at the Heads of Prosecution Agencies Third Conference. This was in September of this year.

Her Honour is a member of the Advisory Board of *The Laws of New Zealand*. She has been working as one of a group on the preparation of the title *Criminal Law* for that publication. Among her many professional activities she has been a member of the Auckland District Law Society Council in the years 1985 to 1988, has been a legal assessor to the Medical Practitioners Disciplinary Committee, and a member of the New Zealand Law Society Ethics Committee. In 1994 she was Director of the New Zealand Law Society's Litigation Skills course. Her Honour is married to Christopher Hodson, a Wellington Barrister. She has a daughter Rebecca Scott by a previous marriage. Rebecca Scott is a Barrister and Solicitor in Wellington having been admitted earlier this year.

Following the normal pattern the appointment is temporary in the first instance, but it will be made permanent in due course. The new Judge will sit in Wellington. ❑

Judicial Administration Conference

From 20 to 22 September 1996 the Australian Institute of Judicial Administration is to hold a Conference in Wellington. The venue will be the Parkroyal Hotel. Associated with the Conference proper on Saturday 21 and Sunday 22 September there will be the Court Administrators' and Court Librarians' Conferences on Friday 20 September. On that Friday evening there will be a welcome reception.

Further information can be obtained from the Conference Administrator Mrs Margaret McHutchison, The Australian Institute of Judicial Administration Incorporated, 103-105 Barry Street, Carlton South, Victoria 3053, Australia – telephone (0061) 3 9347 6600, fax (0061) 3 9347 2980.

Case and Comment

The mental element in extortion

R v Cargill [1995] 3 NZLR 263

Introduction

Judging by the limited number of reported cases in standard New Zealand texts on criminal law, extortion is not, perhaps contrary to popular belief, a common crime. Indeed, prior to the case which is the subject of this note, the most recent decision of any significance dealing with extortion was *R v Leary* (Supreme Court, Auckland, 13 March 1972), the judgment of which appears to have completely disappeared from the public record. It is nevertheless a serious crime and one which at common law was often severely punished. The reason is not difficult to see. The threat to disclose to a third party discreditable facts about the victim unless he or she hands over a sum of money or other consideration may be a cause of great distress; and although the substance of the allegation in respect of which the threat to make disclosure is made may be true, the law has always distinguished between the freedom to demand money and speak the truth, and unlawfully demanding money under the threat of speaking the truth.

Although the offence as currently defined in New Zealand in s 238 of the Crimes Act 1961 derives from the common law the mens rea elements of the offence appear to be significantly narrower than its English counterpart rendering the prospects of acquittal in New Zealand much lower.

The distinctive character of the New Zealand approach to blackmail has recently been considered by the Court of Appeal in *R v Cargill* which will now be discussed.

The facts

Cargill involved an application under s 379A of the Crimes Act for leave to appeal against a pre-trial ruling on the admissibility of certain evidence. The applicant was employed by a company which had a dispute with the complainant and his daughter (the applicant's former girlfriend) over a sum of $6,300 which the company claimed it was owed. The applicant believed they had stolen the money and wrote to the complainant's lawyer making allegations about the couple and threatening to distribute a statement headed "Caveat" to certain individuals and companies in Tauranga. The letter contained an implicit threat to take this action unless within three weeks the complainant and his daughter apologised and repaid the money to the company "plus legal and other fees we have incurred". The "Caveat" asserted that the daughter had stolen $6,300 from the company with the complainant's assistance.

High Court decision

At the trial the proposed defence to a charge of blackmail under s 238 was that the money was owed to the company or, if not in law owed, the appellant believed it was. The defence contended that threats of the kind mentioned in s 238 are not punishable where the person making them acts with reasonable justification or excuse as well as with intent to extort or gain something. Blanchard J held that under s 238 the Crown needed only to prove a demand with menaces made with the intent of obtaining for the accused or some other person something which may be regarded as a gain to the person receiving it; and that any subjective belief on the part of the accused that there are reasonable grounds for making the demand or that the use of menaces is a proper means of reinforcing the demand is irrelevant. Taking the view that "gain" in s 238 is simply the equivalent of "obtain" the Judge concluded that there was present both an intent to extort and an intent that the company receive a gain.

Court of Appeal

In the Court of Appeal Richardson J, delivering the judgment of the Court, noted that at common law extortion was confined to public officials acting under colour of office. It was not clear, however, whether at common law the act must be done with a particular corrupt intent, an uncertainty that also pertained to the meaning of extortion in American law. This matter is considered later in the judgment.

Statutory history

The Court looked at the statutory history of extortion in New Zealand. It noted that the phrase "intent to extort or gain" derived from the English statute 10 and 11 Vict c 66 (1847) which was applied to New Zealand by the English Acts Act 1854 s 1. The phrase "with intent to gain anything from any person" was incorporated into the definition of extortion in ss 295 and 296 of the English Draft Code of 1879. These provisions were ultimately enacted as ss 248 and 249 of the Criminal Code Act 1893, but with the significant amendment that the expression "without lawful excuse" which was part of the definition of both offences in the English Draft Code was missing from the 1893 Act. When the present s 238 consolidated the two extortion provisions in the earlier Act the same formulation "with intent to extort or gain anything from any person" was used. Again absent was any reference to "lawful excuse".

In *Cargill* the Court also observed that the expression "with intent to steal" defines the mens rea in the offence of demanding with intent to steal in s 239 of the Crimes Act 1961 and requires that the prosecution establish that the accused acted fraudulently and without colour of right. The absence of an express colour of right requirement in s 238 therefore raised the question of whether a dishonest purpose is required as part of the "intent" to extort or gain as a claim of right defence under s 20.

It is significant that in other jurisdictions surveyed in the judgment the definition of blackmail contains a

reference either to "reasonable justification or excuse" (see Canadian Criminal Code s 346; Crimes Act of New South Wales, s 100 ("without reasonable cause")) or to a "belief that he has reasonable grounds for making the demand" (Theft Act 1968 (UK) s 21; Crimes Act of Victoria, s 87). In either case an inquiry into the accused's actual belief considered objectively is necessary to determine whether the demand was dishonest or otherwise unreasonable.

Interpreting s 238

The Court was unwilling to read an unreasonableness requirement into the New Zealand provision on the basis that the legislature could have qualified culpability in that way, as other jurisdictions have done, but had chosen not to. The conclusion to be drawn is that any threats made by a person in association with a demand for money are per se unreasonable and illegal. Furthermore, the common law defence of claim of right preserved by virtue of s 20 of the Crimes Act the Court held could have no application to the crime of extortion in New Zealand in the absence of any clear case law authority either in England or New Zealand. The Court was uninfluenced in its view by the Supreme Court decision in *R v Leary*, 13 March 1972, considered briefly in "Colour of Right and Offences of Dishonesty" (1987) 11 Crim LJ 153, where McMullin J held that the honest belief of the applicant that he was entitled to the vehicles he took from the complainants, took him outside the words "with intent to extort or gain" in s 238.

Meaning of "extort or gain"

The expression in s 238 "with intent to extort or gain anything from any person" is seminal to the definition of extortion in New Zealand. In *Cargill* the defence argued that to seek the recovery of money that had been stolen was outside the meaning of the words "extort or gain", on the basis that if all that is demanded is the payment of what is due, there can be no gain. The meaning of "gain" contended for is not without merit, at least semantically, since seeking compensation for what one is legally entitled to and not for profit is hardly a "gain" if that term is given the dictionary meaning of increasing possessions, resources or advantages consequent upon an action or event; profit or emolument. (*Shorter Oxford Dictionary*).

However, in legal terms the meaning to be given to "gain" may be of little consequence in New Zealand. As the Court in *Cargill* found, with support from the earlier Court of Appeal judgment in *R v Blazina* [1925] NZLR 407, "extort", may be read disjunctively from "gain" and means simply to "wrest" or "wring" from. To establish extortion simpliciter it is thus not necessary to prove that the accused acted for personal gain. In *Cargill* the majority held that the disjunctive use of the word "gain" meant that the legislature did not intend to employ extort in its widest possible sense and concluded that to come within the section there must be "an attempt to obtain *for the offender himself, or for some other person*, something which may be regarded as a gain to the person receiving it". [emphasis added].

Richardson J noted that entitlement to the "anything" on the part of the extortionist, or the lack of entitlement to it on the part of the recipient of the extortion, is irrelevant, since the concern of the section is simply with intimidatory conduct of a particular description. On the basis of this approach the Court was able to define the essence of the offence under s 238 as it pertained to the facts of the case as (a) the deliberate making of a threat to disclose the offence of theft; and (b) an intention to wrest or wring money from the complainant by that method of intimidation. The fact that the complainant had allegedly stolen the money sought to be recovered was held to be irrelevant to those issues and to the character of the conduct.

Following the decision of the Supreme Court of Canada in *R v Naterelli & Volpe* (1967) 1 CR (NS) 302, 309 the Court held that "gain" means simply to "obtain" thus adopting a legal meaning significantly broader than the dictionary meaning of the term.

Meaning of "intent"

The final issue considered by the Court was the meaning of "intent" in s 238, in particular whether the section requires a dishonest intention as opposed to a simple determination to extort or gain. The Court pointed to three reasons for concluding that the intent element in s 238 does not require or allow consideration of dishonesty of purpose and that the section is satisfied where the accused makes a threat intending to do so.

First, Parliament could have expressly included a dishonest purpose element in s 238. The history of the legislation does not support its inclusion by implication and from the outset New Zealand criminal legislation has never included a "without lawful excuse" qualification in the relevant provisions. More important in the Court's eyes, however, was the fact that the real purpose of the predecessor sections to s 238 was to prevent threats by policemen or gamekeepers to bring charges accompanied by demands for property or favours for the price of silence. It followed that the only mens rea requirement under s 238 should be in respect of making a threat with the intent to obtain money by the means of the threat. This was not a case where a belief in facts, which if true, would make the act innocent, could be a defence.

Secondly, the intent requirements in s 238 are different from those in companion sections in the statute, namely s 239 which requires proof of demanding with menaces with an intent to *steal* and is confined to demanding things which are capable of being stolen, unlike s 238 which applies to "anything". Thus dishonest purpose is an implicit element in the companion provisions (see ss 234, 235, 236, 237, 239) but not s 238.

Thirdly, the principal policy argument underlying the crime of blackmail is that members of an ordered society should use legally approved means to redress grievances and self-help is to be discouraged. The Court said:

> We alter the quality of justice if we allow any individual to demand property or favours as the price for not disclosing embarrassing information.

Although, as the Court noted, the Crimes Consultative Committee has endorsed the Crimes Bill 1989 proposal to recast the crime of blackmail to include a qualification based on a threat being a reasonable and proper means of effecting the desired purpose, in line with the approach of other jurisdictions, their

Honours were unwilling to allow any concession based on the accused's belief that what was sought was the property of or a debt due to the accused or another person. For the crime of extortion in New Zealand it is only necessary for the Crown to prove that the accused threatened to make an accusation or disclosure of an offence or of sexual misconduct with the intent of obtaining anything for the accused or some other person as the price of silence.

Comment

The decision in *Cargill* represents a rigorous application of the law. It may seem that the exclusion of the defences of colour of right and mistake of fact render the offence of blackmail effectively one of strict liability once it has been proved that the accused issued a threat with the purpose of obtaining something. The interpretation adopted by the Court now means that an offender cannot be heard to say "Yes I did threaten disclosure of some unpleasant facts, but I honestly thought that I was legally entitled to make a strong demand for the return of that which I believe belongs to me". As far as the defence of colour of right is concerned it has always been regarded as having application to all offences in which a theftuous intent is an element to be proved by the prosecution and where the accused's behaviour is consistent with honesty of purpose since "true moral blameworthiness" is the essential requirement of a criminal act. (See *Brown and Edney v Police* (1984) 1 CRNZ 576 and see *Murphy v Gregory* [1959] NZLR 868 (SC); *R v Skivington* (1967) 51 Cr App R 167.) What this ruling means is that whereas a defendant might still be free to plead colour or claim of right in relation to an attempt to recover property which he or she honestly believed was his or her own, the defence will not extend to threats of disclosure made to achieve that purpose. Indeed, it would be paradoxical if the law were to allow a person to threaten to disclose some unsavoury facts about another under pain of payment of a sum of money or the return of property as the price of silence and then to assert that the behaviour had an honest purpose and was morally blameless. Whatever honesty might be attributable to the purpose is surely negated by the evidently dishonest character of the means chosen to secure the end sought. It is this element that distinguishes the crime of blackmail from other dishonesty offences where the conduct may be legitimated by an honestly asserted belief in the legal propriety of the action taken. The essential message of this decision is that there can never be any legal propriety in threats of disclosure accompanied by demands for payment, however justified those demands may be. However, an intent to extort or gain might be denied where the accused, seeking the return of property in the possession of the victim and having issued a threat in terms of the section, claims that his intention was not to gain anything, because he knew that it would be impossible for the defendant to return the item in question, but simply to give the victim a fright in order to reinforce the moral duty owed to the defendant.

W J Brookbanks
University of Auckland

Salmond comment

In Wellington's Evening Post *of 17 November 1995 there was a review of Alex Frame's biography of Sir John Salmond which was the subject of an editorial at [1995] NZLJ 313. The* Evening Post *review appeared under the headline "The Kaiser from Temuka". Mr E Haughey, formerly a Judge of the Maori Land Court and before that Crown Counsel in the Crown Law Office wrote to the newspaper about the review, but his letter was not published. For the record and the point it makes, it is published herewith.*

In the review of Alex Frame's biography of the famous New Zealand lawyer and jurist, Sir John Salmond (1862-1924), Salmond was described as "The Kaiser from Temuka". Such a description of him is both offensive and ill-founded.

In this review it is very rightly stated that "Frame has written an attractive and stimulating account of the public life of this important theorist, Judge, and [Solicitor]-General"; but much of the review has been devoted to incidental episodes which are also ill-founded or distorted such as that relating to the alleged "prosecution" (sic) of Von Zedlitz.

It appears to me that in the review, and also in the book itself, too much emphasis has been placed on Salmond's so-called "pragmatism" and "utilitarianism".

It is abundantly plain however from his great work on Jurisprudence that Salmond early recognised that there is an important link between law and moral philosophy.

In his book he wrote:

> The purpose and end of the law may be said generally to be the maintenance of justice within a community by means of the physical force of the state. Ethical jurisprudence is concerned therefore with the theory of justice in relation to the law. It is the meeting point and common ground of moral and legal philosophy – of ethics and jurisprudence.

E J Haughey

Back on the Rails

By Rt Hon Sir Robin Cooke, President of the Court of Appeal of New Zealand

This article describes Sir Robin Cooke's experience of attending the Seventh International Appellate Judges' Conference held in Ottawa from 25 to 29 September 1995.

Labour in the salt mine of the Court of Appeal has some fringe benefits. Travel for international conferences is appropriate from time to time, and long rail journeys have been highlights: Boston-New York-Washington-Chicago by Amtrak, after a seminar at the University of Windsor, Ontario; Johannesburg-Cape Town after a human rights colloquium at Bloemfontein; and now the Canadian Rockies, after the Seventh International Appellate Judges' Conference in Ottawa. At the instigation of the editor and in accordance with precedent (see *A Sketch from the Blue Train* [1994] NZLJ 10), I set down, while initially gliding along the Thompson River valley on board the Rocky Mountaineer, a few impressions of the Ottawa Conference.

It was chaired by the present Chief Justice of Canada, the Rt Hon Antonio Lamer, an omnipresent figure throughout five days of intense business and social activity, his proprietorial air enhanced by an authoritative stick. The programme committee was chaired by Madam Justice Beverley McLachlin, well-known in New Zealand and to attend the forthcoming Dunedin conference, and the hospitality committee by Mr Justice Allen Linden of the Federal Court of Appeal, the author of an outstanding book on Canadian Tort Law. Some 117 countries were represented, including Burkina Faso and Myanmar, by a total of more than 150 Judges. The proceedings were conducted in English and French, simultaneous translations being available. Seating at the plenary sessions was alphabetical, so I found myself between New Brunswick and Nicaragua, the representative of the former being more available for conversation in English. As usual the Chief Justice of Zimbabwe formed the rearguard.

In the interests of economy of effort, it is convenient to reproduce a contribution to the closing session –

> The invitation to speak at this session requested a summary of the conference on behalf of the continent of Australasia. Geologists do postulate that, hundreds of thousands of millions of years ago, Australia and New Zealand may have formed one continent, until New Zealand broke off and drifted a thousand miles away. Evidently the news has been slow in reaching Ottawa. The prospect of a future political union exists, and any application by Australia to become part of New Zealand would certainly be carefully considered.
>
> This great judicial conference – the greatest ever, according to Professor Weeramantry – is not a forum into which to obtrude the jurisprudence of the comparatively small jurisdictions in which I have primarily worked. I mention but two conference-related matters. First, as to the rights of indigenous peoples, New Zealand has managed to move perhaps further along the path than some larger countries. Excruciating problems are still being tackled; yet in the eighties and nineties interaction between parliamentary, government and judicial forces has made solid practical progress in evolving a concept of partnership between races and securing redress for colonial wrongs.
>
> Secondly, we in New Zealand are major consumers of Canadian jurisprudence, and particularly that of the Charter, from which our Bill of Rights draws heavily. So it has been a delight to rub shoulders with present-day Judges of the Supreme Court and other Canadian Courts, and to touch the hem of the garment of Brian Dickson.
>
> Any summary of the conference in a few minutes can only be impressionistic. To adopt Professor Sander's metaphor of the orange, I am among those who wanted from the conference, less the reaffirmation or reincarnation of old ideas, than the renewal of old friendships and the forging of new ones. But we have had both parts of the orange and more.
>
> A natural early theme was judicial independence. The Lord Chancellor stressed the need to withstand improper pressures from all quarters. The pressures occasionally attempted by elements of big business can be as potentially damaging as executive interference – and at times unscrupulous in the manipulation of the media. As to the contribution of the Chief Justice of India, I will tell you a story about him, largely to his credit. He referred to the interpretation by the Indian Supreme Court of the constitutional requirement that in the appointment of high judicial officers there be consultation with the Chief Justice. The Court determined that consultation meant approval. What he did not mention was that it was a majority decision, and that the minority included Mr Justice Ahmadi, as he then was. He took the view that consultation meant consultation. Yet since succeeding to the office of Chief Justice, he has loyally applied the majority decision.
>
> He reminded us of the persecution of judges, and the fact that in some countries our colleagues discharge their responsibilities surrounded by physical peril. On his suggestion of an international watchdog body, heed should perhaps be paid to Occam's Razor. Statistics in the paper were drawn from the Centre for the Independence of Judges and Lawyers, an emanation of the International Commission of Jurists. Intensified support for that Centre could avoid an unnecessary multiplication of entities.
>
> A factual highpoint of the conference was the second day, with contributions including those from three Canadian counsel on the influence of the World Bank in the enforcement of human rights norms, the influence of fish in the formation of

an international law of the high seas, and front-line service to the justice of aboriginal cultures. Soon afterwards there was a tactfully-handled visit to the tension between two concepts of the judicial role: on the one hand, emphasis on following the terms of the text and precedents: on the other, the judges as agents of social change. May it be that the right place for the emphasis turns on the national history and social setting in which the individual judge is operating?

On the third day, the Lord continued his work, dividing the dry land from the seas, providing the plants and trees, and so establishing the subject matter of environmental law. The Almighty was not subject, however to the time dictates of a programme committee. I must leave the remaining days to others, concluding by recording one's sense of privilege ' at being permitted by our Canadian hosts to participate in this world judicial summit. Of the series of seven conferences, I have attended four. In its business programme, this one has been distinguished by its range and sophistication. Despite all the difficulties that we have brought out, I believe that the ultimate message is one of hope for civilisation.

The latter days of the conference, which there was not time to cover in those remarks, included some frank speaking about the difficulties of his current task by Richard Goldstone, a Judge of the South African Constitutional Court and previously of the Appellate division of the Supreme Court. Currently he is the prosecutor for the United Nations ad hoc tribunals to try was crimes in the former Yugoslavia and Rwanda. The co-operation of a number of national governments has evidently been less than satisfactory. The New Zealander Professor Peter Burns made a knowledgeable and well-presented contribution at a workshop on this subject.

The host country is expected to meet the cost of conducting these conferences and the accommodation and some internal travelling expenses of the delegates. Although Australia has done so, and although New Zealand would be a popular venue, it is less than obvious that any New Zealand government would be prepared to foot the bill. So I thought it expedient to second, after securing insertion of the words "and conducting", the following resolution moved by Chief Judge Gilbert Merritt of the United States Court of Appeals:

> *Whereas* the Seventh International Appellate Judges Conference recognizes the need to strengthen this organization by establishing a temporary secretariat to seek financial assistance and technical help in planning and conducting future meetings and in conducting research into the important topics discussed at this meeting, like judicial independence, judicial education, delay, Alternative Dispute Resolution and others.
>
> *Now therefore*, be it resolved by the Seventh International Appellate Judges Conference that the seven chief justices from the former host countries and the chief justice of the next host country each appoint a delegate or representative as a steering committee to consider and establish a temporary secretariat for these purposes.

This was duly carried on the voices. I respectfully commend thoughts on the matter to our Chief Justice and my successors in our Court of Appeal.

After the conference my wife and I (at our own expense, let it hastily be added) boarded the Rocky Mountaineer at Banff. There had been a fresh fall of snow, and the two full days of travelling through the mountains and down to Vancouver are an experience to be recommended. The train is of more than twenty coaches, with an intermediate engine as well as the front one. The last coach consists of an upper deck observation dome, where passengers sit for most of the time while they are not taking photographs or exercise, and downstairs a kitchen and restaurant. There is a lift for handicapped passengers.

Two features of the journey have legal connotations. For the night between the two days the company (it is a private venture on the old Canadian Pacific track) has the passengers put up in hotels in Kamloops, celebrated for the judgment of Madam Justice Wilson in *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641. I did not meet Nielsen. The second feature, however, I have witnessed. If memory is correct, it was first mentioned to me by Sir Ian Barker. Lord Diplock's metaphor in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924-5, is famous:

> Your Lordships have been referred to the vivid phrase traceable to the first edition of *Ashburner, Principles of Equity* where, in speaking in 1902 of the effect of the Supreme Court of Judicature Act he says (p 23) "the two streams of jurisdiction" (sc. law and equity) – "though they run in the same channel, run side by side and do not mingle their waters". My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1872 the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by courts of admiralty, probate and matrimonial causes), were fused. As at the confluence of the Rhône and the Saône, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

I have not seen the confluence of the Rhône and the Saône, but was disturbed by the comment of Derek Davies of St Catherine's College Oxford, a leading equity academic lawyer who has been a visiting professor at the University of Auckland, regarding the different temperatures of the two rivers. The result of the confluence, he said, was fog. So it has been reassuring to observe that when the clear blue Thompson and the rather muddy and yellowish Fraser meet, the separate sources of the body of water are indeed apparent for some miles; yet ultimately fusion is complete and there is no sign of fog. ❑

The Biosecurity Act 1993 and the "thin green line"

By Michael Webb, Associate, Chen & Palmer, Public Law Specialists, Wellington

New biological technology has risks that are economic as well as problematic in the area of social morality. This is particularly important for an agriculture based economy, as is that of New Zealand. This article examines the meaning and implications of the Biosecurity Act 1993. The meaning and relevance of the Act has already been before the Court in the Asparagus Council *case which is considered in detail by Mr Webb in this article.*

Introduction

The primary production sector has a central place not only in the national psyche, but, more importantly perhaps, in the nation's economy. It contributes some $11 billion a year or 65 per cent of New Zealand's total export income. A recently enacted piece of legislation, the Biosecurity Act 1993, is the first line of defence in the Government's attempt to protect this economic base from biological attack in a thorough-going way. The second proposed shield, the Hazardous Substances and New Organisms Bill, is currently being considered by a specially convened parliamentary select committee.

The Biosecurity Act conflates functions previously carried out under seven different statutes and multiple regulations. Its reach is an ambitious one: to provide for the exclusion, eradication, or effective management of pests and unwanted organisms of all kinds; be they extant in New Zealand (for instance, sheep measles), or possible imports from overseas (for example, foot and mouth disease). The Act also provides for the management of risks to New Zealand's primary production sector associated with the introduction or presence of unwanted animals, plants, and other organisms. According to the present Minister of Agriculture, the Hon John Falloon, the Act:

> will help to ensure that New Zealand remains free of the serious pests and diseases that plague many parts of the world. It will also establish a rational and equitable mechanism to manage pests that are damaging either the reputation of New Zealand's primary products or the productivity of the land itself (*New Zealand Parliamentary Debates*, Vol 537, 17 August 1993, p 17459).

While in many ways the Act has simply consolidated the biosecurity powers and responsibilities which were present in earlier legislation, the high stakes involved makes it an Act which the Courts are likely to be asked to consider; and in particular, to review the exercise of administrative powers which it confers. Indeed, the first such case, *The New Zealand Asparagus Council and Ors v The Director-General of Agriculture and Fisheries* (unreported, High Court, Wellington Registry, CP 103/95, 20 June 1995), has recently come to hand.

In this article, the legislative history and overall scheme of the Biosecurity Act will be traversed, before focusing on the particular facts of the *Asparagus Council* case. It will be argued that the Act should not be dismissed as an arcane piece of regulatory legislation, but rather one that because of its far-reaching implications warrants attention from both rural and urban practitioners alike.

Legislative history

The Biosecurity Act was the result of a protracted gestation. The initial impetus for the Act was a series of discussion papers by the Ministry of Agriculture and Fisheries commissioned in the late 1980s, which mooted the introduction of four new statutes to reform and replace the patchwork array of laws which dealt with the technical regulation of primary production in New Zealand. Biosecurity functions were at that stage scattered throughout seven different Acts and a number of statutory regulations.

What grew to become the Biosecurity Bill was designed to eventually replace each of the seven Acts and revoke the subordinate regulations. The Agricultural Pest Destruction Act 1967, Poultry Act 1968, and Noxious Plants Act 1978 were all to be immediately repealed. To ensure a smooth transition between biosecurity systems, certain parts of the other Acts were to be saved from immediate repeal. The sections of the Apiaries Act 1969 and Plants Act 1970 which concerned the regulation of exports were to continue in force until the passage of the proposed Primary Produce Bill. Likewise, the provisions in the Animals Act 1967 and Plants Act 1970 that imposed controls over the introduction of new organisms into New Zealand were to continue to apply until the proposed Hazardous Substances and New Organisms Bill was enacted. And Parts II and VI of the Dog Control and Hydatids Act 1982 were to have currency until such time as there was in place an approved pest management strategy for "true" hydatids and sheep measles.

Despite the Biosecurity Bill being tagged by the Minister of Agriculture as an urgent priority for the Government as early as September 1991, and despite early support in principle by the Labour Opposition together with a promise to help facilitate its passage through the House, the Bill was not introduced until December 1992. The reasons for this delay are unclear, and are not fully explained by its complicated subject matter or the fact that the preparation of the Bill was accompanied by extensive consultation. One disaffected Opposition MP, Jack Elder, was later to say that:

"The lack of attention to the Bill is just about the most amazing performance in lack of Cabinet co-ordination and ability to get legislation through that I have ever seen in my political career" (*NZPD*, Vol 537, 10 August 1993, p 17294). John Blincoe MP was more succinct, describing it as: "a saga of inexcusable delay on the Government's part" (*NZPD*, Vol 537, 10 August 1993, p 17296).

In his introduction speech to the Bill, the Minister suggested that it was imperative that it be passed by May 1993 to allow regional councils and the Animal Health Board to make use of its provisions going into the 1993/94 financial year. The need for urgency was also linked by the Minister to the Animal Health Board's five year plan to reduce the number of tuberculosis reactors, which the Minister saw as endemic in many parts of New Zealand and a real threat to the country's international trade. This goal was not realised, however, and the Bill was not reported back by the Primary Production Select Committee until 10 August 1993.

The chairman of the Committee, Ross Meurant MP, reported that 82 submissions were received on the Bill, almost all of which supported its general thrust, its emphasis on public consultation, and the concept of pest management strategies. The Bill also enjoyed tripartisan support within the Committee itself. A number of changes were made to the Bill as reported back, including the removal of the rather anomalous Part V on Stock Identification as a separate Bill. The Hansard Report on the Bill as reported back reflects a concern with legalising the commercialisation of feral rabbits, the issue of monopoly rights in relation to waste disposal services at ports of entry, and the powers of Ministry of Agriculture and Fisheries officers to stop, search and arrest people suspected of breaching the Act. With respect to the latter of these issues, the chairman of the Committee was particularly influential in resisting the extension of police powers to Ministry of Agriculture and Fisheries border staff. Drawing on his personal experience with the police, Mr Meurant was instrumental in the Committee recommending instead a power of detention for up to four hours where there are reasonable grounds to suspect that a person may have introduced pests or unwanted organisms.

The Bill received its second reading on 12 August 1993. Only three Members spoke to the Bill, which by this stage had a new Part IA that summarised the biosecurity functions, powers, and duties of the various levels of Government. The perception seems to have been that the problems with the Bill had been ironed out at the Select Committee stage, and in the context of multi-party support and calls for urgency, there was no reason to further delay the passage of the Bill. This impression is confirmed by the discussions which took place between the Government and Opposition about the Bill, which resulted in leave being sought (and granted without objection) for the House to take the Bill through its remaining stages. Following a number of amendments at the Committee of the whole House stage, primarily by Supplementary Order Paper, the Bill was given an uneventful third reading on 17 August 1993. The Bill was given the Royal Assent one week later, on 26 August 1993, and came into force on 1 October 1993.

The scheme of the Act

The purpose of the Biosecurity Act may be summed up in two words: bug-busting. The Act targets the exclusion, eradication, or effective management of pests and unwanted organisms of all kinds. This it does in two ways: risk management and damage control. First, it provides for the management of risks associated with the importation of animals, plants, microbia, and anything contaminated by them. Secondly, it provides for the investigation and management of unwanted organisms that gain a foothold in New Zealand.

Part I of the Act contains the interpretation clauses and preliminary statements concerning its relationship to other enactments and the obligations of the Crown. Part I also defines the application of the Act in relation to syndromes of uncertain origin, as well as fish and mammals taken in the exclusive economic zone. Section 6 of Part I, which was added at the Select Committee stage of the Bill's passage through the House, is particularly interesting, in that it deems the boundary of land abutting a road to extend through to the middle line of that road. This makes it the clear responsibility of a landowner to undertake works on the verge of boundary roads to his or her property.

Part II of the Act summarises the biosecurity-related functions, powers and duties of Ministers and local authorities. This Part was added following the Select Committee stage and prior to the second reading of the Bill. It follows the model of the Resource Management Act 1991 where implied or assumed powers have been made specific, and the roles of the responsible Minister, other Ministers, regional councils, and territorial authorities have each been clarified.

Part III of the Act does not substantively alter the relevant procedures under previous legislation. It deals with the effective management of biosecurity risks associated with the importation of goods that may result in the introduction of pests or harmful organisms. Such goods are considered to be "risk goods", which are defined in s 2 of the Act as:

> any organism, organic material, or other thing or substance, that (by reason of its nature or origin) it is reasonable to suspect to constitute, contain, or otherwise pose a risk that its presence in New Zealand will result in –
>
> (a) Exposure of organisms in New Zealand to damage, disease, loss, or harm; or
>
> (b) Interference with the diagnosis, management, or treatment, in New Zealand, of pests or unwanted organisms.

As is the current policy, an importer must obtain a biosecurity clearance for "risk goods", whether or not they have already obtained an import health permit to bring the goods into the country. Part III also includes provisions relating to the arrival and inspection of craft, the duties of people in biosecurity areas, and the registration of quarantine facilities. Section 37 of Part III, relating to the designation of ports of entry, is noteworthy because of its anti-monopolistic approach to the provision of waste disposal facilities at ports of entry.

Part IV of the Act establishes a regime for the constant monitoring of goods brought into New Zealand for the presence or absence of pests and unwanted organisms. The surveillance anticipated in Part IV is

necessary for compliance with international reporting and export certification requirements, the establishment of New Zealand's pest and disease status, and keeping a check on the effectiveness of pest management strategies. This Part of the Act provides for the gathering of information on pests, pest agents, and unwanted organisms; creates a general duty to inform inspectors of the presence of organisms not usually seen in New Zealand; provides for declaring an organism notifiable; imposes a duty to report notifiable organisms; allows the information supplied in this way to be used to communicate New Zealand's animal or plant health status, or the occurrence of pests or unwanted organisms; provides for the approval of identification systems; and imposes a requirement to identify organisms for disease control.

Part V of the Act deals with the effective management or eradication of pests through the use of a new mechanism called a "pest management strategy". The concept of pest management strategies used in the Act is not a prescriptive one, nor is it exclusive. It does not delimit the ability of responsible Ministers to institute a national pest management strategy to control the presence of a particular pest. Similarly, regional pest management strategies may be formulated for pests of particular regional importance. This notion of local "ownership" of pest management strategies is a striking feature of the Act, and one of its great strengths. It enables management systems to be developed to best suit local conditions rather than requiring that rigid, pre-determined external frameworks be followed. This power to localise management strategies also recognises that the same pests may be expressed in significantly different ways throughout the country, and thus may require quite different management strategies if they are to be effectively combatted.

An interesting component of the pest management strategy concept is the way in which the introduction of a particular strategy is explicitly tied to utilitarian calculations about the respective costs and benefits involved. Sections 57(a) and (b) of the Act provide that a Minister shall only propose a national pest management strategy if he or she is of the opinion that the benefits of having one in relation to the organism concerned outweigh the costs, after taking account of the likely consequences of inaction or alternative courses of action, and that the net benefits of national intervention exceed the net benefits of regional intervention. Similar prerequisites must be satisfied by a regional council that wishes to propose a regional pest management strategy under s 72 of the Act. (The First Schedule of the Act sets out a full list of matters that must be considered when a proposal for a strategy is being prepared.)

The Act's sensitivity to the economics of pest management strategies is also evident in the user-pays philosophy which underscores the power of Ministers to recommend levy orders under s 90 of the Act. A Minister cannot recommend a levy order for a pest management strategy unless he or she is satisfied that it will best target those who need the strategy, or those who stand to benefit most from it. In addition to specific levy orders, provision is also made for funding regional pest management strategies by levying rates. In terms of the Crown's liability for pest management, this is limited to what has been approved by the Governor-General by Order in Council. The concomitant of this finite level of funding is that: "once the Crown had agreed by Order in Council to [a] pest management strategy, it would effectively be a contract that the Government, no matter whether there was a change of Government or policy, would be morally and contractually obliged to continue with" (*NZPD*, Vol 537, 12 August 1993, p 17461).

It is also envisaged by Part V that pest management strategies will involve proper consultation (for example, s 73). In this spirit, provision has been made to allow regions to develop joint pest management strategies. The possibility of conflict between competing interests has been addressed with the provision for a board of inquiry or hearings commissioner to adjudicate in cases where there is significant opposition to a particular strategy. Section 100 of Part V is also worth noting, in that it allows the Minister or regional council to undertake small-scale management of unwanted organisms without the need to institute a formal pest management strategy.

Part VI sets out the necessary powers, rules, and cost recovery mechanisms needed to achieve the biosecurity measures outlined in the Act. Three categories of front-line personnel are provided for: inspectors, authorised persons, and accredited persons. Inspectors have wide powers to implement the import clearance, surveillance, pest management and exigency action provisions of the Act. Authorised persons have more limited powers that are primarily restricted to the implementation of the surveillance and pest management components of the Act. Finally, accredited persons have no powers under the Act per se, but may be appointed to carry out certain defined functions, particularly in the area of pest management. As mentioned earlier, only the police may exercise the power to search persons suspected of carrying uncleared risk goods. To balance this restriction, inspectors have the power to detain such persons for up to four hours to enable a police officer to be summoned to conduct such a search. And in terms of recovering the costs of carrying out these various administrative functions under the Act, s 135 of Part VI provides for cost recovery on a user-pays basis, and authorises the employment of a range of mechanisms for this purpose.

One of the more remarkable aspects of the Act is Part VII, which deals with the declaration of biosecurity emergencies. The Governor-General may, under prescribed conditions and on the recommendation of the Minister, proclaim a biosecurity emergency if invasion by an unwanted organism is threatened or has occurred, or if a pest is not able to be controlled by means of a national pest management strategy already in place to deal with it. The proclamation of such a biosecurity emergency gives the Minister extraordinary powers to take all necessary steps to control the particular organism.

As a footnote here, it is worth observing that a state of emergency has never been declared in New Zealand under the equivalent powers in the Animals Act to deal with a foreign pest or unwanted organism. Moreover, it is unlikely that the emergency powers contained in the Act will ever be initiated; even, say, in the case of an outbreak of foot and mouth disease. The reason is that the Ministry of Agriculture and Fisheries intends to develop a pest management strategy

for such diseases that will establish a comprehensive protocol to be followed in the case of an outbreak, that would most likely not require the formal declaration of a biosecurity emergency.

Enforcement, offences, and penalties are dealt with in Part VIII of the Act. For instance, s 154(p) of the Act makes it an offence for a person in a biosecurity area to fail to answer truthfully within reasonable time the questions of an inspector about the presence, nature, origin, or itinerary of any risk goods. The penalty for this offence is a $100 instant fine issued by way of infringement notice; which may be increased in the case of a conviction to a fine not exceeding $1,000 for an individual, and $5,000 for a corporation. The penalties for introducing risk goods into the country without the requisite biosecurity clearance have been substantially increased under the Act. Any person who is convicted of knowingly having uncleared goods in his or her possession, trading or otherwise disposing of uncleared goods, or interfering with seized risk goods without permission, is liable to imprisonment for a term not exceeding five years, a fine of up to $100,000, or both. The financial penalty for a corporation convicted of any of these offences is a fine not exceeding $200,000.

Part IX of the Act provides for regulatory-making powers, the Ministerial issue of codes of practice, and consequential amendments, repeals and revocations. One particular repeal dealt with in Part IX (and the Fourth Schedule) which caused some controversy during the Bill's passage through the House is the removal of the ban on the commercialisation of wild rabbits. The Act amends the Meat Act 1981 and Meat Regulations 1969 so that feral rabbits may be sold for human consumption under certain conditions, notably that the meat has been processed in a licensed packing house. In a speech to the House during the Bill's second reading, the Minister specifically emphasised that, in the interests of public health, the sale of rabbit meat remains illegal until the certification and inspection process is complete. This may have been in response to publicity surrounding a Rangiora man who was convicted on 24 charges of selling rabbit and hare meat from mid-1992 to mid-1993; see *Foster v Ministry of Agriculture and Fisheries* (unreported, High Court, Christchurch Registry, AP 283/93, 23 September 1993, per Tipping J). Note, also, that it is still possible for a regional council to ban rabbit hunting or poisoning in declared areas under the Agricultural Pests Destruction Regulations 1979 (which were omitted from the Act's Fourth Schedule in apparent error, and thus still continue in force until revoked), or a pest management strategy.

Perhaps the most important sections of Part IX, however, are ss 163 and 164. Section 163 indemnifies inspectors and other officers under the Act from civil or criminal liability provided that they perform their functions in good faith and with reasonable cause. Section 164 indemnifies the Crown from civil liability in respect of loss or damage that is suffered by goods, provided that the actions causing the loss or damage were taken in good faith and with reasonable care in the exercise of authority under the Act.

The final part of the Act, Part X, makes provision for a smooth transition period between the pre-existing biosecurity system and the regime introduced by the new Act.

The *Asparagus Council* case

The New Zealand Asparagus Council and Ors v The Director-General of Agriculture and Fisheries was the first case to review the performance of the biosecurity procedures established by the Act. This was a case brought before Greig J in the High Court at Napier for interim relief against a decision by the Director-General to allow the importation of fresh cut asparagus into New Zealand. In the result, the application for relief was successful, with declarations being made that effectively halted the importation of fresh cut asparagus until such time as the provisions of the Act relating to import health permits are complied with.

Background to the case

The New Zealand asparagus industry commercially produces around 6,000 tonnes of crop each year, yielding approximately $30 million annually in export earnings. While the New Zealand industry is fortunate to be untroubled by some of the most serious diseases which can attack asparagus, the plant itself is innately susceptible to disease, and considerable efforts have gone towards protecting the crop and base plants from infection. Of particular concern would be the introduction of non-eradicable viruses such as AV1 and AV3, "asparagus rust", and the fungi phoma stem blight. The introduction of any such virus would have severe ramifications on the state of the New Zealand crop, and would require the industry to expend major resources to fight its spread and limit its effects.

In the past, the threat of such viruses gaining a foothold in New Zealand has been minimal due to the fact that only minor quantities of asparagus have been imported into the country, usually to cover shortfalls in local production. In recent times, however, there has evidently been a surge in interest by overseas exporters to sell their product in New Zealand. Already, it appears, quantities of fresh cut asparagus have been imported from the United States of America, and imports from the Philippines and Australia have also been approved or permitted.

Concerned by the threat posed to the local industry by the importation of fresh asparagus which might carry potentially devastating new diseases, representatives of the New Zealand asparagus industry wrote to the Ministry of Agriculture and Fisheries in early 1995. Thus ensued an exchange of correspondence and a series of meeting between the two sides. Dissatisfied with the Ministry's apparent reluctance to heed the asparagus industry's concerns, judicial review proceedings against the Director-General of Agriculture and Fisheries were filed.

The nature of the proceedings

The first plaintiffs in the review proceedings were the national body and Hawke's Bay regional body responsible for promoting the interests of asparagus growers, processors and exporters. The second plaintiff was an individual asparagus growing, packing, processing, and exporting company based in Napier. The legal action was also supported by VegFood, the New Zealand Vegetable and Potato Growers' Federation.

Four causes of action were pleaded before the Court. The first alleged illegality, in that the actions and decisions taken by the Director-

General were illegal for want of compliance with the mandatory provisions of the Act relating to the importation of risk goods. The second cause of action alleged predetermination, whereby the defendant was said to have predetermined the exercise of its proper discretion and failed to have regard to the necessary statutory considerations before granting approval for importation of risk goods. The third cause of action alleged breach of an implied duty on the part of the Director-General to consult with the plaintiffs, or New Zealand commercial asparagus growers as a whole. The fourth cause of action alleged unreasonableness, in that no reasonable decision-maker, complying with its obligations under the Act, could make a decision to permit the importation of fresh cut asparagus into New Zealand when aware of the potential risk of disease introduction that was contingent upon such a decision.

The nature of the relief claimed by the plaintiffs was an interim order or declaration that no importation of fresh cut asparagus be permitted, and that no import health permit for fresh cut asparagus be issued under s 20 of the Biosecurity Act. Counsel for the plaintiffs indicated in his submissions, however, that the plaintiff's desire in practical terms was simply to stop importation until a proper risk assessment had been completed in consultation with the interested parties, and until the Ministry and the Director-General began to comply with the correct biosecurity clearance procedures anticipated by the Act. Counsel for the plaintiff accepted, therefore, that the corollary of this approach was that asparagus imports might be permitted on a case-by-case basis following the appropriately rigorous identification of their pest and disease free status.

Scientific evidence

Prior to rehearsing the merits of each of the causes of action, Greig J opined that

> [t]he kernel of the dispute between the parties is a disagreement by the scientists, who are experts in plant pathology, on each side. They differ in their assessment of the risk of the introduction of any of the diseases in question and the magnitude of that risk (p 4).

At the interim stage at which the proceedings were brought before him, Greig J disqualified the Court from resolving these disputes of scientific fact. Indeed, he questioned whether such a scientific matter can or ought to be resolved in a Court setting at all. Noting this difficulty, His Honour pragmatically put it to one side, speculating only that the opposing positions taken by the scientists on each side of the proceedings "might well be a basis for consultation and an effective exchange of views later" (p 4).

Analyses of the causes of action

Turning to each of the causes of action pleaded in the case, Greig J focused firstly on the legal requirements of Part II of the Act relating to the biosecurity clearance of risk goods. After reviewing the interrelationship between ss 20, 21, 22, 25, and 27 of the Act, His Honour concluded that what the legislation required was that before any risk goods (including asparagus) may be legally imported, there must be an import health standard relating to it, and also an import health permit which will extend to the particular importation which is to be cleared. It was the plaintiff's contention that both aspects of this procedural test had been failed by the Director-General and the Ministry.

On the first question of whether an import health standard had been proposed, Greig J found that a Ministry document entitled *MAF Regulatory Standard 152.02 Clearance of Fresh Produce*, amended as at 5 April 1995 and endorsed by the Chief Plants Officer, constituted the import health standard for asparagus imports. Described as a National Agricultural Security Service Standard, the document outlines the requirements for the border clearance of fresh produce, and set out the entry conditions for fresh produce into New Zealand. Included in one of the tables to the document is a reference to asparagus, which details particular conditions for its importation from various countries, including the salient countries of the United States, Australia and the Philippines. The entry conditions stipulate that any importation is subject on arrival to inspection (and treatment if necessary), and must be accompanied by an international phytosanitary certificate issued by the exporting country.

Against an argument that the Ministry document was generic and that an import health standard was required for each particular risk good, Greig J noted that while *Standard 152.02* is not specifically calibrated to individual detail, "in a general way it covers the various matters" (p 8). He also dispensed with an objection that the Ministry document was not appropriately delegated from the Director-General to the Chief Plants Officer. On balance, he held, *Standard 152.02* complies with the requirements of the Act for the production and promulgation of an import health standard.

On the second issue of whether an import health permit had been issued in respect of the asparagus imports that have taken place since the Act came into force, Greig J was less inclined to be flexible. He noted that it is an express requirement of the Act that there should be an import health permit issued for risk goods in accordance with s 21, yet no such permit had in fact been issued for any of the actual or prospective importation of asparagus since the Act came into force on 1 October 1993. His Honour concluded (p 9):

> What has happened is that MAF have proceeded on the historical basis making no effort to comply at all with the mandatory requirements of the Act and the new regime but have applied the old regime. That clearly is not sufficient. There can be no escape, I think, from the inexorable requirement for the issue of an import health permit before any clearance be made. That is to say before any import can be brought into New Zealand of asparagus there has to be an import health permit. Without that any importation is illegal. The steps that have been taken and the permits and approvals that have purportedly been made by MAF have no statutory or other warrant. The steps and the decision that have been made in this respect, then, all lack compliance with the statute and must be treated as being in breach of the law.

Greig J dealt with the remaining three causes of action in short time. With respect to the allegation of predetermination, His Honour doub-

ted whether this was a case where predetermination could be made out. He preferred instead to characterise it as a case of conduct or procedure which ignores the requirements of the law. In sum, he observed (p 10):

> Predetermination is usually applied to decisions made in terms of the law which applies but which limits the discretions so that there can be no free consideration of the proper requirements. In this case the whole statutory procedure and the department's [sic] own policy has been sidestepped and action taken outside the legislative regime.

The third cause of action relating to consultation was also not supported. Greig J held that there is no express or implied obligation in the Act to consult with the plaintiffs on the issue of import health standards or permits. Furthermore, he stated, there had been no practice, promise, or conduct which could be taken to give rise to an implied duty to consult. Nonetheless, the Court accepted that because of the circumstances that have arisen during the course of the proceedings, there will now be a duty to consult with the plaintiffs or their representative regarding future decisions on the import health standard concerning asparagus (although not on applications for import health permits for asparagus, provided that such applications fell within the provisions of the import health standard).

Greig J was also persuaded against upholding the fourth cause of action vis-à-vis unreasonableness. His reasoning was as follows. Given the Ministry must weigh up the risks on both sides before coming to its decision, which will inevitably require it to take into account and listen to the scientific advice and contrary submissions, "it would be extremely difficult if not impossible to say that ... a decision that was then made would be unreasonable in the terms which that word connotes in this part of the law" (p 11). Rather, His Honour felt, "[t]he reality in this case is that MAF have not in fact made any decision under the Act at all but have carried out a procedure which is not authorised. It is not a question of unreasonableness but of illegality" (pp 11-12).

The decision

After reviewing the factual evidence in light of the legislation, Greig J found that on the substantive cause of action the Director-General had proceeded, and, it seemed, proposed to continue to proceed, contrary to the legal requirements of the Biosecurity Act; the remedy for which must be to declare that illegality and declare that it ought not continue. His Honour's decision was framed in the following terms (p 13):

> [T]here will be a declaration that any biosecurity clearance of fresh cut asparagus imported into New Zealand is unlawful unless there is an import health permit issued pursuant to ss 20 and 21 of the Biosecurity Act 1993 or other compliance with the provisions of s 27 of that Act. There will be a declaration that no importation of fresh cut asparagus should be permitted or approved except in accordance with the provisions of the Act.

In making these declarations, Greig J was not swayed by Crown counsel's arguments that there are strong reasons of national and international trade which militated against his granting relief. On a national level, it was argued, importers who in many cases had already entered into contracts to supply fresh asparagus would be unable to meet their commitments, and suffer loss as a result. On a international level, it was said, New Zealand's status as an exporting nation might be at risk from the perceived application of such strict entry requirements for imports, and New Zealand exporters of other commodities might encounter retaliatory action as a result. Neither of these arguments found favour with the Court. His Honour countered (p 12):

> The real point, however, is that the statute, passed as recently as 1993, setting up a regime for importation is not being complied with or followed at all by the Ministry which has the oversight and the supervision of importation under the Act. The Court, I think, cannot condone conduct which is outside and contrary to the regime set up in New Zealand by Act or Parliament simply because international standards may be different or because the Ministry, in its own view, is acting reasonably and safely.

On the same basis, while Greig J noted that "[f]rom the evidence before me MAF has found some difficulty in a practical, theoretical and economic way in establishing at once a new system in replacement of the old" (p 3), of itself this was no excuse for non-compliance. His Honour gave weight to the fact that the Act was given a specific commencement date (1 October 1993) in s 1(2) of the Act, and thus was not a statute for which the date of commencement was left open to allow the Ministry a preparation or transition period. Moreover, the various transitional provisions contained in Part X of the Act did not appear to preserve any existing system of import control, or the ability to endorse imports that had historically been approved.

A further submission by Crown counsel that the granting of relief would amount to the Court controlling the decision-making power and authority of the Ministry was also rejected. Greig J quietly observed that the Court was not usurping the Ministry's decision-making independence, but rather was "doing what it always does, namely, reviewing the conduct and decisions of those who are obliged to comply with statutes to ensure that they do so comply" (p 13).

This pithy but telling observation by Greig J captures the essence of the judicial review function of the Courts in this area as in any other. While the decision serves to animate what is a powerful and far-reaching piece of legislation, His Honour's judgment as a whole is a testament to simplicity, for, at heart, the problem before him was a simple one.

Conclusion

In the *Asparagus Council* case, Greig J has effectively given the Ministry a wake-up call to comply with the letter of the Biosecurity Act. It would be foolhardy to ignore such a clear directive from the bench. Where the Court had been told during the *Asparagus Council* case that "the Ministry has been progressively re-ordering its systems to comply with the new Act" (p 3), it has now been put on notice that it must immediately bring its biosecurity clearance procedures

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The House of Lords

By Bernard Robertson of Massey University

As this issue of The New Zealand Law Journal *was going to print it was announced that Sir Robin Cooke is to have conferred on him a Barony for Life, that is to say he is to be a member of the House of Lords of the United Kingdom. This was not a decision of the New Zealand Government. The profession must be delighted that this signal – and constitutionally most unusual – honour has been given to Sir Robin. It is hoped to notice the honour more fully in a later issue of* The New Zealand Law Journal. *The following article deals with the House of Lords as an institution and only incidentally with the position of Sir Robin Cooke.*

The House of Lords, of which Sir Robin Cooke will find himself a member, is a unique survival of a once common form of parliamentary organisation in Europe. A New Zealander is not an "alien" in British law and is therefore entitled to take a seat in the House and speak and vote on both legislative and judicial business. It seems that the intention is that Sir Robin will only participate in judicial decisions of the Privy Council and not of the House of Lords, but even if he will just be using the House as "the best Club in London" it may be of interest to review the membership and activities of that club.

As is well known, the House of Lords is both the Upper House of Parliament of the United Kingdom and the highest Court of England, Wales and Northern Ireland and (for civil cases only) for Scotland. Theoretically it is the same body that performs both these roles, but it is convenient to review them separately.

The House of Lords (Legislative)

The House consists of the Lord Chancellor and four kinds of member. The Lord Chancellor presides over the House, but in practice his other duties as "Minister for Courts" and Head of the Judiciary prevent him from frequent attendance.

Hereditary Peers: There are about 750 hereditary peers of whom about 25 are those on whom the peerage was originally conferred. Very few such peerages have been created since Life Peerages were introduced. Most date from since 1850 or so and have been created by Letters Patent which specify descent through the direct male line. Older peerages must pass to someone, though they may become dormant when no obvious claimant appears.

These rules have two effects. First, the newer peerages are dying out. One of the latest was the Dukedom of Manchester, the last Duke having only daughters. Supporters of the hereditary principle are now playing the sexism card in an effort to change the terms of these peerages so that they do not die out. The second is that the older peerages descend upon some unexpected people. Thus a police sergeant, a council park attendant and an Australian sheep-farmer have all found themselves thrust directly into Parliament in recent years. Furthermore, peerages descend on youngsters who can take their seats at 21. Most peers today have to earn a living. Even if their occupations are mostly at the upper end of the spectrum they are mainly concerned with their family and their job. In this way they are far more "representative" than the House of Commons which consists increasingly of people who have been involved in nothing but politics since leaving school.

Although the hereditary peers constitute a majority of the overall membership of the House, the majority of daily attendance is of

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into line with the legislation, lest it be subject to further judicial review proceedings. The need for such review proceedings in the future will hopefully be obviated, as the newly separated Ministry of Agriculture works alongside farmers and growers to develop new protocols to ensure that the biosecurity of New Zealand's primary produce is not compromised.

While Greig J's decision is doubtless correct in terms of fidelity to the express words of Parliament, it is also correct on an even more practical level. One of the competitive advantages enjoyed by the New Zealand agricultural and horticultural sectors are their relative freedom from pests and diseases. The strict regime codified by the Biosecurity Act provides a valuable device for the country's primary producers to maintain this competitive advantage. And, as the *Asparagus Council* case demonstrates, the Courts will be available to ensure that the procedural safeguards set out in the Act are followed. In this way, the Act essentially forms part of a thin green line against the threat posed by harmful pests and organisms to this country's agricultural and horticultural exports.

While perhaps not the "sexiest" piece of legislation that has ever been passed (to use a phrase which seems to be popular with younger practitioners), then, the Biosecurity Act 1993 is nevertheless landmark legislation. To quote the Minister of Agriculture once again (*NZPD*, Vol 537, 17 August 1993, p 17508):

> A lot of people really could not give a damn about it, but they probably should because it protects the security of our export industries as a country, our good name internationally, and our ability to continue to stay in business as a country, whether it be in agriculture or horticulture, whether it be in protecting our precious, indigenous flora and fauna, or in protecting our wonderful livestock and horticultural industries from unwanted pests and diseases.

To this extent, it is suggested that the Biosecurity Act 1993 is worthy of attention by both town and country lawyers alike. ❑

people who have personally been created Peers, either hereditary or Life.

The Bishops: The other ancient element of the House are the Bishops of the Established Church. The Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester and the 21 senior diocesan Bishops in order of appointment are members of the House. They are members only as long as they hold office, but the Archbishop of Canterbury is usually made a Life Peer, so that he continues in the House after retirement.

By convention the Bishops do not belong to political parties or even to the Cross-Benchers' organisation. They have their own "Whip" whose job it is to organise a roster so that at least two or three are present every day the House sits. They sit just to the right of the Woolsack and wear their robes. One of the "21" leads the prayers at the beginning of each day's session.

Only the Established Church is represented in this way, but in recent years it has been the practice to make the leaders of other denominations, including the Jewish organisations, Life Peers. An exception to this is Basil Hume, head of the Roman Catholic hierarchy who takes seriously the Pope's interdict on taking part in secular political institutions.

The Law Lords: These are the salaried Judges appointed to the House to hear its judicial business. Today there are eleven, two of whom must be from Scotland. They are Life Peers, so that they continue as members after retirement. The expression "Law Lord" is also loosely used to include other senior Judges on whom a Life Peerage is conferred. These usually include the Chief Justice, the Master of the Rolls and the President of the (Scottish Court of Session. Including the "retired" there are about 30 such members of the House. Again, by convention, they do not join political parties, even the Cross-Benchers, and do not speak on controversial political matters while they are serving as Judges. They do, however, play a full role in the running of the House and are to be found on Committees, especially those to do with delegated legislation, the European Community, Privileges and Peerages (which decides disputed claims to peerages).

Life Peers: The Life Peerages Act 1958 created male and female Life Peerages. Many life peers have been politicians but they have also included a wide range of other backgrounds such as business, the unions, the stage, the public services, the Armed Forces, the Police, academia, music and so on and so on. It was intended that the Life Peers would become the core of the House, but this has not worked out quite as expected. Many Life Peers regard their careers as over and in the last few years an increasing role has been played by younger hereditary peers, especially on the Conservative side. Several junior Ministers are hereditary peers.

The Business of the House

Whoever presides over the House has nothing like the powers of the Speaker of the House of Commons or of our House of Representatives. The place of the Speaker's Chair is occupied by the Royal Throne, only used by the Queen. The Lord Chancellor, or whoever is presiding, sits, on the same level as the front benches, on the Woolsack, a seat made from a large bale of wool, symbolising (at the time it was presented) the importance of wool to the English economy!

The House is self-regulating. There is widespread consultation over the order of business which is then settled by a meeting of the Government and Opposition Whips and the Convenor of the Cross-Benchers (or neutral Peers).

If two Peers stand up to speak simultaneously and one will not give way the right to speak is determined not by the person on the Woolsack but by all the members present shouting out their preference. Despite this kind of informality the House of Lords invariably conducts itself far more decorously than the House of Commons.

Under the Parliament Acts of 1911 and 1949 the House has limited powers. It can only delay the passage of legislation for a year, or in the case of the Budget, for a month. Often, however, the mere threat of a Government defeat in the Lords brings about changes in legislation. Paradoxically, the House is usually braver under a Conservative government than under a Labour government when the shadow of threats of abolition hangs over it.

Much non-contentious legislation is introduced in the Lords and goes through detailed examination in Committee there before going to the Commons. Likewise consensual amendments to legislation are often introduced in the House. The other business of the House is the scrutiny of government by Questions and Committees and debates on issues raised by individual peers. Government Business has, in theory, no priority in the House and one day a week is reserved for debates initiated by backbench peers (but not, "by the Opposition").

The House of Lords (Judicial)

The functioning of the House as a Court has been extensively examined in recent years. Suffice to say that there is no rule preventing any peer from sitting when the House conducts judicial business. By convention only the "Law Lords" (in the broad sense of the term) do so. Appeals are heard in a Committee room but judgment is given in the House itself, before the day's legislative business starts. The Law Lords who attended the hearing sit arranged on both front benches. They stand in turn and announce their vote. If they have written a substantive "speech" they simply say that they vote for or against allowing the appeal "for the reasons given in this opinion". Counsel attend, seated at the Bar of the House, wearing wigs and gowns.

Should Sir Robin take part in British business?

Doubtless Sir Robin will feel restrained from speaking on legislative business unless it effects the Commonwealth as a whole, or he is invited to describe the way a matter is dealt with in New Zealand. As for judicial business, Sir Robin has himself been a leading exponent of the idea that an "indigenous New Zealand law" is developing, or should develop. This would seem to make it inappropriate that he should ever sit in an appellate decision of the House. If one believes, however, that the common law is an entity based on fundamental principles then there can be no possible objection to Sir Robin sitting on House of Lords appeals. Such, in essence, is the argument for retaining appeal to the Privy Council from New Zealand. Were the British to invite a distinguished New Zealand jurist to sit in their highest Court, this would be a resounding affirmation of the unity of the Common Law. ❑

Computing and legal practice in New Zealand

(An unofficial slice of history)

By Donna Buckingham, Faculty of Law, University of Otago and Ian Wilson, Faculty of Law, Queensland University of Technology

Computing technology now presents a comprehensive agenda for practitioners, in terms both of management and practice of the profession itself. In May 1995, the authors presented a report to the Institute of Professional Legal Studies which addresses the correlative challenge to legal education. An overview of the computing environment was considered necessary to set the report in context, including hardware and software advances, increases in the range of electronic publications, proliferation of "legal" computing applications and the use of computer networks for communication and access to information. This article is excerpted, with minor amendments, from that part of the Report. The authors are grateful to the Institute for permission to reproduce those sections.

Hardware and software developments

Changes in the technical face of computing in the last five years[1] have resulted in hardware[2] which has become faster, more powerful and cheaper than any average consumer could have imagined. For example a 386 computer,[3] which in 1990 represented the highest pinnacle of personal computer development, is now not even regarded as an entry level machine. Its launch price, even in 1990 dollars, would now fund three entry level machines, each twice as powerful. Many similar examples can be given in almost any technical area. Computer memory, processing speed, storage media (disk, tape, CD-ROM), peripherals (printer, fax cards) all bear a similar history: real-cost deflation co-existing with feature enhancement.

Computer software[4] has changed dramatically as well, owing to the development of the Windows[5] environment and the launching of applications which are customised to run under its interface.[6] Further major developments in 1995 include a single computer[7] which will obviate the need to choose between the two hitherto differing styles of personal computers: the IBM™ PC and its "compatible" clones on one hand and the Apple Macintosh™ on the other. Users can also look forward to issuing voice commands to their computers and to linking them through home and business telephone lines to a variety of information and activity sites around the globe.

Electronic publishing of legal information

Computer assisted legal retrieval was regarded as highly novel at the beginning of the decade. Today the ability to electronically search and retrieve both primary and secondary sources of law is increasingly considered an essential attribute of a working law library. For many lawyers who have yet to become electronic consumers, the learning curve may seem steeper than ever, not so much in terms of learning how to operate a computer but rather in terms of gathering information on what material is available to be retrieved. This section provides a review of services available as at May 1995.

On-line services[8]

It was as recently as 1986 that the first electronic publishing of New Zealand legal information began. In that year the New Zealand Council of Law Reporting agreed to make available to the United States base service LEXIS[9] the full text[10] of judgments contained in the official NZLR series, beginning with the 1970 annual volume.

1988 saw the official launch of KIWINET, a domestically based on-line facility.[11] Its advent saw the parliamentary suite of legislative databases, constructed by the Government Printing Office, become publicly accessible: legislation before the New Zealand Parliament (BILL),[12] Hansard (HANS),[13] and Parliamentary Questions (QUES).[14] All are available in full text. Since that time three other full-text "legal" databases have come under the KIWINET host umbrella: judgments of the Court of Appeal (APPL),[15] decisions of the Commerce Commission (COMM)[16] and Explanatory Notes (EXPL).[17]

KIWINET has also become host to several bibliographic[18] "legal" databases which have been built by a number of database producers. LINX[19] (Legal Index) and CASE[20] (Briefcase) were simultaneously launched in February 1989. Since that time a number of other bibliographic style services have been launched under the KIWINET umbrella, including coverage of the Employment Court (LABR),[21] Planning Tribunal (PLAN),[22] and NZ Patent Office (MARK).[23]

In terms of "law" (ie legal information which is generated by legislative or judicial activity and commentary thereon) this overview represents the present state of coverage which is publicly accessible on-line. There are several other

on-line services of interest to lawyers, which are not exclusively "legal" in terms of the community of interest of their users. They include MOTOCHECK,[24] BAYNET,[25] and VNZ.[26]

In-house services

In-house services are those which the user has resident on a computer within his or her own practice and which may be accessed at will.[27] The entire data set is purchased from an external provider (on disks, tape or CD-ROM[28]) and costing is on a subscription basis, rather than the volume/time formula used by on-line services. The in-house services presently available are outlined here in the approximate order of their launch.

CASE (Briefcase) A bibliographic database, operated by Law Library Management, containing summaries of cases noted in *The Capital Letter, Butterworths Current Law, NZ Caselaw Digest* and the major report services.

LINX A bibliographic database operated by the District Law Societies of Auckland, Wellington and Canterbury, indexing all Court of Appeal and High Court judgments, together with literature holdings of the major law society libraries.

Smart Technology A variety of value added database services in discrete areas of law including taxation, resource management, local government law and company law. These databases contain the statutory domain, supporting case law (often in full text) and commentary.

Brookers Electronic publication of all public statutes, with amendments textually incorporated, supported by legislative history. Regulations are also published. In addition, Brookers makes available in electronic format several of its well established hard copy services.[29]

Status Publishing A similar service to that of Brookers in relation to publication in electronic form of statutory material (primary and subordinate).

Butterworths of New Zealand Bostax – A service containing primary and secondary taxation materials in full text.

Data Services Limited Salmon: Resource Management Act (full text, annotated with Planning Tribunal decisions); New Zealand Planning Tribunal Digest (a synopsis of current tribunal decisions and full text of selected decisions).

At the time of writing, these services are available only in-house, with the exception of LINX, CASE and some Data Services database material (all available on line via KIWINET).[30]

It is appropriate at this point to make mention of CD–ROM technology and its place in the steadily expanding world of legal electronic publishing. The storage capacity of a single CD-ROM is immense, roughly equivalent to the full 24 volume set of the *Encyclopaedia Britannica*. This is expected to double in the near future. Thus, data sets too large to store on conventional hard disks[31] can now be readily accessed through CD-ROM. This is likely to result in materials hitherto accessible only via an on-line service becoming available as in-house services. Such a trend is already evident in Australia, where Info-One[32] makes available on CD-ROM the entire contents of its reported cases databases from all Australian jurisdictions, both State and Federal. The disks are replaced at least annually and the on-line facility can then be used just to obtain updates between old and new editions of the disks.

Both on-line and in-house database services are "free-search" systems: retrieval of relevant material is not determined by conventional indexation techniques. The searcher is quite literally "free" (since each word bears its own indexation value) to choose a variety of language which will represent the legal information it is desired to locate (whether it be a concept, case, or statutory reference), unconfined by an index. Therefore, the searcher may construct highly specialised searches to meet a specific information need.[33] While the electronic publication of legal material may in substance cover the identical domain to that of the printed hard copy, the difference between electronic and manual searching lies in the way the material is selected, with the consequent advantages of speed, flexibility and portability of research.

Other computing applications in legal practice

Listed in this section are most of the major heads of computer use which could presently be incorporated as part of a legal practice (the first four of which are well embedded):

- Trust accounting
- Client management
- Time costing
- Word processing
- "Banking" of opinions, pleadings and other work product documents

These can be free searched to prevent duplication of effort within a practice, irrespective of the number of legal authors.

- Construction of unique primary law source databases

These are viable using imaging and/or scanning technology,[34] and while they may embrace only a small domain of law, their free search value may be enhanced by annotations, notes, associated precedents etc.

- Litigation support

This software enables file content to be systematically arranged, searched and reorganised quickly and repeatedly according to need. Litigation support programs often allow key documents (eg affidavit of documents) to be produced automatically. The software also allows for documents (eg pleadings, affidavits, trial transcripts, appeal books) to be free searched in order to locate key words, phrases or issues.

- Expert systems

These enable legal knowledge to be represented in a form which a computer can assimilate. The computer is then able to predict legal conclusions, and to justify its reasoning, on the basis of facts which it is told by the user.

- Document generation systems

These are a form of expert system. They seek information from the user, and from scanned or imaged documents held on file. They can then automatically produce documents in the required form eg affidavit, will, conveyance etc.[35]

- Voice recognition systems

Now commercially available, these systems allow the user to issue commands to the computer by means of speech rather than through the keyboard or through a mouse, trackball or similar device.

Networks for access to information and communication

New Zealand On-Line

The Law and Technology Committee of the New Zealand Law Society began its work in 1989. One of its originating terms of reference was to "liaise with groups in Government and private industry interested in commercial exploitation of new technologies of interest to the legal profession". LawNet,[36] launched in December 1990, was formed as a vehicle by which this could be achieved. It was clear at that time that practitioners interested in learning to use on-line databases faced a technical maze in terms of selecting communication software and obtaining registration to different services, each of which had separate subscription procedures. Membership of LawNet was intended to provide simple and seamless access to electronic mail[37] and to existing and future databases containing legal information on-line.[38]

The arrangement between Netway Communications (the network provider) and the New Zealand Law Society terminated in mid-1994. Now the New Zealand On-Line service (NZOL) offers similar but enhanced database access, e-mail and bulletin boards and caters for the needs of the profession formerly serviced by LawNet. This service is also one of a growing number which provides access to the so-called "information super-highway" – the internet – which carries legal information amidst a plethora of other material.[39]

The Internet[40]

The Internet is a loose association of co-operating private and public networks. Physically, the links between these networks (which may be quite dissimilar in nature) are forged by electronic gateways, which connect the networks and translate between them, using an agreed common language – the Internet Protocol. It is this trans-global communications web, and its potential to reach so many users, which the media has dubbed the "information super-highway".

The philosophical underpinning of this informal and fast growing concept[41] is that information exchange is inherently beneficial. Its very informality however means accurate description of the breadth and scope of the Internet is not possible. Nor does it matter in essence, except to say that a great deal of information is now available via its arteries.[42] Information flows through the Internet in a variety of ways: electronic mail,[43] Telnet,[44] and File Transfer Protocol (FTP).[45]

The Internet is growing at a staggering rate, both in terms of the number of users it is attracting and the networks available to be travelled via the gateway links. It is inevitable that providers of database services will look to it as a way of reaching potential users of legal information in New Zealand.[46] The first instance, to the authors' knowledge, of use of the Internet to access domestic primary sources of law in New Zealand was launched in November 1994. The Knowledge Basket, operated by Electronic Text Ltd of Auckland, hosts (inter alia) Hansard and all current statutes and regulations in full text. GP Print is the supplier of these materials to the database provider.

World Wide Web

This is a subset of the Internet, and perhaps the most rapidly expanding lane on the information super-highway. Until recently Internet use required a good deal of technical knowledge in order to access information sites and navigate around them. This situation changed with the adoption of standards by popular sites for navigation by selection of items from a range of menus and sub-menus. Even so, only materials in text could be viewed; sound, graphics, photos and videos were generally unavailable. New generation software (eg Mosaic, Netscape) has now made Internet navigation even easier and allowed for transmission of materials in all audio and visual media ("multimedia"). Internet sites which support this type of access are part of what is known as the World Wide Web. Such has been the development of WWW as an information resource of general public availability that any person or group (eg a law firm) or company can not only access thousands of other sites but actually maintain a site of their own. In this way, information can be made available globally to WWW users about practice members, areas of expertise, library holdings, hours of business etc.

Conclusion

The above represents an overview of the development of computing in the professional legal domain. There are obvious gaps – some information domains are notable for absence of electronic access, most particularly almost all the registry information generated by the former divisions of the Department of Justice.[47] Nevertheless, it is clear that the "legal" face of computing has been transformed in less than a decade and investment in the digital practice of law has or will soon become a necessity. ❑

1 A temporal benchmark of five years was used, since 1990 marked the NZLS seminar "Personal Computers – An Introduction for Lawyers" which the authors jointly undertook.

2 The physical components which make up a computer and allow it to carry out processing functions. The term also includes peripheral equipment such as printers etc.

3 A benchmark IBM/compatible computer, the term being based on the Intel Corporation 80386 processing chip at the heart of the circuitry.

4 The sequences of digital instructions (or "code) which the computer hardware "reads" in order to carry out processing functions.

5 A Microsoft Corporation product enabling user commands to be given to a computer by positioning an arrow over a pictorial representation (or "icon"). This type of "graphical interface" has always been a feature of Apple computers. Before Windows, an IBM/compatible computer had to be given user commands by typing complicated [sometimes] alphanumeric syntax through the keyboard.

6 The means whereby a user communicates with a computer and vice versa.

7 The Power Mac/Power PC range.

8 "On-line" refers to accessing a remote computer which holds information by use of a telephone or data line, incurring search fees and/or connect time fees. Cf. "in-house" services, where the information is actually resident in a computer within the user's own practice and may be accessed on an at will basis.

9 LEXIS is the largest full text legal database service in the world, hosting cases, statutes and secondary material. Coverage is also undertaken of the USA, England, Scotland, Ireland, Northern Ireland, France, Europe, Canada, Australia. The New Zealand library is the smallest and, to the authors' knowledge, there are no plans to expand coverage in the dramatic way in which the Australian domain was expanded in 1994, by the addition of the SCALE databases operated by the Attorney-General's office.

10 Full text databases contain the original document in its entirety. By contrast, bibliographic databases contain only a summary of its contents and are often informally referred to as "index style" databases.

11 KIWINET is operated by the National Library of New Zealand and has 25 databases under its host umbrella, at the time of writing. Coverage ranges from cases, legislation, parliamentary proceedings, legal index services, company and trademark information, to general library materials, scientific and other specialised indices, and the full text of some periodicals.

12 BILL contains the full text of legislation currently before the New Zealand Parliament, in all three readings and is updated daily. An archive database (HBIL) for legislation from the 43rd session is also available.

13 HANS contains parliamentary debates from September 1987, updated weekly.

14 QUES contains parliamentary questions (written and oral) from October 1987, updated weekly.

15 APPL contains Court of Appeal judgments since April 1982, updated weekly.

16 COMM contains mergers and takeovers decisions (1975-1986) and all decisions under the Commerce Act 1986, updated as they are issued.

17 EXPL contains the full text of the Explanatory Notes to Bills from the 42nd session onwards.

18 Bibliographic databases are those which do not hold resident the full text of the original document, but rather a summary of its contents.

19 LINX was produced by the Auckland District Law Society and contained an index to Court of Appeal judgments, Auckland District High Court judgments and legal literature held in the ADLS library. It has been expanded to embrace the index databases of the Wellington and Canterbury District Law Societies.

20 CASE indexes judgments noted in *The Capital Letter, Butterworths Current Law* and *NZ Caselaw Digest* or reported in the major report services and is produced by Law Library Management Ltd.

21 LABR is produced by the Employment Court itself and contains headnotes for judgments from the Labour/Employment Court and related Court of Appeal cases, updated weekly.

22 PLAN is produced by Data Services Ltd and indexes Planning Tribunal (from 1984) and related High Court (from 1990) decisions in detailed synopsis form, updated monthly.

23 MARK is produced by the New Zealand Patent Office and covers New Zealand trade marks and overseas trademarks registered for use in New Zealand.

24 MOTOCHEK is the car ownership registration service which enables location of owners by plate number.

25 BAYNET contains the information holding of BAYCORP, which engages in credit checks, debt recovery and the collection of company information.

26 VNZ is the valuation records database, which allows location of valuation and sales details for all Torrens system land in New Zealand, together with real estate statistics.

27 This is to be contrasted with an on-line service, where the computer which holds the information to be accessed is sited in another location and must be accessed by means of a telephone or date line.

28 The acronym stands for Compact Disk Read Only Memory. The concept is the same as that of the music CD on a home player. A large volume of data can be fitted onto the disk, but once there it cannot be overwritten.

29 Eg, *Adams on Criminal Law, Anderson's Companies and Securities Law, McGechan on Procedure*, Employment Contracts, Employment Law Casenotes (1984 onwards) and Resource Management materials.

30 Kiwinet also announced in July 1995 that Brookers legislative material will be made available on-line.

31 The standard magnetic storage medium of a computer. Five years ago 100 megabytes was considered a huge hard disk capacity; today 300 megabytes is fairly standard in new computers and larger capacity is available. By comparison, the laser storage method used with CD-ROM currently fits up to 800 megabytes on one disk.

32 A database comprising (inter alia) case and statutes from all Australian jurisdictions, both state and federal.

33 Retrieval rates can be staggeringly fast. Eg in LEXIS, the system can search for all Commonwealth cases on a legal concept, case name or statutory section in 10 seconds and collate the material ready for viewing.

34 Imaging enables the computer to "see" a document including all notations, graphics etc and to reproduce a facsimile on screen, edit or search document content etc. Scanning handles only printed text, once again enabling the computer to display, edit or search content.

35 These systems are far more sophisticated than standard computer "precedent" systems. The former are merely reactive, in the sense that they ask the user to fill in the blanks. Document generation systems are pro-active, in the sense that, once told the document required, they automatically search for the information necessary to produce it in the appropriate format and ask the user for data only if that material is not already held on files which the system can read.

36 LawNet was neither a database service, nor a network carrier to a database service. It was simply a name given to a particular digital community, membership of which enabled the user to access particular electronic gateways to databases or to electronic communications.

37 Electronic mail enables digital communication without the need to print the text on paper. It developed during the 1960s but only gained widespread acceptance in the 1980s. Unlike conventional mail ("snail mail" as it is described by "emailers") an electronic message is capable of being transmitted simultaneously and instantaneously from one or many senders to one or many recipients. A user may append a text or graphics file to a message and so transmit a digital version of a lengthy document across the office or across the world. The user's "mailbox", to which messages are sent, is protected by password access.

38 The databases to which access was offered included KIWINET, VNZ, BAYNET and MOTOCHEK.

39 For example, the full text of US Supreme Court decisions is available via a computer in Washington DC, updated on a daily basis. The Internet can also be used as the electronic "road" to the LEXIS service.

40 The writers are indebted to Greg Hings, Computing Services Centre, University of Otago for background on the history of the Internet.

41 In a Reuters release (*Otago Daily Times* 14/12/94) it was projected that the 30 million users at that date would grow to 120 million by 1997.

42 Kinds of information available include scientific and research, personal, business and commercial, entertainment (music, games, humour, food and wine), cultural (books, music, film and video), consumer (electronic shopping).

43 Supra, n 37.

44 Software which enables the user to log on to a remote computer and access information from it, provided he or she possesses the necessary access privileges for that site. Many sites around the world allow "guest" access: data in various categories is made available with no specific access privilege being required.

45 Software which enables the user to transfer files back and forth from a remote computer. Many sites permit "anonymous" FTP to enable transfer of data made available to "guests". Others restrict FTP use to transfer of data by those with access privileges.

46 This is especially so in view of the very low charges imposed upon users, by comparison with those incurred by use of the network offered by telephone companies for other forms of data communication. With Internet the typical means of access from home or office is a local phone call through a modem to the nearest "dial-up" site, which then handles all traffic from there (usually on special data carrier links) at very low cost. For example, in Dunedin a commercial service is available at $2.00 per hour peak and $1.00 per hour off-peak plus an annual fee of $130.00 (all figures exclude GST).

47 The Justice Department has decided not to proceed with its Registries automation project with Public Record Access (owned by Unisys), with whom it has been negotiating for nearly two years. At the date of this announcement, the Department, was not prepared to disclose whether the computerisation of the Registries has been abandoned as an option, or simply delayed even further by the restructuring of its internal divisions. (*The Dominion*, April 10 1995, pp 1, 4).

Fraud

Whoever commits a fraud is guilty not only of the particular injury to him whom he deceives, but of the diminution of that confidence which constitutes not only the ease but the existence of society.

Dr Johnson
The Rambler

Apportionment or compensation?

Joint and several liability reconsidered

By Mary-Anne Simpson, School of Law, University of Canterbury

A defendant who is jointly and severally liable is often faced with having to meet the full loss of a plaintiff although only partly at fault. The one with the money is usually an insurance company. There is a movement to have liability to the plaintiff only proportionate to a particular defendant's degree of fault. From the defendant's point of view this seems only reasonable. From an innocent plaintiff's point of view however it must inevitably seem unjust. In this article Mary-Anne Simpson analyses the issues, in a more complex way, in the light of a discussion paper from the Law Commission. This year, and last, she served on a sub-committee of the New Zealand Law Society Limitation of Liability Committee. This article developed from research she completed while on that sub-committee.

Lawyers and accountants are united in criticism of the present scheme of civil liability, which holds a defendant jointly and severally liable for the full amount of the judgment. To these, local authorities will in time be added. Proportionate liability, the scheme advocated by these groups, is entrenched in several countries, and presently demanded in others. Debate in New Zealand was initiated by the discussion paper on Apportionment of Civil Liability published by the Law Commission in 1992.[1] Subsequently, the Law Commission published a draft report,[2] and in January of this year, the Department of the Attorney-General of Australia recommended that the Australian joint and several liability regime be replaced with one of proportionate liability. Calls for reform in this country are timely: the issue is one not only of intellectual interest, but of practical significance.

Alternative bases of liability

Joint and several liability is the linchpin of our present system of civil liability. Where several wrongdoers contribute to a single injury, each wrongdoer is liable in full for the victim's loss. Where one defendant is insolvent or otherwise unavailable, the other defendants will be called upon to bear the "missing" share of liability. The victim is the focus of joint and several liability, or the "in solidum rule", as it is variously called. The plaintiff should be able to recover his or her entire loss. The interests of the defendant are necessarily subordinate to this right. Liability is "apportioned" only in the sense that it is shifted to the defendant or, in practical terms, defendants.

The contrasting approaches to civil liability are best illustrated by a common example. Several years after completion of his home, P discovers cracks in the exterior walls of the house. These are revealed to be due to the inadequacy of the foundations. P incurs great expense in strengthening the foundations and repairing the walls, and seeks to recover the cost from whomever was to blame. Responsibility for the faulty foundations is considered to rest on three shoulders: D1, the architect, who drew up the plans; D2, the builder, who constructed the house; and D3, the local authority which negligently failed to inspect the property during construction, as required by statute.

Long established common law rules allow the victim of an injury to sue any or all of the wrongdoers, and obtain judgment against any for the full amount of the loss.[3] In *Brinsmead v Harrison* (1871) LR 7 CP 547, for example, it was held that judgment against one joint defendant served to discharge all others. The common law experienced difficulty in apportioning blame – a shared liability was regarded as an indivisible obligation (NZLC PP19 at 6). The only constraint upon this, of course, was that the plaintiff could recover only once for his or her injury – full satisfaction of the plaintiff's claim would bar any further proceedings. In the above example, it is quite possible that all of the defendants were, to some extent, "to blame" for the building faults. The architect was careless. But the results of that carelessness should have been noted by the builder employed to construct the house, or discovered by the local authority required to inspect the work in progress (NZLC PP19 at 20). Any of D1, D2 or D3, then, could be fixed with the entirety of P's loss. P is thus relieved of the complex obligation of having to establish how large was each part played in the injury by each defendant. Nor will he or she be prejudiced if not all potential defendants can be found, or are solvent, or are insured (NZLC PP19).

The defendant wrongdoer must bear the full amount of the loss, or pursue his or her right of contribution against the other tortfeasors. In other words, the person who is sued can seek to recover from any other potential defendant all or part of the sum he or she has had to pay to the plaintiff. Under s 17(1)(c) of the Law Reform Act 1936 if D1 and D2 are concurrent tortfeasors, D1 (who is liable to P) may pursue an action against D2 for contribution. If D2 is, or would if sued in time by P have been, liable to P for the same damage, D1 can recover from D2 a contribution which the Court deems "just and equitable".

The right to a contribution is impotent, however, where D2 cannot be found, or is insolvent or is otherwise "judgment proof". In such

cases, the plaintiff's right to recover is unaffected by the defendant's misfortune in failing to secure a contribution: the plaintiff's right is paramount. It must also be noted that contributions can be sought only from tortfeasors. D2 cannot be made to compensate D1 if his or her only liability arises under contract, or from some other relationship. If the home-owner, then, only has a right in contract against the builder, but in tort and contract against the architect and local authority, the latter cannot recover contribution from the former, "who is only a contract-breaker, not a tortfeasor".[4] Proportionate liability is said to answer these anomalies.

Proportionate liability

"Proportionate liability" involves apportionment amongst defendants. It requires a wrongdoer to meet only that portion of liability for which he or she is responsible. Liability is apportioned according to the respective blameworthiness of the parties. The availability of other wrongdoers is of little consequence to a defendant – each can be liable for no more than his or her own share of the harm.

For plaintiffs, however, the implications are greater. Say, for example, D1 can be said to be 80 per cent responsible for P's loss, D2 10 per cent and D3 10 per cent. Under the present system, where D2 is insolvent, D1 or D3 may be fixed with 100 per cent of the liability for the loss. If both are sued, the "missing" portion will be apportioned equally between them. Under a system of proportionate liability, however, where D2 is judgment-proof, D1 still bears only 80 per cent of the loss, and D3 only 10 per cent. The plaintiff must account for the absent portion of damages. Liability equates to responsibility. At present, liability relates only to the plaintiff's desire for full compensation.

The Law Commission acknowledges as "attractive" the argument most commonly raised for displacing joint and several liability, that

> joint and several liability may place a wrongdoer whose proportionate share of the blame for the loss caused to the plaintiff is relatively minor at risk of having to bear a very much greater share, even perhaps the whole, of that liability. (NZLC PP19 at 46.)

Also, the Commission regards as beneficial the fact that, under proportionate liability "there would be no need for complicated rules concerning the apportionment of liability between defendants" (at 47), because the plaintiff would bear the onus of seeking out the possible defendants to an action, and asserting liability against them. Contributory negligence, as it presently stands, is also viewed by the Commission as giving rise to unfairness: it is conceivable that the plaintiff's proportionate contribution to the injury could be greater than that of the only solvent defendant, but the latter could be called upon to compensate the plaintiff in full for the liability of the other insolvent defendant (at 47).

Many of the Law Society's arguments have, however, failed to find favour with the Commission. The Law Commission is concerned with the effect on plaintiffs of abrogation of the joint and several liability rule. The Commission stresses that the common law remains committed to fully compensating the plaintiff for any loss that has been suffered. Joint and several liability is said to be "one means of achieving this: any risk of an absent or insolvent defendant must be borne by the co-defendant (if there is one)" (at 48). Practical difficulties also beset reform of the law: under proportionate liability "the plaintiff will usually have to sue all possible defendants even if the claim will be difficult to prove against some" (at 49). The Commission notes, however, that this problem may be more conceptual than actual – "we understand that in practice plaintiffs already tend to employ a 'shotgun' approach and sue all possible defendants" (ibid).

The "full compensation" canon

The in solidum rule is, according to the Law Commission's 1992 discussion paper, informed by the concern of the common law with full compensation of the plaintiff (at 40). Plaintiffs, it is said, are to be made "whole", hence the maxim "restitutio in integrum" (ibid). Joint and several liability fulfils the compensation goal – any loss caused by the inability of a defendant to tender compensation, is to be borne by his or her fellow defendants.

Times are changing, however, and the Law Society, in its recent submissions to the Law Commission, argues that full compensation is no longer the paramount concern of the common law. In certain circumstances, the Courts are asked to award less than the entire amount of the plaintiff's loss. For example, where the plaintiff is the author of his or her own injury, to a greater or lesser extent, s 3 of the Contributory Negligence Act 1947 comes into play. A contributorily negligent plaintiff is no longer prevented from bringing an action, as was once the case,[5] but nor is he or she entitled to "full compensation". In other words, the law as it currently stands allows that, in some instances, the extent of a plaintiff's recovery will be reduced. The full compensation "principle" applies, in essence, only when measuring damages as between a wholly guilty defendant and a wholly innocent plaintiff. Where either of the parties fails to fit that mould, it becomes a question of determining what circumstances serve to affect the plaintiff's right to recovery.

The "innocent defendant"

The issue is ancient: where, as between a guilty defendant and an innocent plaintiff, should the loss be made to fall? Commonly it is thought that the unfortunate plaintiff should not be made to bear the loss caused by an insolvent wrongdoer, where it is possible to fix that loss upon one or more of the other participants in the damage. The Commission's research to this effect is informed by the proposition that each defendant is wholly "guilty". (NZLC *Draft Report* at 15.) In solidum liability does not hold a defendant liable for the wrongdoing of another: where the defendant's wrongdoing was the cause of the plaintiff's injury, then he or she is 100 per cent responsible for the loss. It is no answer that another cause, or several other causes, of the plaintiff's loss exist. Where it can be said that "but for" the defendant's wrong the plaintiff would have suffered no harm, the defendant ought to be entirely liable to compensate the plaintiff.

Questions such as these are a blend of the pragmatic and the esoteric. It is true to say that "but for" the negligence of D2 in failing to recognise and draw attention to the defects in the house plans, no harm would have occurred. Similarly, if

D3 had properly exercised its statutory function, the later damage to P's property could have been predicted and prevented. D2 and D3 were both "individually fully responsible" for the plaintiff's loss: each of their negligent acts was independently sufficient for the occurrence of the injury, so it is of no consequence that other parties also negligently contributed to that loss. The Law Commission paints a bleak picture of the alternative: plaintiffs would fall victim to a "perverse tortfest" (*Draft Report* at 16, fn 53), in which the more tortfeasors there were the less liable each would be, despite the fact that the tortious behaviour of each defendant remained constant and each was "an actual and proximate cause of the plaintiff's entire injury (at 17, fn 53). A strictly logical analysis allows, then, that a defendant whose actions are a sine qua non of the plaintiff's loss may be said to be responsible for the totality of that loss – "but for" the defendant's negligence the plaintiff would have suffered no loss.

The Law Society argues that, on the contrary, "causa sine qua non" is not the determinant of liability in the law of tort; the test is one of reasonable foreseeability. (Recently affirmed in *Fleming v Securities Commission (No 2)* (1995) 7 NZCLC 260,697 at 260,706 per Cooke P.) So, for example, where D2, the builder, employed an unqualified and unsupervised worker, it could be said that his liability would justly be higher than 10 per cent – say, even, 100 per cent. By his actions, the loss was rendered much more foreseeable. Moreover, policy considerations requiring safe construction require members of the building industry to exercise a high degree of care and skill. There is little that is controversial in this analysis. But it involves entirely different reasoning to saying that because D2 was *a* cause of the loss, he was *the* cause of the loss. Indeed, D1's knowledge that expert builders often identify and rectify architectural errors, and D1 and D2's knowledge that local authorities are required to certify a building's structural integrity, may serve to lessen the extent to which it can be said that the injury was foreseeable by them. A defendant's liability turns not upon whether the loss would have occurred without his or her negligent actions, but upon whether that loss was the reasonably foreseeable consequence of those actions.

It is common to say that, although two people are to blame for an injury, one is more so than the other. D1, then, could acceptably be spoken of as more to blame for P's harm than D2. And D2 more than D3. For this reason, it is entirely proper to apportion liability amongst the defendants so as to reflect the part played by each in causing the plaintiff's injury. For example, one might find that the architect ought to accept the greater share of responsibility for the injury, as his initial negligence was the genesis of the plaintiff's loss. Nor is the liability of the builder and the local authority to be doubted. But perhaps one could say that where each acted in good faith, if carelessly, their liability will be less than that of the architect because there exists a chain of events in which their negligence was preceded by the negligence of another: if there had been no initial wrongdoing, their cursoriness would have carried no adverse consequences.

The "innocent defendant" is one whose guilt is not absolute. He or she is responsible for a portion of the defendant's injury, but not all of it. To the extent to which he or she can be blamed for the plaintiff's harm, the defendant will of course be liable. But as to the remaining portion of blame which the defendant can not be said to bear, the defendant is as blameless as the plaintiff. So, returning to our example, D2 may be said to be 20 per cent to blame for the plaintiff's loss. He can rightly be called upon to tender damages in that proportion. His relationship to the uncompensated balance of liability, however, is no closer than that of the plaintiff. Where loss is caused by the act of a single unavailable wrongdoer, the luckless plaintiff is of course deprived of a cause of action. The plaintiff must bear the loss, and cannot seek to shift that loss to another. Not every wrong, then, is remediable. So, where there are multiple defendants, there must be a reasoned basis for imposing absolute liability. It is inadequate to shift the liability of an insolvent defendant to another defendant solely on the basis of availability.

The Law Commission rejects this analysis, contending that "there is a world of difference between an innocent plaintiff and even a 1% [comparatively] negligent . . . defendant" (*Draft Report* at 21). That difference is said to lie in the distinction between "individual full responsibility" and "comparative responsibility". Each defendant is 100 per cent liable for the injury that the defendant has caused: he or she is "individually fully responsible". Only when the responsibility of the defendant is compared with the responsibilities owed by other defendants (for the purpose of seeking contribution under s 17(1)(c) of the Law Reform Act 1936) can it sometimes be said that his or her liability may be less than 100 per cent. And even then, this has no bearing upon the plaintiff, who will recover regardless. The injury is indivisible. One cannot say that 20 per cent of the injury was caused by one defendant and 80 per cent by the other. Both caused 100 per cent of the harm.

This principle goes hand-in-hand with that of full compensation. Like the latter, it has become the focus of criticism by the Law Society. The Law Commission suggests that there is a significant distinction to be drawn between a person who is 1 per cent to blame for the loss and one who is entirely blameless. A tortfeasor may be only 5 per cent or 10 per cent responsible when compared to the other parties contributing to the injury. Nevertheless, as an "actual and proximate cause of 100 per cent of the injury [he or she] is therefore 100 per cent responsible for the injury (*Draft Report*). This is because the plaintiff, the victim, has "zero responsibility" (ibid) for the injury. The loss should not be made to fall upon the innocent party. The Law Society does not, in this context, agree: it identifies as "artificial" an analysis which suggests that someone who is very slightly at fault is in a "different moral category"[6] to someone who is not at fault at all. The harm may be indivisible, but responsibility for the harm is divisible.

Consider the following example. Assume that one litre of herbicide is sufficient to kill a cow. Four tortfeasors, all neighbours of the plaintiff, independently discharge 250 ml of toxic herbicide into the water trough on the plaintiff's property. The plaintiff's cow drinks from the trough, and is killed. The Commission, in regard to a similar

example, stated that

> it would be silly to assert that each defendant was only 25 per cent negligent or caused only one-fourth of the . . . death. Rather, each defendant was 100 per cent negligent and each defendant's negligence was an actual and proximate cause of the [cow's] indivisible death (NZLC *Draft Report* at 16, fn 53).

The Law Society adopts a contrary view. It is not the death which is divisible, but responsibility for the death. So whilst it cannot be said that a defendant is responsible for *25 per cent of the death*, it is possible to say that a defendant is *25 per cent responsible* for the death.

This kind of determination is willingly undertaken by the Courts where the plaintiff is contributorily negligent. The defendant, although an "actual and proximate cause of the injury", is only liable for the portion of that injury for which the plaintiff himself or herself is not to blame. The Law Commission acknowledges that "the appropriate rule is less obvious when the plaintiff [is] contributorily negligent" (*Draft Report*, at 21). In this area of uncertainty, the Law Society finds support for its analysis.

Contributory negligence

A plaintiff who has failed adequately to preserve his or her own well-being will suffer a reduction of the damages otherwise payable, on account of that contributory negligence.[7] A 1 per cent negligent plaintiff is, by virtue of the Contributory Negligence Act 1947, entitled to bring an action in regard only to the 99 per cent of his loss for which he or she is not to blame.

Inconsistencies are revealed by this comparison. If a 1 per cent negligent plaintiff is not to bear 100 per cent liability, why should a 1 per cent negligent defendant do so? It is not enough to say that the law favours victims. In the contributory negligence scenario, victim is wrongdoer also.

By the Contributory Negligence Act 1947 the unsatisfactory common law penchant for attributing events to a single cause (NZLC PP19 at 46) was eschewed: the legislature recognised that, in some circumstances, several causes will give rise to a single injury, and that liability ought in such cases to be apportioned between the authors of that injury. A claim for damages by a contributorily negligent plaintiff is no longer excluded. Now, damages may be reduced to a "just and equitable" (s 3 Contributory Negligence Act 1947) level, consonant with the defendant's involvement in the injury. In *Fitzgerald v Lane* [1989] 1 AC 328, for example, the House of Lords experienced little difficulty in saying that the pedestrian victim of a traffic injury was himself 50 per cent to blame, and the defendant motorists collectively 50 per cent liable. Importantly, their Lordships remarked that ". . . to note the negligence of either of the two defendants as being twice as bad as that of the plaintiff is clearly wrong . . ." (at 340, per Lord Ackner).

Apportionment has traditionally been applied in admiralty cases. (See NZLC PP19 at 9.) In *The Miraflores and The Abadesa* [1967] 1 AC 826, concerning a collision between several vessels, Lord Pearce regarded the correct principle as that ". . . to get a fair apportionment it is necessary to weigh the fault of each negligent party against that of each of the others . . ." (at 846). A "fair apportionment" was, in that case, difficult to determine given the virtually indistinguishable degrees of fault observed by the Court. Ultimately, the plaintiff vessel (the *George Livanos*) was held to be 50 per cent the author of its own grounding, and the remaining 50 per cent was held to be recoverable from the *Abadesa* and the *Miraflores* in the proportion of two-thirds and one-third respectively. The Courts, then, are both able and willing to determine who amongst the actors in a given situation is most to blame, who is less to blame, and who still less so. If such an analysis is permissible where the victim is partially responsible for his own injury, it is unacceptable that it should not also be available where the harm is entirely caused by outsiders.

However, contributory negligence was introduced to enable a partially at fault plaintiff to recover something, in the event of an injury. Opponents of proportionate liability argue that this principle can not be applied analogically to deprive a claimant of a portion of his or her loss, where there is no negligence whatever on the plaintiff's part.

Proportionate liability assumes other guises within our legal system. Section 43(2)(d) of the Fair Trading Act 1986 states that where a person is guilty of misleading or deceptive conduct within the terms of s 9 of the Act, ". . . the Court may make . . . An order directing the person who engaged in the conduct . . . to pay to the person who suffered the loss or damage *the amount* of the loss or damage". In *Goldsbro v Walker* [1993] 1 NZLR 395, the vendors of a motel property sued the purchasers' solicitors for falsely representing that they had the proper authorisation to bind the purchasers contractually. The respondent solicitors questioned whether the common law rules as to joint tortfeasors applied to the Act, so as to limit the Court to making an order for payment of the full amount of damages only. The solicitors cited the forgery of various documents by a member of the purchasers' family as a contributing cause of the loss. The Court of Appeal declined to import into the Act the common law rule that a tortfeasor whose wrongful conduct contributed to cause damage is liable for the whole of the plaintiff's loss. Parliament could not have intended the Court to adopt an "all or nothing" approach, by directing the full amount of the loss to be met by one wrongdoer, or by declining to make any order at all in respect of the loss. The maxim "omne majus continet in se minus" ("the greater includes the less") was thought to apply: the power to award the full amount of the loss or damage should implicitly carry the power to award part of the full amount. Faced with a choice between the two systems, then, the Court of Appeal favoured adoption of an apportionment regime, in which an individual's liability would closely resemble his or her responsibility for the injury.

In the context of such reforms, the retention of in solidum liability is anomalous. If A and B are equally responsible for a loss to A, A can demand only 50 per cent of the damages from B. If A and B are equally responsible for a loss to C, however, and A is insolvent, C can hold B liable for 100 per cent of his or her injury. B's conduct is identical in each situation. But where the plaintiff shares no blame for his or her loss, B can be fixed with twice the liability as where B injures a contributorily negligent plaintiff.

Or, to reconsider our original example, D1 may represent the plaintiff who has poorly designed his own home. Where D1 is 80 per cent responsible for his own injury, D2 or D3 can be liable only to a maximum of 20 per cent. Where the plaintiff and first defendant are not the same person, but in every other respect the factual account of events remains the same, D2 and D3 are each potentially liable for 100 per cent of the loss, in the event that either D2 or D3 is insolvent. As a matter of logic this cannot be correct. In both instances, an injury has been sustained as the result of the tortious acts of two or more wrongdoers. That one tortfeasor was also the victim of the injury can not materially affect the liability of the parties. If he or she contributed causally to the infliction of the injury then he or she must accept a share of liability for the injury. But the liability of the defendant to the plaintiff can not be magnified solely because the plaintiff played no part in his or her own injury. Liability in tort rests upon causation, proximity and foreseeability, but not upon issues of identity.

The "deep-pocket" defendant

In litigation involving the provision of professional services, professional indemnity ("PI") insurance cover will often be seen as the most obvious source from which recovery can be made. (Small "When the Well Runs Dry" (1994) June *Charter* 14.) PI insurance makes the professional, like the local authority, a "deep-pocket" defendant and a prime target for litigation. Where litigation follows a corporate collapse, for example, the auditors will frequently be the only party with assets of any significance. Yet their contribution to the loss will be small, in many cases. Directors and management, as the day-to-day decision makers, must ordinarily bear primary responsibility for the failure of an enterprise. The accounting profession, on the other hand, exercises a secondary reporting role. Its influence is limited to qualifying the accounts and it exercises no direct control over the actual management of the enterprise.

The law of joint and several liability demands that the insurance purchased by auditors, accountants and lawyers cover the negligence of other parties, as well as their own. In *AWA Ltd v Daniels, t/a Deloitte, Haskins and Sells* (1992) 10 ACLC 933 at 1,022, Rogers CJ emphasised the inequity to which joint and several liability gives rise:

> [A] well insured defendant, who may perhaps be responsible for only a minor fault, in comparison to the fault of other persons, may nonetheless be made liable, at least in the first instance, for the entirety of the damage suffered by the plaintiff . . . Why should the whole of the burden of possibly insolvent wrongdoers fall entirely on a well-insured, or deep-pocket, defendant?

Equally, of course, one may ask "why the whole of the burden of possibly insolvent wrongdoers should fall entirely on a totally innocent plaintiff"? This much is clear: liability determined without reference to the defendant's actual responsibility for the damage caused, but to the defendant's ability to pay, is inappropriate. The professional insures against his or her own negligence, not the negligence of others. He is no social insurer. (See NZLC *Draft Report* at 18.)

Other consequences attend the dissonance of liability and responsibility. The increasingly uneconomic cost of PI insurance is borne not only by professionals themselves, but by those who seek professional services. Cover adequate to meet the large claims now being made is expensive, and sometimes difficult to obtain.[8] The "Big Six" Australian accountancy firms now maintain policies, it is said, costing an average of A$60,000 per annum per partner (Small, above, at 14). Between 1985 and 1991 in New Zealand, premiums for the maximum cover available to a large accountancy firm increased by over 500 per cent (NZ$400,000 – NZ$2.1m). Over the same period, the premiums for NZ$50m cover for a law firm of 40 partners increased by almost 100 per cent (NZ$325,000 – NZ$620,000). (See NZLS *Submissions of New Zealand Law Society on the Law Commission's discussion paper on Apportionment of Liability (Preliminary Paper No 19 March 1992)* at 5.) Naturally these costs, while not yet prohibitive to the professional, are passed on to the client in terms of increased fees.

Where insolvency results from the gulf between coverage and liability, the public interest is further harmed. In *Cambridge Credit Corporation v Hutcheson* (1985) 9 ACLR 545, the New South Wales Court of Appeal allowed an appeal against a A$145m award against the corporation's auditors. The first instance judgment far exceeded the limit of the auditor's professional indemnity cover. Similarly, large settlements of claims are causing the auditing profession anxiously to seek answers to the costly problem of providing liability to an indeterminate class of shareholders and investors. KPMG Peat Marwick paid A$136 million in the Tricontinental case, for failure to warn of the credit risk attached to doubtful loans of over A$1 billion. (Anderson "Several Liability – a viable alternative to capping?" (1995) 16 *The Company Lawyer* 64). As a loss distribution mechanism, joint and several liability has little to commend it.

The imposition of expansive liabilities upon professional advisors may also discourage the undertaking of particular activities. The Law Society reports that, prior to the Privy Council decision in *Clark Boyce v Mouat* [1993] 3 NZLR 641, some practitioners were reluctant to accept instructions from would-be guarantors, thereby restricting the body of available advisors. The number of accountancy firms offering auditing services, particularly to large, public companies, is decreasing. This trend seems likely to continue while the liability of the "deep-pocket" remains unchecked.

A further consequence attends the gulf between liability and responsibility. Professional advisors are becoming increasingly cautious in the nature of their advice. They may warn clients against the remotest dangers, and advise clients against the taking of perfectly acceptable commercial risks, for fear of otherwise incurring liability for having given insufficiently cautious or comprehensive advice.

Naturally, the high cost and potential unavailability of insurance are, alone, uncompelling arguments for reform of the joint and several liability rule. How a defendant meets the cost of liability is, of course, of little relevance to the imposition of that liability. The inverse, however, is equally true: the "deep pocket" of one of a number of defendants can not suffice to justify the imposition of full

liability upon that defendant. It is submitted that the problems of the "deep-pocket defendant" should be a concern, within a body of concerns, to those charged with determining the desirability of reforming the law of joint and several liability.

Overseas reforms

Support for the Law Society's reform proposals is provided by the recent Inquiry into the Law of Joint and Several Liability, undertaken by the Department of the Attorney-General of Australia. The inquiry, headed by Professor Davis of the Australian National University, was charged with "considering whether it is desirable and feasible to alter the present rules on joint and several liability.[9] Particular regard was to be had to the liability of professionals. The inquiry was structured in two stages: the first analysing the present law in Australia and other jurisdictions (including New Zealand), and the second[10] setting out the nature and scope of potential reform of the present law.

Personal injury claims did not come within the terms of reference of the inquiry. (*Stage One* at 5). But property damage and pure economic loss actions are said to be better served by an apportionment regime: the inquiry recommends that, for such actions, joint and several liability "be replaced by liability which is proportionate to each defendant's degree of fault". (*Stage Two* at 2). The present law is said to be effective "largely because of liability insurance and [the] 'deep pocket' defendant" (at 3), the former "becoming prohibitively expensive for professionals [and] local authorities" (ibid). Negligence developed, it is said, in response to personal injury claims, not those for economic loss (ibid). For that reason, full compensation is not considered an unassailable canon. Where the loss is financial, and the effects upon liability insurance are taken into account, full compensation is "not applicable" (*Stage Two* at 4).

The inquiry makes a further noteworthy point. Joint and several liability places the risk of the insolvency or unavailability of a defendant upon other defendants. Proportionate liability, on the other hand, asks the plaintiff to bear that risk. For the plaintiff to recover his or her entire loss, each person responsible for the loss must be sued to judgment, and execution against each satisfied (*Stage Two* at 9). This may be regarded as unjust, but it is noted that where a single unavailable defendant has caused the loss, the unfortunate plaintiff cannot choose to shift his or her loss elsewhere. Not every injury is necessarily remediable.

The inquiry's recommendations follow the lead of Victoria, South Australia and the Northern Territory in abolishing joint and several liability for those responsible for defective building work. (The Building Act 1993 (Vic), the Development Act 1993 (SA) and the Building Act 1993 (NT).) The legislation is framed broadly: those who may be held proportionately liable include the builder and architect, as well as the engineer, project manager and local authority. Building control ministers from the other State legislatures have agreed to seek the enactment of relatively uniform legislation. (*Stage Two* at 19).

Overseas precedents favour proportionate liability. The Law Commission observes that "with the single exception of . . . British Columbia, all of the Commonwealth jurisdictions deriving their legal systems from England have always had the joint and several liability rule". (NZLC PP 19 at 27.) In fact, joint and several liability is less commonplace than this. Amongst the jurisdictions discussed by the Law Commission, only England, New South Wales and New Zealand, within the Commonwealth, sustain systems of joint and several liability which apply in every case. The preponderance of countries and states permit proportionate liability to be fixed in at least some cases. Proportionate liability, or a modified form of proportionate liability, operates successfully in Ireland, British Columbia and 30 US states. (NZLC *Draft Report* at 9.) And in Australia, as we have seen, reform of the law of joint and several liability is imminent. The Law Society advocates "mutual" reform, in the interests of "trans-Tasman uniformity". (NZLS *Submissions* (1995) at 9.) If other jurisdictions are to be cited as blueprints for New Zealand, it must be observed that apportionment of liability is the favoured model.

A statutory cap

Last year, the New South Wales Parliament passed the Professional Standards Act 1994. This allows professional associations to set a "ceiling" on the amount of liability able to be levelled against their members, except in cases involving personal injury, breach of trust, fraud or dishonesty. The Act requires that members possess either professional indemnity insurance to the capped amount, or sufficient business assets to meet the liability (ss 21 and 22).

A cap is a creative alternative to proportionate liability. Like proportionality, it aims to limit the damages for which a professional may become liable. Also like proportionality, it focuses upon the defendant, and consequently fails to fully compensate the innocent plaintiff for losses caused by the professional's negligence.

However, it reiterates the present arbitrariness. Recovery again fails to accord with wrongdoing, but is merely unavailable beyond a certain level. The capped amount for which an auditor may become liable, for example, could still exceed the sum properly attributable to his or her negligence,[11] and perhaps inadequate for the plaintiff's needs. Coupled with compulsory professional insurance, a statutory cap may go some way towards ameliorating the present difficulties. Such a piecemeal reform would, however, not be based on principle, but evolve from expedience.

A half-way house

The Law Commission proposed, in its original paper, an alternative strategy for ameliorating the difficulties caused by the in solidum rule, falling short of adopting a proportionate liability regime. The strategy entailed two principal elements: extension of the right of contribution, and apportionment of the uncollectable share, where the plaintiff is partly at fault.

Extending rights of contribution between defendants was identified by the Commission as essential to any reform. At present, of course, contributions can be sought only from tortfeasors. Contractual wrongdoers, for example, can not be compelled to contribute. The Commission's proposal, drawing upon English precedent (s 61(c) Civil Liability (Contribution) Act 1978 (England and Wales)), extends the right to contribution to all types of civil obligation. The draft provision reads as follows:

This Act applies to loss or damage

(a) which arises wholly or partly from an act or omission of a person, whether intentional or not, including an act or omission that is
  (i) a tort, or
  (ii) a breach of a statutory duty, or
  (iii) a breach of contract, or
  (iv) a breach of trust or other fiduciary duty

  whether or not the act or omission is also a crime, and

(b) for which that person has a civil liability to pay damages

. . .

A reform which stops short of adopting blanket proportionality amongst defendants, must of necessity extend the right to contribution in this manner. There is no basis in principle for restricting the right to contribution to tortfeasors. The right to contribution should extend to all – excepting debt and admiralty (NZLC PP19 at 30) – situations, whether they be statutory, tortious, contractual, equitable or arising in some other manner. Under such legislative intervention as the Commission proposes, a defendant whose liability arises in tort will be able to claim contribution from a contract-breaker.

Most importantly, the Commission "recognised the hardship" (NZLC PP19 at 52) of the in solidum rule to a defendant who finds that a co-defendant is missing, insolvent or otherwise unavailable. The problem essentially remains: is there a mechanism to mitigate the impact on D1 where D2's fair share of the damages is uncollectable? How should the uncollectable share be allocated?

Where it is clear from the outset of the litigation that a potential defendant is or defendants are insolvent, the Court should, the Commission recommends, apportion liability only between those who are parties before it, disregarding any potential defendant who has not been sued by the plaintiff or joined as a third party. (NZLC PP19 at 52.)

If the insolvent wrongdoer is before the Court, and the Court is aware of that insolvency at judgment or becomes aware within a short time of judgment, the insolvency ought to be taken into account. The insolvent wrongdoer can be entirely ignored, if he or she offers no prospect of recovery. Where, however, the possibility remains of a dividend in the insolvency, the Court should enter judgment against each defendant. If D1 suspects or discovers that recovery is unavailable from D3, because of insolvency or another reason, D1 should be entitled to return to the Court within a reasonable time – the Commission recommends one year – to apply for reallocation of the uncollectable share among the remaining parties. Returning to our earlier example, D1 and D2 may be 30 per cent responsible for the loss and D3 40 per cent responsible. If D1 discovers that D3 is unavailable, D1 may apply for reallocation of the 30 per cent. Since D1 and D2 are, as between themselves, equally responsible, each will be required to meet an additional 20 per cent – half of the outstanding share. (NZLC PP19 at 52-53.)

Where the plaintiff is partly responsible for his or her own loss, the plaintiff will, for the purpose of allocating the uncollectable share, be taken to be a party to the loss. If P is 30 per cent at fault, and the balance of responsibility has been divided between D1, as to 30 per cent, and D2, as to 40 per cent, P would, in the absence of insolvency, be able to recover 70 per cent from either D1 or D2. The chosen defendant would then seek contribution, so that all parties bear an appropriate share of the loss. Under the proposed law, however, P and D1 would share proportionately between them the burden of D2's insolvency. As P and D1 are each 30 per cent responsible for 50 per cent (30 per cent + half of D2's share), and P would be left to bear the remaining 50 percent of his or her injury. (NZLC PP19 at 52-53.)

The solution advanced by the Commission is, by its own admission, not so much a solution as a compromise, a "half-way house" (NZLC PP19 at 54). It addresses the unsatisfactory inconsistency between the "full compensation" principle embodied currently in the general law of joint and several liability, and the "partial compensation" approach the Courts are directed to take by the Contributory Negligence Act 1947. It means that, wherever the plaintiff wrongfully contributes to his or her own injury, and where a wrongdoer is insolvent or otherwise unavailable, the plaintiff must join other wrongdoers in accounting for the unavailable defendant's share. To this extent, the Commission's proposal is equitable and uncontentious. It remains controversial, however, to the extent that it does not require apportionment in all instances. It enshrines the element of chance besetting defendant wrongdoers: the extent of a defendant's liability, where another wrongdoer is insolvent, will depend upon whether the plaintiff contributed to his or her own loss, not upon that defendant's own actions. This also is not a principled basis for the imposition of liability. The issue, and the alternatives, remain the subject of ongoing discussion between the Law Commission, the Law Society and the Society of Accountants. At the end of the day, a compromise solution may be the only solution to the polarising problem of apportionment. □

1 NZLC PP19 *Apportionment of Civil Liability: A Discussion Paper* (1992).

2 NZCLC *Draft Report on Joint and Several Liability* (1994).

3 See *Cashfield House Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452 at 456, where Tipping J described this as "a longstanding and uncontroversial proposition"; see also *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, at 31 per Lord Atkinson; *Cassell & Co Ltd v Broome* [1972] AC 1027, 1063 per Lord Hailsham; Todd et al *The Law of Torts in New Zealand* (1991) 849.

4 Todd, above, at 855.

5 See *Butterfield v Forrester* (1809) 11 East 60, 103 ER 926, later the subject of criticism by Lindley LJ in *The Bernina (2)* (1887) 12 PD 58 and Viscount Birkenhead LC in *The Volute* [1922] 1 AC 129.

6 NZLS *Submissions of the New Zealand Law Society on the Law Commission's Draft Report on Joint and Several Liability* (1995) at 6.

7 The Attorney-General of Australia *Inquiry into the Law of Joint and Several Liability: Stage Two* (1995) at 22.

8 *Stage Two*, (above), at 11, records that

> Concern has been expressed for some years at the increasing level of payments which [professional] insurance funds are required to meet, and the consequently increasing cost of that insurance. Among the submissions received in response to the release of Stage One of this inquiry, there was consistent comment that the cost of insurance had reached unacceptable levels . . . Not only is the cost of insurance reflected in the cost of the professional services, but there is a fear that insurance itself is becoming unobtainable.

9 Attorney-General of Australia *Inquiry into the Law of Joint and Several Liability: Stage One* (1994) at 5.

10 Attorney-General of Australia *Inquiry into the Law of Joint and Several Liability: Stage Two* (1995).

11 Anderson "Proportionate Liability: A Good Start But Not The Whole Answer" (1995) 13 *C&SLJ* 334 at 336.

Arbitration and dispute resolution in New Zealand – where to from here?

By Austin Forbes, President of the New Zealand Law Society

Alternative Dispute Resolution is a current fashion. In this article Austin Forbes considers the present position and makes some prognostications and recommendations for the future. In general terms he considered that Alternative Dispute Resolution should be encouraged, although he sees some problems too.

The article was originally given as a paper at the Annual Conference of the Arbitrators' Institute in Christchurch in July 1995.

Where are we at?

Before looking forward, I think it is helpful to have some idea of the present position in New Zealand in respect of arbitration and Alternative Dispute Resolution (ADR).

Whither the new Arbitration Act? Will it continue to wither?

The Law Commission's comprehensive report on *Arbitration* was submitted to the Minister of Justice in October 1991. A new Arbitration Act for New Zealand was recommended, based on the Model Law on International Commercial Arbitration produced by the United Nations Commission on International Trade Law (UNCITRAL). I do not need to add to what Dr Herrmann has said about that. The draft act includes additional provisions to adapt the Model Law for domestic arbitrations in New Zealand.

The Law Commission believes that its draft act will be passed, although to date it has been accorded only a relatively low priority in the Government's legislative programme. Overseas jurisdictions continue to adopt the UNCITRAL Model Law. Singapore did so last year, for instance. New Zealand will inevitably have to be part of the increasingly uniform international arbitration system.

The Minister of Justice supports the adoption of the UNCITRAL model as the basis of a new New Zealand arbitration statute. He says that it is his hope that better progress may be able to be made by introducing a bill, based substantially on the Law Commission's draft, as a Private Member's bill, under the auspices of Mr Peter Hilt MP. It may be that this will be able to be done in the current session of Parliament, although its timing will be subject to the balloting procedure for Private Members' bills. I am informed that the fact that Mr Hilt has recently fled the coop as a Government MP should not adversely affect the bill's prospects.

ADR – an efflorescent industry?

Enthusiastic hype for ADR abounds. A recent *National Business Review* article on ADR included statements like "ADR catches on like wildfire", "the legal profession is embracing this method of resolving disputes with a passion" and there is now "a wave of enthusiasm" for ADR. A Harvard commentator has even gone so far as to describe this development as no less than "the most creative social experiment of our time". Justice Michael Kirby, the President of the New South Wales Court of Appeal (and something of a legal folk hero in Australia and elsewhere) has said that "the search for new and supplementary methods of dispute resolution is now before our community in earnest".

By way of illustration, over the past year or so, I have received in my office in Christchurch promotional and information pamphlets from a range of new local ADR services, going under such names as The ADC Centre, Mediation Associates and from individual mediators associated with Lawyers Engaged in Alternative Dispute Resolution (LEADR). Just a few days ago I received a pamphlet about a comprehensive mediation and ADR forum and workshop to be held on separate days in Auckland and Christchurch in October.

Perhaps not surprisingly, an abundance of jargon has already been spawned. Examples I have come across include "conflict management", "early neutral evaluation products", "conflict diagnosis", "a more efficient smorgasbord of interventions into conflict" (I am not joking) and "diagnostic problem solvers" (I am still not joking). Mediators have been called "head-banging facilitators", "lawyer bashers" and "new process zealots" (I assure I am not making this up).

Recognised ADR techniques and options now include traditional negotiation and arbitration, mediation (the principal consensual option), mini-trials, independent expert advice, early neutral evaluation, non-binding arbitration and executive trials.

Nor are these necessarily discrete processes. Various combinations or "hybrid" processes have become recognised overseas. ADR clauses in contracts and ADR agreements often provide for more than one method to proceed jointly or for one to follow on from the other. Quintessential features of mediation are that it is consensual, flexible, adaptable, informal, private and confidential and without prejudice to any later Court proceedings. The parties (or

"disputants" as they now sometimes seem to be called) play an active, rather than passive, role in the process and have substantial control over it. The outcome is more likely to preserve existing relationships between the parties and they are also likely to feel satisfied with the outcome – the "win/win" solution. Two obvious and significant advantages which mediated resolutions are likely to achieve are substantial savings of costs and time. There is often an intangible saving in stress as well.

A singular feature of the experience of the actual mediation of substantial commercial disputes in New Zealand in recent times has been the shortness of the time taken to achieve a successful resolution, as against the estimated time of a litigated or arbitrated resolution – a matter of hours or days against weeks in a number of cases.

Some recent ADR developments

The wildfire is certainly spreading. Courses in mediation and negotiation skills are now an established part of the law degree curriculum in the five (yes, five) law schools. Other universities and polytechnic courses offer a variety of dispute resolution and conflict management programmes, covering employment, environmental and community disputes. Canterbury and Lincoln Universities have newly-established Centres for Resolving Environmental Disputes and of course, Massey University has established a Dispute Resolution Programme on the initiative of the Arbitrators' Institute.

The Institute has a full range of accredited arbitrators, mediators and conciliators covering a number of disciplines and occupational groupings.

A New Zealand Chapter of LEADR was established in 1993 and there are now LEADR groups throughout the country. They and some district law societies have panels of accredited mediators.

The New Zealand Law Society established a special Dispute Resolution Committee in 1993. It has recently received a New Zealand Law Foundation grant to meet the cost of engaging an ADR consultant to assist in drafting model mediation and other ADR clauses and agreements, ethical and practical guidelines for lawyers acting in mediations and a client information pamphlet. These developments reflect the recognised growing use and importance of ADR options by the legal profession, both actual and potential. However, as I will refer to shortly, there is considerable room for improvement in this regard.

The Mediators' Institute of New Zealand was established in 1991 and since then it has played a role in ADR as well.

All these bodies run regular ADR seminars, workshops and courses.

Court-based ADR – not so efflorescent?

I use the term "Court-based" as including "Court-annexed" and "Court-sanctioned" ADR procedures.

It has been said that the use of ADR by the traditional Courts system is an outbreak in civilised common sense. However, while there are some encouraging signs, substantial progress has yet to be made in New Zealand. This is now overdue.

The rules of procedure in both the High and District Courts provide for Court-assisted settlement conferences. Unfortunately, these do not occur very often.

Mediation conferences have been an established part of the Family Court for some time now, ranging from custody to matrimonial property disputes. Lawyers have a general statutory duty to promote conciliation in family law matters. A separate Family Court Conciliation Service was recommended in 1993. It is not yet been established, but I am informed "it is on the way". Mediation is the principal method of dispute resolution proposed for it.

Victim-offender mediation is an essential feature of our youth justice system. It is based on the family group conference. Its underlying concepts of Maori decision-making and restorative justice may soon be the basis of a pilot project in the adult criminal justice system. There is wide support for such a pilot, including by the New Zealand Law Society. New Zealand has in fact led the world in this particular area.

The Associate Minister of Social Welfare said only a week ago that of the 53,000 care and protection family group conferences held to date under the Children, Young Persons and Their Families Act 1989, no less than 90% have resulted in agreement and so could be considered to have been successful.

Mediation and conciliation are a familiar and central part of employment and tenancy dispute resolutions.

Pilot case management projects are currently being conducted in the High and District Courts. Cases are allocated to one of three management streams, which have target timetable dates. Primary responsibility for the control and management of these cases rests with the Court, not the parties. Early settlements are encouraged. This development can be seen as a type of Court-based ADR.

Last year Justice Sir Ian Barker, the senior High Court Judge and Patron of the New Zealand Chapter of LEADR (and also something of a folk hero as a Judge) proposed the adoption of mini-trials in Auckland, on a trial basis. This proposal follows Canadian models. The aim would be to achieve either a complete settlement or at least a delineation of the real issues in dispute and the extent of the relevant evidence required. The process would be consensual and confidential. The format would, in effect, be an abbreviated trial, based on written evidence and oral submissions. The parties themselves would have to be present.

While recognising that it would not be suited to all cases, the New Zealand Law Society has given its full support to this proposal. It would give parties to civil disputes an opportunity to assess the relative strengths and weaknesses of their respective cases. The same notion could be adapted to private procedures which are not Court-based. Unfortunately, to date the mini-trial proposal has not been implemented.

Last year the Legal Services Board established a pilot scheme in the five main centres for the legal aid funding of early neutral evaluation in more substantial civil cases by suitably experienced lawyers. Participation is voluntary. This initiative also has the support of the New Zealand Law Society and it has already had quite a number of successful outcomes.

Also last year the Ministry of Housing initiated the establishment of a working party to develop nationally-recognised qualifications for mediation, in liaison with the New

Zealand Qualifications Authority and the Public Sector Training Organisation. Both the Arbitrators' Institute and the New Zealand Law Society, amongst others, are involved in this. Research by a consultant is currently being conducted. It is evident that there are presently quite diverse training requirements as between, for instance, the Arbitrators' Institute, LEADR and the Mediators' Institute.

Continuing further on the theme of good ideas but little action, last year at a seminar on mediation convened by the Legal Services Board and the Law Commission representatives of a number of interested groups (including the New Zealand Law Society) were agreed on the need to coordinate initiatives in ADR in New Zealand, so that these could proceed in an organised way. Those present expressed an interest in .forming a working party to that end but to date this has not eventuated. It appears that no one group is presently willing to assume primary responsibility for organising and advancing the proposal.

Where to from here?

Coordination or chaos?

I have referred to two recent attempts to coordinate ADR developments, in some shape or form. These have either not been embraced wholeheartedly or have not yet borne fruit. In my view something more has to be done – and soon.

All involved in ADR will have a common desire to ensure that ADR options remain effective, affordable and flexible. There will be a common interest in developing appropriate ethical and practical guidelines, client information and model clauses and agreements. The Arbitrators' Institute has developed a comprehensive Code of Ethics for arbitrators and mediators. This will no doubt be an important reference point for others. The Mediators' Institute has also developed a Code of Ethics. LEADR and the New Zealand Law Society are working, effectively in conjunction, on their versions of guidelines, client information and model precedents for lawyers.

There is a real danger here that individual enthusiasm and, perhaps, professional self-interest will submerge the common interest. National coordination is not, I suggest, merely desirable but essential. The unnecessary duplication of resources and "reinventing the wheel" several times over are surely to be avoided, especially in a country with a population of only 3.5 million.

Coordinated international liaison is surely also equally desirable. Modern ADR options largely derive from the United States. The experience of their adaptation to other countries with broadly similar political and legal systems and social and economic conditions, such as Canada, the United Kingdom and, in particular, Australia, must be beneficial for us here.

An important issue that is already under consideration is whether the training of accredited mediators should be formalised and prescribed or left to self-regulation. I suggest that the public interest is likely to require recognised and approved standards as to training. Likewise in regard to ethical standards.

I consider that there is a need, now overdue, for a general advisory, coordinating and consultative body for ADR in New Zealand. This applies both in regard to Court-based and private ADR options. Apart from training, standards and ethics, other responsibilities for such a body could be policy advice to the Government, public information about ADR and a process for the proper evaluation of various ADR programmes and facilities.

In Australia there have recently been similar calls for a national coordinating body. As here, the goal would be to ensure an integrated and cohesive approach to ADR.

In New Zealand such a body would be likely to need to represent, directly or indirectly, groups such as the Arbitrators' Institute, the New Zealand Law Society, LEADR, the Mediators' Institute, the Department for Courts, the judiciary, the Law Commission, the Legal Services Board, the university law schools and, possibly, the universities generally and the polytechnics. The proposal discussed at the Legal Services Board/Law Commission seminar last year may be a bud that can now burst into flower (in plain language, "effloresce"). Alternatively, there may be scope for one or other of the main bodies involved in ADR, by agreement, to assume this general role. The Arbitrators' Institute is obviously one such possible body, particularly if it were to merge with the Mediators' Institute. The other two bodies principally involved in ADR directly are LEADR and the Dispute Resolution Committee of the New Zealand Law Society, which effectively work together anyway. I readily accept that the coordinating body should not become an unwieldy quango.

The gentle tinkling of a few warning bells?

The outcome of the current enthusiasm for ADR, desirable as it may be, must not be the institutionalisation of some sort of de facto second-class justice. Nor should ADR come to be seen as being something available primarily for the under-privileged or less wealthy people in our society. Nor should people feel that they are under compulsion to participate, at least so long as ADR professes to be a voluntary process. Nor should they be or feel penalised in some way if a mediated outcome is not achieved.

Nor can ADR fall to be stigmatised as one where the likely outcome will be a compromise or a "split the difference" result. It is not and cannot be allowed to be seen as being a soft or weak option.

Any ADR process must be fair and appear to be fair. Proper ethical standards and expectations as to confidentiality must be adhered to. Legal rights and the protection they afford cannot be ignored either. Sometimes there may in truth be no genuine dispute and so nothing to mediate about.

ADR should not be urged or used for inappropriate cases. These may include disputes where there are substantial legal questions, a significant public or community interest, where there is a significant power or bargaining imbalance between the parties or where there are strong evidential conflicts, substantial credibility issues or allegations of fraud or dishonesty and the like. One or other of the parties may be intransigent about keeping the case in Court. Sometimes Court sanctions, such as an injunction, are unavoidably going to be necessary. I do not say that ADR can never be used in such cases, only that care in doing so must be exercised.

At the end of the day it is vitally important that the confidence of both the particular parties in any given dispute resolution process and of the public in ADR generally are maintained.

Nor am I suggesting for one moment that ADR should become subject to formalised legal processes. After all, dissatisfaction with those processes was one of the primary reasons why ADR options developed in the first place.

Court-based ADR – Where to from here?

Failings in our civil litigation system

The perennial twin problems that have bedevilled countries which have our Rolls-Royce or "leave no stand unturned" Courts system are cost and delay. The adversarial mode is a major contributor to these two problems. The consequence is now that these problems have given rise to a major issue in our civil litigation system in terms of access to justice.

The position has now been reached in New Zealand where it would generally be uneconomic to defend a civil case involving $50,000 or less. For most people, that is still a significant amount of money. By "uneconomic" I mean that the total costs to both parties, including the costs of legal representation of the parties, of witnesses and other expenses from commencement through to conclusion are very likely to be in total a substantial proportion of the amount in dispute – or even more. I use as an example a case with, say, two experts and six other witnesses and a hearing time of two days, with the usual process of preliminary advice, preparation of proceedings, subsequent interlocutory matters (in particular, discovery), briefing the evidence of witnesses, preparation for hearing (including any legal issues) and the conduct of the hearing itself.

In some cases, not that uncommon these days, the interlocutory process of discovery of documents can involve thousands of documents and can cost thousands of dollars in itself. Most of the documents are likely to be irrelevant to the final outcome of the case. The complex rules of the evidence and procedure also add to the costs of litigation.

Over and above all this, the process tends to intimidate people and be stressful.

Features of modern civil litigation are vast amounts of paper and increasingly lengthy trials. The effects of the photocopier and word processor have not been entirely beneficial. The increased use of computers may assist, although some say that they may only serve to add to rather than reduce the problems.

For many cases the Rolls-Royce version is inappropriate. A Honda Civic system would do nearly as well, at a realistically affordable cost.

Is Court-based ADR essential?

Should there be any compulsion?

Last year the former Chief Justice of Canada, the Rt Hon Brian Dickson, said in a lecture at Cornell University in the United States:

> If we are to ensure that ADR develops in a manner consistent with our judicial system's most fundamental values, then it seems to me essential that the courts stay involved... We must make sure that cases that belong in courtrooms do not get pushed out into ADR simply because the courts are over-burdened.

The Courts should certainly not be the only vehicle for ADR. But they need to be able to provide ADR options. I have been surprised and disappointed at the apparent reluctance of some Judges and, at least to date, the legal profession and the Court system as a whole to acknowledge this and, further, to take positive steps to do something about it.

There will always be disputes that have to be litigated – leaving aside crystal-ball gazing into the next millennium and beyond. There will always be disputes where the preferred option is formal arbitration.

In England this year it became mandatory for lawyers involved in litigated disputes in the High Court there to consider attempting to resolve them by ADR. A pre-trial checklist confirming that various ADR possibilities have been considered must be completed before a case can go to Court.

This is an example of what is sometimes known as "process compulsion". It is compulsory to consider ADR, hopefully genuinely, but ADR is not compulsory as such.

In Hong Kong there is now a mandatory requirement that information about ADR be given to the parties – as to its nature, the procedures, the alternatives and the frequent advantages. The Court can appoint a mediator if the parties cannot agree on one but want to mediate. So again it is only consideration of the process that is compulsory.

Compulsion in this sense seems to me to be entirely acceptable. The adoption of similar procedures in New Zealand could be contemplated without any risk of a lawyers' boycott or the Judges throwing their wigs out the Courtroom window.

The Courts and the legal profession cannot drag their feet any longer in offering ADR options. The potential for savings in costs, both public and private, and in time is massive. The system has to offer the streamlined or Honda Civic alternative – limited discovery, limited hearing time, limited numbers of expert witnesses, simplified rules of evidence and procedure and limited time for submissions. Legal aid has to be available for ADR.

Such a process may be less than perfect, at least from a lawyer's traditional perspective, but the outcome is likely to be a more meaningful form of justice.

What I am suggesting is not a substitute for the Rolls Royce system. If one or more of the parties wants that, so be it. Sometimes that will be the only appropriate alternative. What I am suggesting is an alternative within the Courts system, especially for cases involving less than substantial amounts or issues. The alternative should be available in every case if the parties want it.

What I am also suggesting is an element of compulsion in the consideration of and information about ADR options within the civil litigation process. The strategy needs to be Court-led, with active cooperation from the legal profession. We need what have been described as "multi-door Courthouses" offering alternative dispute resolution processes. As things presently stand, New Zealand is behind the play in this regard. Like other public service providers, our Courts must meet the challenge of delivering justice and dispute resolution in flexible forms, which allow for individual choice and needs.

In civil litigation, it can no longer

be "business as usual". In due course these alternatives may need to be assisted by a few carrots and sticks but I believe it would be better to move forward slowly. Mandatory mediation is potentially a contradiction in terms. This and sanctions for failure to attempt to resolve a dispute through an ADR process or having it as a necessary precondition to litigating are things that can be held over for future consideration. If changes of the type I have proposed (and most of them have been suggested before, in one way or another), then it would be interesting to see how long it was before ADR or the streamlined option became the preferred dispute resolution processes in New Zealand, as against litigation or arbitration.

But unless the Courts and the legal profession are active promoters and participants then "disputants" will either sidestep the Courts and the civil litigation process altogether or will continue frequently to be disillusioned by it.

Other reforms needed in our civil litigation system

The traditional Courts are not under threat by the changes I have suggested. As I have said, there will always be cases that are really only suitable for resolution by the Courts.

Real respect for the Courts, as a relevant and essential institution in our society, ought to be enhanced, not eroded, if the "multi-door" service is provided. Mystique, awe or incomprehension are not proper foundations for public confidence in and respect for the Courts.

Other reforms are also necessary, desirable or should at least be considered. I mention a few, at random. The wearing of wigs and gowns is under review. I predict they will be abolished, as they now ought to be. Night sittings of the District Court have been the subject of a pilot project, in an attempt to better meet the convenience and needs of the public. Simple adjournments and uncontested matters should not necessarily require an appearance in Court. Steps in that regard have already been taken in criminal cases. More efficient ways of recording oral evidence are needed. The procedures for written briefs of evidence need to be formalised. Greater use of judicial teleconferences and interactive video conferences needs to be made. Electronic (ie paperless) filing of Court documents is already on the agenda for the new Department for Courts. The days of the final and expensive right of appeal to the Privy Council in London look to be numbered. Modern Courtrooms are now designed more with the needs of the public in mind and not as places that have to be dim, drafty, Victorian edifices. The rules of procedure in the District Court could be simplified. The jurisdiction of the Disputes Tribunal could be extended from its present limit of $3,000 (or $5,000 by consent).

In England Lord Woolf's recent interim report on the civil justice system there may be a pointer to similar reforms that could be adopted in New Zealand, although it should be said that quite a few of the recommendations in that report are already in place in New Zealand. For disputes up to the equivalent of about NZ$25,000 in England, it is recommended that there be limited discovery, a trial hearing time limit of three hours, experts will not give oral evidence, simple offers to settle will replace the formalised payment into Court system and early settlements will be encouraged. The Courts will control expert evidence on a neutral basis and only one expert will normally be permitted. These are, at this stage, recommendations only.

In the United States expert witnesses have been described as "saxophones" – the lawyer plays the tune, manipulating the expert as though a musical instrument on which the desired notes sound.

Arbitration as ADR?

Arbitration is the traditional form of ADR. While it enjoys some advantages over litigation, arbitration often (but not always) suffers from many (but not all) of the disadvantages and limitations of litigation. It can have some additional disadvantages sometimes.

The confidentiality of the arbitration process will always be a major advantage. Nevertheless, the fact is that overall arbitration falls far short of being the preferred method of dispute resolution, even if it is customarily used, and effectively, for certain types of commercial disputes.

Arbitration is not really seen as a modern ADR option, in that it is not a consensual or cooperative process. The resolution is imposed, as in litigation. Its use usually arises from a pre-existing agreement to arbitrate rather than as an agreed option for the resolution of an existing dispute. Again I generalise, but across the board I venture to suggest that mediation has a much brighter future than arbitration for the resolution of domestic disputes (ie disputes arising within New Zealand).

ADR – so you've heard of it, but have you used it?

Perhaps the most significant problem facing the development of ADR in New Zealand is the attitudinal mindset of litigation lawyers (yes, this includes barristers such as myself).

The former Chief Justice of the United States, Justice Warren Burger, said in 1986 that

> The true function of our profession should be to gain an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client.

And so say all of us. Justice Burger also said that "We need more reconcilers and fewer warriors". Right again.

The art of advocacy is not necessarily the art of adversary. The dispute resolution process and outcome should not be a Rambo-style one of black/white, win/loose, right/wrong. Effective resolution is the goal.

So we lawyers have some learning to do – what I am told is "deskilling and reskilling". That process sounds a rather uncomfortable one. Quite a number of lawyers have already embraced the developing concepts proactively. However, the majority of us have not. ADR is not yet a regular practice tool for most lawyers.

The old belief that to offer to negotiate or settle or, now, mediate is somehow a sign of weakness is still pervasive. ADR should not be a soft option. What the client invariably wants is a resolution which is realistic and workable, involving the minimum amount of time and money. Lawyers have a challenge to adopt the necessary behavioural change. That this will have to occur there can be no doubt. The real ques-

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The problem with violent offending:

A critique of the Serious Violent Offences provisions of the Criminal Justice Act

By Mark Brown, Department of Criminology, University of Melbourne, and Neil Cameron, Law Faculty, Victoria University of Wellington

This article is a critical analysis of present policies of the criminal justice system regarding violent offending. The authors suggest the need for distinguishing between punishment and behavioural control.

There is perhaps no other area of crime so fraught with difficulty as violent offending. The question of how and why it occurs and how we ought to frame our response has come increasingly to occupy the minds of the community, politicians, academics, and those working within the justice system. The purpose of this article is to briefly outline recent developments in the criminal justice response to violent offending, and to critically evaluate the capacity of these changes to affect rates of violent offending in this country. It will be suggested that our current offence-based response to violent offending is founded on assumptions which are almost completely at odds with well-known patterns of offending behaviour and with the emerging literature on the prediction of "dangerousness" within the criminal justice context. Accordingly, while current legislative and judicial efforts to tackle the problem of violent crime may well serve a number of important symbolic and declarative functions, and may well meet at least some of the concerns of victims, all the available data point toward them having little if any effect upon the actual incidence of violent offending.

Recent trends in legislative policy and the Criminal Justice Amendment Act 1993

The 1985 Criminal Justice Act introduced into New Zealand law a fundamental distinction between property offences on the one hand and the more serious offences of violence of the other. (The most obvious example is the presumptions concerning imprisonment in ss 5 and 6.) Since then a series of amendments, culminating in the Criminal Justice Amendment Act 1993, have elaborated and entrenched this distinction, emphasising its importance not only for sentencing but also for parole eligibility and the conditions under which prisoners must be released. Indeed, its significance now extends well beyond this, affecting areas such as access to bail (see s 318 Crimes Act 1961 – as amended in 1991), prosecution policy and the development of general police strategies.

The drawing of such legislative distinctions between "ordinary" offences and offenders, and a small group of serious violent and sexual offences and offenders is now a fairly standard part of the response of most Western jurisdictions to the crises produced by rising rates of reported crime, the perceived failure of traditional methods of handling offenders, and the increasing need for fiscal restraint. Its justification lies in the rediscovery in the 1970s of the notion of "dangerousness". By dangerousness is meant the belief that the "real crime problem" is largely the product of a small group of persistent, serious offenders whose identification and removal then becomes the major task of the system. Unlike earlier conceptions of dangerousness – which tended to focus on sexual predation and persistent property offending – more recent attempts to define the problem have increasingly come to see it almost exclusively in terms of violence. Managing crime, as the history of the 1985 Act shows, has become a matter of managing violent offending and this in turn means isolating and managing "violent offenders".

Briefly, the Criminal Justice Amendment Act 1993 not only enabled the Courts to fix minimum periods of imprisonment for offenders sentenced to indeterminate sentences, it also sought to provide a regime whereby those convicted of "serious violent offences" could be largely exempted from the ordinary operation of the parole system. Under the Act a "serious violent offence" is defined as any of a small group of listed violent offences in respect of which the offender has received a sentence of two years' imprisonment or more. (See s 2 Criminal Justice Act 1985.) In such cases the Court may impose a minimum term if it is

> satisfied that the circumstances of the offence are so exceptional that the imposition of a minimum period of imprisonment that is longer than the period otherwise applicable [under the provisions relating to parole] is justified. (s 80 (4),(5) Criminal Justice Act.)

Regardless of the length of the nominal sentence, the minimum term specified may not exceed ten years. (s 80(6) Criminal Justice Act.)

In addition, whether subject to a minimum term or not, Serious Violent Offences prisoners serving sentences of less than 15 years are no longer eligible for early release on parole. (s 89(7) Criminal Justice Act.) Furthermore, although they may in theory seek a special referral to the appropriate Board at any time during their sentence (ss 97(5) and 100(5) Criminal Justice Act), this process has been subverted in practice by instructions from the Department of Justice that the departmental members of these boards should not refer Serious Violent Offences prisoners for parole consideration. On release Serious Violent Offences prisoners, like other prisoners being released at their final release date (what was previously known as the "remission date"), are subject to the standard conditions relating to reporting, residence, employment and association and may, in addition, be subject to special conditions designed to protect the public or assist in their rehabilitation. (ss 107A-107C Criminal Justice Act.)

The approach underlying these provisions has also been extended to the sentence of preventive detention with the abandonment of the previous conviction requirement in sexual violation cases. (s 75(1)(a) Criminal Justice Act.) The prediction of dangerousness in such cases can now be based entirely on current offending, assisted by whatever help can be obtained from the mandatory psychiatric report, and must amount to a belief that there is "a substantial risk that the offender will commit a specified offence upon release". (s 75(3A) Criminal Justice Act.) "Specified offences" under s 75 are essentially the major sexual and violent offences plus less serious sexual assaults committed against children. (s 75(4) Criminal Justice Act.) In a similar vein, s 105 provides that offenders convicted of "specified offences" and serving determinate sentences may be required to serve their full term if the Parole Board, on an application from the Secretary for Justice, considers that they would be likely to commit a further specified offence during any period of early release that they might otherwise obtain. (s 105 Criminal Justice Act.) Both these developments seem to be based on a belief that, at least in extreme cases, it is possible to predict likely future behaviour from current circumstances with a degree of precision that would be the envy of most astrologers.

The intent of these provisions is to ensure that serious violent offenders serve a relatively greater proportion of their nominal sentence in prison. In the words of the Minister, this is part of a strategy "to protect the public better from those who offend, in particular, by targeting violent and sexual offending; [and] to maintain the integrity of the sentence imposed by the sentencing judge".[1] Among other things, this clearly identifies the measures as a means of more effectively preventing reoffending through enhanced deterrence, coupled with a measure of incapacitation. Serious Violent Offences offenders and those eligible for preventive detention are selected for such special attention (and the considerable resources that their "extra" incarceration requires are justified) on the assumption that their current offence identifies them as "serious" or "dangerous" offenders who contribute disproportionately to the serious crime figures and who are otherwise very likely to continue to commit serious violent and sexual offences.

It should be noted that in so far as these measures involve enhanced incapacitation, two rather different strategies are involved. Judicially determined minimum sentences and the sentence of preventive detention for example, are instances of "selective" incapacitation. As such they depend on individual assessments of dangerousness. The restriction on parole eligibility, on individual assessments of dangerousness. The restriction on parole eligibility, on the other hand, is an instance of what is generally labelled "collective" incapacitation. Offenders are selected for special treatment simply on the basis of their membership of a group which is believed to present a special risk of reoffending. While the discussion that follows strongly suggests that any strategy based on predictions of dangerousness derived primarily from the assessment of current offending behaviour is badly flawed, this is likely to be especially true of strategies which are collective in nature.

The Serious Violent Offences classification

Before looking at the assumptions that underlie this strategy, it is worth making a couple of points about the Serious Violent Offences classification itself. If the strategy is intended to protect the public by effectively targeting serious and dangerous offenders, then the group targeted should presumably comprise all those who have committed serious offences and who we have good reason to believe are likely to reoffend in a similar fashion. Unfortunately s 2 does not appear to do this. The list of offences provided in that section seems to be based neither upon the nature of the behaviour (since, for example, sexual violation is included but attempted sexual violation is not), nor on the seriousness with which the Courts have viewed the behaviour (since many equally serious or more serious offences are excluded – for example, incest and aggravated wounding or injury), nor on any reasonable prediction of the likelihood of repetition.

This failure to apply what would seem to be fairly fundamental criteria for any sensible classification of serious violent offending is illustrated by the table below. This lists the Serious Violent Offences offences together with a number of other violent offences that are their equivalent either in terms of the nature of the behaviour involved, or in terms of seriousness. The seriousness score, which was developed by the Department of Justice,[2] is an indication of "judicial" seriousness and reflects the average number of days in custody to which individuals convicted of each offence were sentenced by the Courts.

Serious Violent Offences and Comparable "Ordinary" Offences

Offence		Seriousness score
(a) Section 2 offences		
Crimes Act		
s 128	Sexual violation	1534
s 171	Manslaughter	1276
s 173	Attempt to murder	1512
s 188(1)	Wounding with intent to cause Grievous Bodily Harm	776
s 188(2)	Wounding with intent to injure	463
s 189(1)	Injuring with intent to cause Grievous Bodily Harm	412
s 198A	Using firearm against law enforcement officer, etc	1023
s 198B	Commission of crime with firearm	1023
s 234	Robbery	177
s 235	Aggravated robbery	866
(b) Other serious offences not included in section 2		
Crimes Act		
s 129	Attempt to commit sexual violation	730
s 129A	Inducing sexual connection by coercion	148
s 130	Incest	829
s 174	Counsel or attempt to procure murder	3650
s 175	Conspiracy to murder	3650
s 189(2)	Injuring with intent to injure	208
s 237	Assault with intent to rob	257
s 191	Aggravated wounding or injury	630

Even from this very limited comparison it is apparent that the selection of offences for inclusion in s 2 is somewhat arbitrary. If the intention is to isolate those offences which concern the public and the judiciary most, it plainly does not achieve that. If the thesis is that certain types of behaviour indicate a propensity to reoffend, it clearly does not isolate those types of behaviour either. In short, even if selecting "dangerous" offenders on the basis of the nature and seriousness of their current offence makes sense, s 2 does not provide anything like a proper foundation for doing so.

The underlying assumptions

Leaving aside the adequacy of s 2, even a cursory examination of the Serious Violent Offences strategy suggests that it is founded upon two rather questionable assumptions. First, in order to give the notion of the dangerous offender any kind of practical utility, such offenders have to be assumed to be a separate and identifiable class. Dangerousness is a quality possessed by dangerous offenders – a kind of personality trait, stable over time and manifest in continuing serious violent behaviour. Some offenders are dangerous and others, by definition, are not.

Linked with this is a second set of assumptions. To make sense as a crime control strategy, it also must be assumed that dangerous offenders specialise in such violent behaviour and, correspondingly, that most of such behaviour is in fact committed by this small group of dangerous individuals. Following this line of reasoning, it is reasonable to attack the problem of escalating dangerous crime by classifying offenders as "ordinary" or as "dangerous" largely on the basis of the offence for which they are currently before the Court. That offence is assumed to stem from their inherent dangerousness and to be both representative of their past activities and predictive of their future propensities.[3]

Clearly the success of such a strategy will turn on the validity of the assumptions about offenders and offender behaviour which underlie it. If the spectre of the dangerous offender turns out to be no more than a popular myth, political rallying call or legal construction, then serious questions need to be asked about the direction of penal policy in New Zealand and about how lawyers and Judges should and can react to the legislation. The following section will consider these assumptions drawing upon data from a large sample of New Zealand prisoners to test their validity.

Serious Violent Offences and offenders

One way of testing whether or not the Serious Violent Offences classification identifies useful differences between offenders is to compare the reoffending patterns of Serious Violent Offences and "ordinary" offenders. Current data would, of course, be useless for this since it could always be argued that the special regime applicable to Serious Violent Offences offenders had itself influenced the reoffending behaviour. Historical data is, however, more useful. Accordingly pre-1993 data collected by Brown as part of a study of parole decision making[4] was analysed to examine the reoffending patterns of individuals who, if they were sentenced now, would fall within the Serious Violent Offences category.

The data covered 613 offenders release from prison in 1986 and followed-up for two and a half years. These prisoners were all serving sentences of less than seven years and had been reviewed for early release by a District Prisons Board. They were either granted parole and released shortly after expiry of half their sentence or released on remission after serving two thirds of their sentence. Two and a half years after release there were no significant differences in the reconviction rates of the parole and remission release groups (76 percent and 80 percent respectively) although significantly more of those released on remission had received a further custodial sentence (55 percent as opposed to 41 percent of those released on parole).

This data was further analysed by identifying those members of the sample who, if sentenced today, would fall under the Serious Violent Offences regime, and then comparing their subsequent offending history with that of their "ordinary" counterparts. This enabled us to answer two questions. First, were those prisoners who would now fall under the Serious Violent Offences regime in fact more likely to be either reconvicted or reimprisoned than "ordinary" offence prisoners? And secondly, were those prisoners who would now fall under the Serious Violent Offences regime more likely to be reconvicted of serious violent offences?

Of the 613 offenders making up our sample, 43 would now be classified as Serious Violent Offences offenders. On examining their subsequent history it became quite clear that the Serious Violent Offences offenders were no more likely than "ordinary" offenders to be reconvicted during the follow-up

period. Furthermore, those Serious Violent Offences offenders who were convicted were significantly less likely to receive a further sentence of imprisonment than "ordinary" offenders – thus suggesting that their reoffending was in fact likely to be less serious than that of their ostensibly less dangerous counterparts.

To answer the second question, the post-release history of the Serious Violent Offences prisoners was examined to determine whether or not their first reconviction was for a Serious Violent Offences offence, and whether or not the offence for which they received the heaviest penalty during the follow-up period fell within this category. Contrary to the assumption underlying the legislation but consistent with the findings in other jurisdictions, we would predict that the "serious" offenders would not in fact go on to commit further serious offences of the same type. That, indeed, proved to be the case. Of the 43 potential Serious Violent Offences offenders just one (2.3 percent) was reconvicted of a further s 2 offence on first reappearance, and just three (6.9 percent) received their heaviest subsequent penalty for such offences.

Comparison of "serious" and "ordinary" offenders showed that it was in fact the latter group who contributed the bulk of s 2 offences recorded during the follow-up period. Of the 13 Serious Violent Offences offences committed by the total sample at their first reconviction, 12 (92.3 percent) were committed by "ordinary" offenders. Similarly, the "ordinary" offenders contributed 19 (86.4 percent of the 22 Serious Violent Offences offences for which offenders received the heaviest penalty during the follow-up period. While it is true that the "ordinary" offenders were marginally less likely to commit Serious Violent Offences offences on release (2.1 percent were convicted of a Serious Violent Offences offence on first reconviction and 3.3 percent received their heaviest post-release penalty for a Serious Violent Offences offence) the numbers are so small as to be insignificant. They certainly cannot provide a sensible justification for the Serious Violent Offences policy and they provide no support for the assumption on which it is based – that Serious Violent Offences offenders are an inherently more dangerous group.

The data presented here is, of course, based on officially recorded reoffending rates. Would it make any difference if we looked instead at actual offending? In other words, might it not be the case that Serious Violent Offences offenders, while being caught at much the same rate and for much the same offences as "ordinary" offenders, nevertheless in fact offend more seriously and, perhaps, more frequently? One only has to state the question like this to realise its absurdity. We simply have no reason to believe, either in logic or from what we know about offenders and offending patterns, that such offenders are likely to commit more and more serious undetected offences than any other group of offenders.

The problems of the Serious Violent Offender classification

The data what we have, then, suggests that our efforts to identify and neutralise "dangerous" offenders on the basis of their current offending, are largely misconceived. The group of offenders identified by the legislation – and, indeed, by much of current sentencing practice – is not the group who in fact go on to commit further serious violent offences on release. In retrospect this result is not particularly surprising. There are at least two basic reasons for this.

First, the literature on offence specialisation makes it clear that offenders typically engage in a wide range of illegal behaviours of varying seriousness and type.[5] The New Zealand data confirm this. In the study noted above, less than half of all those reconvicted during the follow-up period were reconvicted for offences within even the same broad offence category (eg violent, sexual, property) as that for which they were imprisoned. Furthermore, this effect remained whether the criterion was first post-release conviction (36.1 percent) or the post-release conviction attracting the heaviest penalty (43.4 percent). Hence the assumption that Serious Violent Offences offenders represent a group who are particularly at risk of committing further Serious Violent Offences offences is palpably false. This plus the failure of offence specialisation studies to identify any significant predictive relationship between current and future offending reinforces the commonsense conclusion that most offenders commit different types of offences in an unpredictable fashion, dictated primarily, it seems, by the situations or opportunities with which they are confronted.

Secondly, the focus of the Serious Violent Offences legislation on current serious offending is problematic because it fails to take into account the statistical principle of regression – the observation that in all areas of human behaviour extreme events are by definition infrequent and are likely to be followed by less extreme (or in the present case, less serious) events. This principle suggests that most offenders' behaviour is likely to be relatively trivial and that serious offences of the sort that are caught by the Serious Violent Offences category will be rare, and will be both preceded and followed by periods of less intense criminal activity. Thus, for Serious Violent Offences offenders, even when subsequent offending is broadly of the same type, it is most likely to be less serious and will therefore either result in charges falling outside the Serious Violent Offences criteria, or fail to attract the 2-year minimum sentence required to trigger the Serious Violent Offences classification.

If the problem were simply that "dangerous" offenders typically engage in a wide range of offending behaviours and that much of this behaviour will in fact be relatively trivial, it would, of course, be possible to argue that the strategy could still be salvaged by the development of more refined (ie individualised) predictive techniques based on past offending behaviour. Unfortunately this would be to misinterpret the sort of data presented above. Those data suggest very strongly that the best we can do is to identify a group of offenders who have committed one or more serious offences in the past and who may do it again at some time in the future. This is scarcely to identify a class of "dangerous" offenders. Furthermore, although we know that this group will contribute disproportionately to future conviction rates for serious violent crime, our ability to predict the

future behaviour of any one individual on the basis of his or her membership of the group is minimal. This is shown clearly by the data presented above where more than 90 percent of the Serious Violent Offences offenders had not been convicted of a further s 2 offence in the 2½ years following release.

The notion of "dangerousness" as something which can be ascribed to, or identified in, individuals and which remains reasonably stable over time accordingly finds precious little support in the data we have on offenders and offending. Indeed, even the ascription of dangerousness to offenders suffering from mental disorder, which was the one area in which strong behavioural science support was initially thought to exist, is now being challenged by a new generation of more sophisticated research. In a recent study, for example, Link and Stueve found that it is active psychotic symptoms rather than a history of psychosis that elevates the risk of violence and that these symptoms may occur within both ex-patients and members of the community who have never received any form of psychiatric treatment.[6] This sort of finding has resulted in the violence prediction literature turning toward the identification and prediction of risk factors or risk scenarios that combine both internal and external environmental conditions in preference to some notion of a stable and enduring trait of dangerousness that resides within the person and that can be identified by reference to past conduct and record.

None of this is to deny that there are a small number of offenders who are consistently and transparently "dangerous". There is probably much truth in the commonsense notion that repeated and recent violence is a good predictor of future violence. A selective incapacitation policy may well make considerable sense in relation to such offenders, although even there it raises the spectre of increasing inconsistency in sentencing and of individual injustice. Nevertheless such offenders are very few in number and make only a minor contribution to the overall level of even serious violent offending.

What this suggests is that, in so far as it is possible at all, the prediction of future serious offending is a much more complex task than either the Criminal Justice Act or current judicial sentencing policy suggests. The task cannot be reduced to reliance on one or two crude variables drawn from "commonsense" perceptions of what offenders are "really like" as evidenced by either their present offending or past record.

Conclusion

The data on the reoffending patterns of New Zealand prisoners, and mechanisms that underlie them, confirm the inadequacy of our strategy for dealing with future violent offending. If the primary function of our current policies and practices in this area is seen as largely symbolic, this may not matter unduly – although even then many would regard the injustice and inconsistency inherent in a flawed predictive strategy of this sort as outweighing any potential symbolic benefit. However, if the intention is to achieve some sort of utilitarian purpose as well – for example through the enhancement of the deterrent and incapacitative effects of imprisonment – the Serious Violent Offences provisions seem unlikely to achieve this aim. Even within the sub-group of offenders who find their way into the criminal justice system, significant numbers of future Serious Violent Offences offenders are unlikely to be captured by a criterion that focuses upon a single current offence. Our data suggests that something in the order of 85 percent of the Serious Violent Offences offences committed by released prisoners will in fact be committed by those who do not currently fall within the Serious Violent Offences category. Conversely the strategy will clearly seriously overpredict the dangerousness of current Serious Violent Offences offenders. Again, our data suggests that in fact only about 1 in 15 Serious Violent Offences offenders will go on to be convicted of a further "serious" offence – at last within a two-three-year period.

More generally, our data in fact suggest that, depending on how you measure it, the current criteria for selecting future Serious Violent Offences offenders are likely to get it wrong in between 93 percent and 98 percent of the cases. This means, of course, that a considerably better prediction rate could be achieved by simply tossing a coin. The fact that such a method would be rightly criticised as arbitrary is itself a telling comment on current penal policy.

All this suggests that the Serious Violent Offences provisions are likely to ensure that we get the worst of both worlds: substantial injustice is likely to be done to those whose effective sentence is increased on the basis of a false prediction that they will otherwise continue to commit serious violent offences; the public purse is defrauded to the extent that it must cover the extra costs involved in incarcerating and supervising such offenders for no terribly good purpose; and the community does not receive the protection from further violent crime that it has been promised.

Within the current sentencing system the conclusions to be drawn from this line of argument are simple. Any sentencing regime founded on the assumption that the potential for future serious violence can be predicted merely from current offending and prevented through extended periods of imprisonment is badly flawed. In so far as the Criminal Justice Act seeks to encourage Courts to fix minimum terms of imprisonment on this basis it should be resisted. Lawyers and Judges should be encouraged to make use of the professional literature in this area so as to avoid the trap of assuming that future prevention is a realistic goal for sentencing in such cases.[7] Under s 80(5) a minimum sentence may only be imposed if the Court considers that the circumstances of the case are "so exceptional" that its imposition is justified. We would argue that, on the basis of the material presented here, it would in most cases be improper for a Court to interpret this as enabling the imposition of a minimum term purely on the grounds that the nature and circumstances of the current offence seem to point towards the likelihood of future serious violent offending. While there will certainly be a small number of cases in which the current offence fits into a pattern of recent, repetitive violence which is likely to bode ill for the future, most offenders falling under this section will be at little risk of such reoffending, no matter how extreme the circumstances of their current offence.

If we were serious about using the prediction of future risk as a sentencing tool, we would need to adopt risk

management programmes which took proper account of the complexities of individualised risk assessment and which would enable us to tailor the criminal justice response much more to the needs and situation of the individual offender. To be effective, such programmes must focus on and be able to identify high risk offenders so that appropriate incapacitative and rehabilitative strategies can be put into place. All the evidence we have suggests that it is only with very high risk offenders that the expense, intrusiveness and potential injustice of such an approach can be justified.[8] As the figures given above graphically show, attempts to predict and address risk among more widely defined groups are problematic in the extreme. Above all, such an approach can hope to succeed only if the sentencing structure provides the penal system with the flexibility to enable it to identify and address all the risk factors in the offender's life and environment which are related to reoffending. All this requires a significant move away from the current sentencing structure for serious offences and from the sort of strategy enshrined in the Serious Violent Offences provisions.

In so far as it is concerned with future behaviour, the current system has always relied heavily on long-term predictions made primarily by the sentencing Judge. Until recently the effects of this have been mitigated to at least a limited extent by the parole system and by programmes such as Throughcare which have attempted to manage the risk of reoffending across the prison population in general by controlling the reintegration process and matching treatment programmes to offenders. The Serious Violent Offences strategy, with its crude lumping together of high, medium and low risk offenders, its general restriction on parole eligibility, its acceptance of judicially imposed minima and its general emphasis on the need to maintain the integrity of judicial decisions over lengthy periods of time, runs contrary to even this limited investment in effective risk management.

A true risk management approach would reverse this, moving away from the fixed judicial term and the reliance on imprisonment as a one-stop-shop for risk reduction in serious cases. Sentencing would need to distinguish clearly between the demands of punishment and those of behavioural control, appreciating that risk resides not in the offender but in the interaction between the offender and his or her environment. The recognition that measures intended to reduce future risk require the flexibility to enable the environmental dimension to be addressed, may well imply less rather than more reliance on lengthy prison sentences for such offenders and places a greater emphasis on transfer from custodial to community-based programmes. It raises again the central dilemma of all modern penal systems: how to combine the demands of punishment with the equally legitimate demands of the community that the penal system do something to reduce the risk of reoffending. ❑

1 Hon Doug Graham in moving the second reading of the 1993 Bill. Quoted in *Hall's Sentencing* (Butterworths, Wellington, 1993) S1.6

2 P Speir, F Luketina & S Kettles *Changes in the Seriousness of Offending and in the Pattern of Sentencing, 1979-1988.* (Department of Justice, Wellington, 1991).

3 This approach can be seen not only in the New Zealand provisions but also in the Criminal Justice Act 1991 (UK) and in comparable legislation in North American, Australian and other jurisdictions.

4 M Brown *Decision Making in District Prisons Boards.* (Department of Justice, Wellington, 1992)

5 See, eg, D P Farrington "Childhood Aggression and Adult Violence: Early Precursors and Later Life Outcomes." In D J Pepler and K H Rubin (ed) *The Development and Treatment of Childhood Aggression.* (Erlbaum. Hillsdale, NJ. 1991) 5-29; M W Klein "Offence Specialization and Versatility Among Juveniles" (1984) 24 *British Journal of Criminology* 185-194; M E Wolfgang, R M Figlio and T Sellin *Delinquency in a Birth Cohort.* (University of Chicago Press, Chicago, 1972).

6 B G Link and A Stueve "Psychotic Symptoms and the Violent/Illegal Behavior of Mental Patients Compared to Community Controls." In J Monahan and H J Steadman (ed). *Violence and Mental Disorder: Developments in Risk Assessment.* (University of Chicago Press, Chicago, 1994) 137-160.

7 Good accessible material on this area can be found in A E Bottoms ad R Brownsword "Dangerousness and Rights". In J W Hinton (ed) *Dangerousness: Problems of Assessment and Prediction* (Allen & Unwin. London, 1983); J Floud and W Young *Dangerousness and Criminal Justice* (Heinemann. London. 1981); S D Gottfredson and D M Gottfredson "Behavioural Prediction and the Problem of Incapacitation". (1994) 32 Criminology 441-474; M Miller and N Morris "Predictions of Dangerousness: An Argument for Limited Use". (1988) 3 Violence and Victims 263-283; J Monahan *The Clinical Prediction of Violent Behaviour* (US Dept of Health and Human Services, Rockville, MD, 1981).

8 See eg D A Andrews and J Bonta *The Psychology of Criminal Conduct.* (Anderson Publishing, Cincinnati, OH, 1994).

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tion is – when? The challenge may be a lot easier for the new generation of younger lawyers.

A desirable golden rule for all litigators is –would I incur this cost or take this step if I was paying for it myself? The client's resources should be treated as one's own.

I predict that two likely developments will spur the process on. The day will come (and probably already has in California) when a lawyer is sued for failing to give proper advice as to ADR options.

I also predict that consideration will need to be given as to whether the New Zealand Law Society's Rules of Professional Conduct, which are the ethical rules for all lawyers, ought to impose a positive obligation on those involved in litigation to consider and advise their clients as to settlement or ADR options.

Summary

- A bill to enact a new Arbitration Act, based on the Law Commission/UNCITRAL model, may be introduced into Parliament soon.
- ADR is becoming something of a boom industry. Its development is fully to be encouraged.
- There are some potential pitfalls with ADR which need to be avoided.
- There is a need for national coordination of ADR.
- Court-based ADR is already in existence in a variety of forms, but more needs to be done.
- This includes making consideration of and information about ADR mandatory in all litigated cases.
- Further reforms in our civil litigation system are required.
- These include making available the streamlined and the mini-trial alternatives in litigation cases.
- There is still to be overcome a basic attitudinal problem by litigation lawyers towards ADR. ❑

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