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# LEWIS ELLIOT OR ROSCOE POUND?

This edition examines a number of aspects of legal education in New Zealand. Coincidentally, Professor Peter Birks, the Regius Professor of Civil Law at Oxford, has been visiting New Zealand and discussing the relationship between acadaemia and the profession. Since the Regius Chair of Civil Law epitomises the historical gulf between the universities and the professions in England, his views make interesting, if not ironic, reading.

Professor Birks stressed that the study of the common law is a young subject in academic terms. In fact it is really only in the lifetime of now retired professors such as Sir William Wade and Jock Brookfield that it has become an academically oriented subject. Lewis Elliot, the fictional law don at Cambridge in C P Snow's *Strangers and Brothers* series, slid into his Fellowship in the 1930s without having any university degree at all and within living memory law was largely taught in New Zealand by practitioners whose only qualification was a heavily professionally oriented LLB. But today we are coming to an end of a generation for whom it has been quite normal to go straight from post-graduate work into a university post and remain there for a lifetime. That style now seems threatened by some for the developments that Professor Birks discussed.

Meantime it is not clear that law has matured into a fully academic subject in New Zealand. The causes of this are to be found in pressures from within the faculties themselves, from the profession and from the university administration.

Professor Birks discussed a number of attitudes which he described as threats to the academic study of law. These were rooted in his experience in England, but make interesting pegs on which to hang comments about the situation in New Zealand.

First, he deplored what he called the "milch cow" attitude. This is the belief held by governments and university administrators that law is a cheap money spinner. This results in cost cutting and the slow decline in quality of the teaching and research. He did not mention the most dangerous aspect of this attitude which is the effect of the redistribution of income away from law faculties. The results of this are crippling. One of the chief reasons for the lack of innovation and development of new courses, especially at Masters level, is that under the current incomprehensible accounting regimes employed at universities, to undertake such a task is simply to take on a great deal of extra effort and work, the benefits of which will flow elsewhere.

University administrators are by and large central planners and redistributors. Thus some will not allow law faculty libraries to make money from providing services to law firms because it is "unfair" that one part of the library can make money when others cannot. Likewise, grants made to academics by outside bodies are heavily taxed by the university to pay for "overheads", the administrators apparently not understanding that since academics are expected to do research anyway the opportunity cost to the university is zero. The mere fact that at least one university recently seriously proposed to remove all royalties from its staff demonstrates the complete lack of understanding of the effects of incentives and of taxing those who produce, for the benefit, presumably, of those who do not. As one of the potentially greatest revenue earners in universities, law faculties suffer disproportionately from these attitudes.

Second, Professor Birks identified an attitude amongst some professionals that legal education is a mere rite of passage, that one has to go through before getting on with real life. In England the professions have announced that they value a liberal education which need only contain the core law subjects. What the English professions have forgotten (or in many cases never discovered) is first, that law is, or can be, a liberal education and that secondly education requires at some point the pursuit of some subject in a sustained way to a sophisticated level. In New Zealand the LLB is almost the only undergraduate degree course which meets this criterion, the quality of BA's and BSc's varying wildly according to the way in which the student has put together the self-designed course. The Council for Legal Education has specified that it requires the equivalent of four years at university including three years' full time study of law. This seems a sensible approach which may be the product of the fact that the Council includes the law deans as well as representatives of the profession. But to be accurate, one should say that the Council represents the current law deans. The Council must take care to avoid any appearance of cartelisation. One also wonders whether it would ever be prepared to take the step of disapproving a particular law school's degree, a sanction that Professor Birks said was most important in the United States, if that meant expelling one of its members. This would require a level of personal confrontation which does not seem to come easily to New Zealanders.

Next, Professor Birks addressed the "ivory tower" approach. This, he said, manifested itself in two ways. The first was a belief that certain subjects, such as procedure and ethics, were not worthy of serious intellectual attention. Quite obviously, this is not true. Procedure, for example, is the product of the values of the legal system. If those values and their relationship to procedure are not understood one can easily descend to intellectually lazy statements about "substance not form" "substantial justice" etc. There can be no doubting that the teaching of such subjects in the LLB is a valid exercise. But the CLE should not consider this an invitation to make subjects like ethics and procedure compulsory in the LLB. The inevitable consequence of prescribing too many compulsory subjects is that they will either have to be taught by people who are not interested in them, or as in the past, by practitioners who attend at eight in the morning to read aloud chunks from *McGechan*.

The second manifestation of the ivory tower approach that Professor Birks identified, was a loss of involvement in what went on in the Courts altogether, usually justified by reference to some lofty role as an observer of society. Professor Birks was probably not aware that our Parliament has seen fit to legislate for a role for the universities as "the critic and conscience of society". This phrase is quite meaningless, since there is no such entity as "society" which is capable of doing things that bear on the conscience. Only individuals can do such things.

In the North Island law faculties at any rate, the whole public law area, plus others such as employment law, has become hopelessly politicised. The result is anything but a diversity of views, rather a collectivist conformity which one fails to join at one's peril. This is helped by the relativism embedded in some university academic hierarchies.

Fourthly, Professor Birks referred to the "treasure in heaven" problem: by suffering in this world, law teachers will build up treasure in the next, or perhaps in posterity. Unfortunately, this will not pay the mortgage or keep one's children at the standard of living that their lawyers' children friends enjoy. The root of the problem here is the insistence by the universities, for the sake of peace with the union, that law teachers are paid essentially the same as teachers in other subjects. This is so patently silly that it could only happen in an ivory tower utterly detached from such vulgar problems as supply and demand. The results are serious. They are not just that there is a constant outflow of quality staff from the universities into the profession. One of the prime reasons for the lack of postgraduate study in law is this distortion. In some departments academic salaries are substantially better than could be earned outside. The result is large numbers of applicants per position which enables the departments to crank up the academic qualifications required for appointment. This in turn creates demand for their PhD and Masters courses. Meanwhile law faculties still occasionally appoint to lecturer positions applicants with no postgraduate degree at all and a one year Master's degree is all that is expected.

Finally, Professor Birks discussed teaching professionally oriented matters such as drafting and negotiation. He was all in favour of law faculties tackling these matters. Again, this is all well when there are staff who are interested and capable of dealing with these subjects. But if they become the fad of the moment they end up being taught by staff who are neither. A classic example is mooting. For most people, staff and students, this is an exercise wearily gone through only because it is compulsory. As preparation for Court it may even be dangerous as it appears to cement in the belief that one must begin by reading at length from papers that the Judges should have read. John McLinden, now practising as a barrister in London, has spoken on several occasions to the effect that the tutorial system of Oxford and Cambridge, where mooting is a voluntary students' association activity, prepares one far better for Court than does the New Zealand system, for all the moots and endless references by lecturers to what may or may not happen in practice.

Professor Birks had begun by arguing that the law faculties play a vital role in the social and political structure. They are the guardians of certain values. His example was that we do not settle arguments the way that they were recently settled in Bosnia. Less dramatically, the values the law faculties should guard would include some meaningfully defined concept of the Rule of Law, the idea that there are some rules and principles that do not get broken whatever the policy exigencies, the idea that law is something different from policy or sociology. Unfortunately, being the critic and conscience of society does not seem to include the vigorous defence of these views. ❑

# LETTERS

In my 56 years few have thought to accuse me of modesty. The absence of this trait makes it possible for me to assert that, in some 32 years of practice (24 of them as a barrister sole) I have built a nationwide reputation as an expert in resource management law, and as a leader of the planning bar. I have also accumulated over the last ten years and from two Solicitors General, five letters regretting to inform me that my application for appointment as one of Her Majesty's Counsel has been unsuccessful.

Well, superficially at least, there is nothing of importance in that. It is now abundantly clear that I will not get past the gatekeepers. So what? Will anyone but the gatekeepers (whoever they are) be at all interested to know that there will be no further importuning by me?

There may, however, be something of deeper importance. My two most recent bids for silk were made on the urging of a number of senior planning advocates throughout New Zealand. I am led to believe that, were enquiry to have been made, my most recent application would have received support from a majority of the Environment Court Judges (that is, all of those with whom the matter was discussed) and from most of the Christchurch silks. This latest rejection cannot therefore have been on the basis of my lack of ability as an advocate (about which the gatekeepers are, at a personal level, profoundly ignorant) nor my lack of seniority, expertise or reputation. Nor can it be founded (I would assert) on some notion that the jurisdiction in which I practice is concerned only with relatively unimportant matters – as anyone with any experience of it would know, the Environment Court routinely deals with issues of great social significance and upon which millions of dollars may depend. Instead it appears based on a (much rumoured) policy decision – a prejudice in every sense of that word – to the effect that those who do not appear regularly in the High Court or Court of Appeal may not aspire to silk.

And, of course, I do not appear regularly in those fora. This is inherent both in the status of the Environment Court as one of specialist jurisdiction, and the fact that I work full time in that specialist field. The time is long past, I assert, in which our legal system can be seen as simply lineal, such that every issue of any consequence inevitably gravitates to the High Court, and thence to the Court of Appeal.

The point of my letter is this: there are, as I know, many young practitioners now considering practice as a barrister sole and specialising full time in resource management law. What they should know is that a practice of that kind will deprive them of recognition within the profession. They will find (as I have found) that over time this will lead to a growing doubt within the public mind as to their competence ("why is it that you are not, when ... ?"). Because of this they will find (again, as I have found) that instructions will be diverted to those less able and experienced in the field, but who, by practising in approved jurisdictions, have attained membership of the club.

This knowledge may lead them into other fields of law – to the great disadvantage of an increasingly important and distinct field of jurisprudence. On the other hand, and perhaps more healthily, given the present dispensation, they may simply come to regard the rank as neither worth aspiring to nor preserving.

**John R Milligan**

# CANCELLATION OF LEASES

*David Grinlinton, The University of Auckland*

*explores the interface between contract and land law*

## DUAL NATURE OF LEASES

It is trite law that a lease is both a contract and an estate in land. Whilst a tenancy requires a contract to create it, it does not require one to continue it, and the two relationships are distinct. (See *City of London Corporation v Fell* [1993] 2 All ER 449, CA, per Nourse LJ)

In recent times the Courts have emphasised the contractual element in the relationship of landlord and tenant in a number of decisions applying contractual doctrines such as mistake, frustration and repudiation to leases. The application of the contractual doctrines of repudiation and frustration in particular have marked a departure from earlier held views that once a lease is formally executed the essential contractual bargain is fulfilled and neither repudiation for loss of bargain nor frustration can thereafter occur. (see eg *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1971] 3 All ER 1226 (CA))

The doctrine of repudiation has now been applied to leases in Canada (see eg *Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710 (SC)); Australia (see eg *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 (HCA)); New Zealand (see eg *Williams v KF Meates & Co Ltd* (1971) 1 NZCPR 594 (CA), *Miller v Mattin* (1990) 2 NZ ConvC 191,714 (CA), *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275 (CA)); and in the lower Courts in England. (*Hussein v Mehlman* [1992] 2 EGLR 87). Similarly it is now accepted that the doctrine of frustration applies to leases. (*National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, *Maori Trustee v Prentice* [1992] 3 NZLR 344). This article will be confined to a discussion of repudiation and cancellation in the context of leases.

In New Zealand the doctrine of repudiation is incorporated in the Contractual Remedies Act 1979 along with a number of other grounds for cancellation and recovery of damages. A number of issues arise in the application of these contractual remedies to leases including:

- The extent of the right to cancel under the Contractual Remedies Act 1979;
- When cancellation is available;
- The measure of damages;
- The need for privity of contract;
- The interrelationship of cancellation with re-entry and forfeiture;
- The availability of relief against forfeiture following cancellation; and
- The effect of cancellation on registered leases.

## CONTRACTUAL REMEDIES ACT – CANCELLATION

Section 7(2) Contractual Remedies Act 1979 provides that:

> a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

In addition the Act also provides that a party may cancel for misrepresentation or breach of a stipulation by the other party where the truth of the representation or the performance of the stipulation is essential, or the effect of the misrepresentation or breach is to substantially alter the benefit or burden of the contract to his or her detriment. (ss 7(3) & (4); and *Auto Point Motors Ltd v Hollows* (1992) 2 NZ ConvC 191,422 at 191,425-191,426, *Nordern v Blueport Enterprises Ltd* [1996] 3 NZLR 450 at 458-459)

While the Act preserves the rights of a successful party to recover common law and equitable damages upon cancellation (ss 8(4) & 10(1)), the Court is also given a wide discretion to grant relief (s 9(1) & (2)). The parties to a contract may expressly provide for remedies for repudiation or breach in the contract of lease and the Act will then take effect subject to those provisions. (s 5; and *Benjamin v Wareham Associates (NZ) Ltd* (1990) 1 NZ ConvC 190,638 at 190,647, *Morris* at 277 per Hardie Boys J, *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd* (1996) 3 NZ ConvC 192,398 at 192,416-418)

A party to a contract loses the right of cancellation under the Act if he or she affirms the contract knowing of the repudiation, misrepresentation or breach. (s 7(5); and *Westpac Merchant Finance Ltd v Winstone Industries Ltd* [1993] 2 NZLR 247, 255)

## WHEN IS CANCELLATION AVAILABLE?

In *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, Lord Wilberforce stated (at 576) that –

> Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations.

Cancellation may be available either to the landlord or the tenant in appropriate circumstances.

Abandonment of possession of the premises by the tenant with no intention of continuing to perform its obligations will invariably amount to repudiation (see eg *Miller*, *Benjamin* and *Metcalfe v Waterbedroom (Dominion Road) Ltd*

(1991) 1 NZ ConvC 190,756. Simply failing to pay the rent or perform some other covenant may not in itself amount to a repudiation (*Morris* at 277-278, per Hardie Boys J, at 282 per Gault J, and at 288-289 per Gallen J), although persistent breach may evince an intention on the part of the defaulting party not to perform the obligations in the future (see eg Australian decisions: *Progressive Mailing House*; *Ripka Pty Ltd v Maggiore Bakeries Pty Ltd* [1984] VR 629; *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 NSWLR 105 (CA)). Further, non-payment of rent or non-performance of a covenant in the lease may be regarded as a breach of an essential term or a breach which substantially reduces the benefit of the contract entitling the innocent party to cancel under ss 7(3) & (4) of the Contractual Remedies Act 1979. (eg *Auto Point Motors* at 191, 425-426)

On the other side, breach of the covenant for quiet enjoyment by the landlord re-entering and preventing continued occupation by the tenant will normally constitute a repudiation by the landlord. (as in *Cash Handling Systems*)

Where the lease expressly states that a particular covenant or obligation is essential, it would seem that this will entitle cancellation under the Act for breach of that covenant or obligation. (see s 5; and *Morris* at 278 per Hardie Boys J, and the note by Slatter at (1994) 6 BCB 262)

In all cases considerable caution must be exercised by the party asserting there has been a breach as a wrongful cancellation by one party may constitute a repudiation entitling the other party to cancel. (see eg *Cash Handling Systems* where the landlord's wrongful cancellation and re-entry was held to be a repudiation entitling the tenant to cancel and seek damages)

## PRIVITY OF CONTRACT

While the remedy of cancellation clearly applies between the original contracting parties, including any guarantors, it is uncertain whether it applies where the lease has been assigned or the reversion transferred. In most cases where a lease is assigned it is a condition precedent to the landlord's consent to the assignment that the proposed assignee enters into a direct covenant with the landlord to perform covenants in the lease. This creates privity of contract between the landlord and the assignee thus allowing the parties resort to contractual remedies in addition to the remedies which flow from their tenurial relationship such as distress and forfeiture.

Where there is no privity of contract, however, the question arises whether purely contractual remedies are available to the parties. Surprisingly the Courts in some cases appear to have allowed cancellation by the transferee of the reversion and the award of contractual damages against the original tenant and guarantor following breach by an assignee even though there appeared to be no privity of contract between the parties. (see *Benjamin* and *Metcalfe*)

It is therefore useful at this point to restate the principles that apply to the enforceability of covenants and obligations when leases are assigned and reversions transferred. In such cases the benefit and burden of covenants which touch and concern the land run with the land and are enforceable by successors in title of both the leasehold and reversionary interests. This is consequent upon the tenurial relationship of landlord and tenant for the time being rather than upon any contractual relationship. Damages for breach of covenant are available during the lease, but once the lease is terminated by re-entry and forfeiture, or surrender, damages are limited to breaches occurring prior to termination. Where there is no privity of contract between the parties, and the tenurial relationship of landlord and tenant has been terminated, it is, with respect, difficult to determine upon what basis contractual damages such as future loss of benefit may be recovered. While a contract of lease is necessary to create the estate of leasehold, the reverse is not true – a tenurial relationship cannot, by itself, create a contractual relationship between the landlord and tenant for the time being.

***Surprisingly the Courts in some cases appear to have allowed cancellation by the transferee of the reversion and the award of contractual damages against the original tenant and guarantor***

It is of course possible at law to assign the benefit of a contract. It may be suggested that s 112(1) Property Law Act 1952 (which provides for rent and the benefit of a lessee's covenants to run with the reversion) operates to assign the benefit of the lessee's covenants to pay rent and perform other obligations. If accepted this suggestion may explain *Benjamin* and *Metcalfe*. However s 112(1) is construed as no more than a word saving provision restating the common law rule that covenants which touch and concern the land run with the land in a tenurial sense. It does not have the effect of creating a contractual relationship between the lessee and the transferee of the reversion. Therefore an express assignment of the benefit of the lessee's covenants would need to be made before the transferee of the reversion could rely upon purely contractual remedies. Similar arguments would apply in considering the effect of s 63 Property Law Act upon the enforceability by the assignee of a lease of the benefit of the landlord's covenants.

The rule that you can assign the benefit of a contract will not assist a lessor in attempting to enforce the burden of the original tenant's covenants against an assignee, nor a tenant attempting to enforce the burden of the original landlord's covenants against a transferee of the reversion as you cannot, at common law, assign the burden of a contract.

Brief reference should also be made to the Contracts (Privity) Act 1982 which provides that covenants made for the benefit of a person not a party to the contract are enforceable by that person. However, for that Act to apply in this context it would be necessary for the assignee or transferee to have been designated by name, description, or by reference to a sufficiently defined "class" in the original contract of lease. A reference to "assigns" or "transferees" alone would probably not be considered a sufficiently defined class. (cf *Field v Fitton* [1988] 1 NZLR 482, 493-494 (CA) per Bisson J)

In conclusion it is the writer's view that (subject to the possible exceptions outlined above) where a lease has been assigned or the reversion transferred there will be no contractual relationship between the parties and the Contractual Remedies Act 1979 will not apply. The parties will be limited to damages for breach of covenants which touch and concern the land accrued to the date of termination based upon their privity of estate to that date.

## MEASURE OF DAMAGES

Damages for loss of bargain are available upon cancellation for misrepresentation, repudiation or breach, whether pursuant to an express term in the lease, or under the Contractual Remedies Act 1979. (see eg *Williams*, *Miller*, and *Morris*) The measure of such damages is generally the financial loss sustained by the innocent party as a result of the breach (see eg *Williams*, *Benjamin* and *Metcalfe*). In *Morris* Hardie Boys J expressed the measure as "the value of the promised benefit which the plaintiff has not received". (p 277)

Where the lessor has cancelled for the lessee's repudiation or breach, damages will normally be the rent reserved by the lease to the end of the lease term, less the rental value of the premises obtainable upon re-letting (see *Williams* at 597, *Benjamin* at 190,645, and *Metcalfe* at 190,760). For the purposes of this calculation the "rental value" will normally be that rent actually obtained upon re-letting, although evidence may be called to ascertain the figure objectively. (cf *Auto Point Motors* at 191,427-428)

Upon cancellation for repudiation or breach the lessor is under a duty to mitigate his or her loss by, for example, making reasonable efforts to re-let (see *Benjamin* at 190,645, *Metcalfe* at 190,758-759, *Auto Point Motors Ltd* at 191,427-428, and the obiter discussion in *Seon Developments Ltd v Roger* (1993) 2 NZ ConvC 191,664 at 191,671-674 (CA) per Sir Gordon Bisson). The onus is normally on the lessee to show a failure to mitigate. (*Auto Point Motors* at 191,427-428)

Where the tenant has cancelled, damages may include compensation for loss of earnings and re-location costs, and exemplary damages. (*Cash Handling Systems* at 192, 423-433)

## EFFECTS OF CANCELLATION

### Re-entry and forfeiture

Not every re-entry and forfeiture will involve breaches of covenant which would entitle the innocent party to recover loss of bargain damages under the Contractual Remedies Act (*Auto Point Motors* at 191,426, *Haddon v PK & CA Bird Motels Ltd* (1993) 2 NZ ConvC 191,600 at 191,608, *Morris* at 276-279 per Hardie Boys J, at 282 per Gault J, and at 288-290 per Gallen J). However, a valid forfeiture will terminate both the estate and the contract of lease while preserving the right to damages for loss occasioned by breach up to the date of re-entry. (*Benjamin* at 190,647, and *Cash Handling Systems* at 192,416-420)

Where there is an express power of re-entry and forfeiture for breach of covenant or obligations which would not normally allow cancellation under the Contractual Remedies Act, s 5 of that Act would seem to give a right to cancel for such breaches, although damages for loss of bargain will only be available if the breach would otherwise give a right to cancel pursuant to s 7(2)-(4) of the Act. (*Benjamin* at 190,647, *Morris* at 277-279 per Hardie Boys J, and *Cash Handling Systems* at 192,416-417)

Where the breach would also justify cancellation under the Contractual Remedies Act 1979, it would seem that re-entry will constitute sufficient compliance with the notification requirements of ss 8(1) and (2) of that Act thus clearing the way for a loss of bargain damages claim. (*Benjamin* at 190,647, *Cash Handling Systems* at 192,420)

It would seem that every cancellation will also operate as a forfeiture (*Benjamin* at 190,647, *Auto Point Motors* at 191,426, *Cash Handling Systems* at 192,420), although where the tenant is in breach of a covenant other than the covenant to pay rent, a notice under s 118(1) Property Law Act 1952 must be served on the tenant allowing the opportunity to remedy the breach within a reasonable time prior to cancellation under the Contractual Remedies Act 1979. (This would seem to be the effect of s 15(g) Contractual Remedies Act: *Cash Handling Systems* at 192,418-420)

### Relief against forfeiture

The statutory jurisdiction of the Court to relieve against forfeiture under s 118(2) Property Law Act is expressly preserved by s 15(g) Contractual Remedies Act. It is uncertain, however, whether its equitable jurisdiction is available where cancellation has been effected pursuant to s 7 of the latter Act. The view has been expressed that in many cases "the circumstances which would justify cancellation of the contract (and therefore entitle the lessor to damages for loss of bargain) would be those circumstances in which relief against forfeiture of the estate would be declined ...", (Slatter (1993) 6 BCB 206 referring to the obiter comments of Greig J in *Haddon* at 191,609), although this will probably not be a universal rule.

In any event the discretion of the Court under s 9 Contractual Remedies Act 1979 to grant relief is probably wide enough to encompass the types of relief available under the equitable jurisdiction without importing the "clean hands" doctrine.

### Registered leases

In *Westpac* Anderson J expressed the view (at 254) that where a lease is cancelled pursuant to the Contractual Remedies Act 1979, such cancellation cannot in itself terminate the registered legal estate, although it will cancel the contract and estate of lease in equity leaving the lessee holding the legal estate as a resulting trustee on behalf of the lessor. As a valid cancellation also entails forfeiture, then upon re-entry and recovery of possession it follows that the re-entry may be notified on the register pursuant to s 121 Land Transfer Act 1952.

## CONCLUDING COMMENTS

Recourse is increasingly made to contract law remedies where there has been a breakdown in the landlord and tenant relationship. This brief review of the law illustrates the extent and complexity of the interrelationship of traditional property law remedies (such as re-entry and forfeiture) with the remedy of cancellation as incorporated in the Contractual Remedies Act 1979.

Recent decisions exhibit a tendency to emphasise the contractual element of leases at the expense of their tenurial status. A lease nevertheless remains an estate in land and the established principles governing the relationship of landlord and tenant continue to be important. This is particularly so where the parties for the time being in the relationship of landlord and tenant are not in privity of contract with each other and contractual remedies may not be available. It is important for practitioners and the Courts to remain cognisant of the dual nature of leases and the various property law and contract principles which may (or may not) apply in this area.

[A more comprehensive treatment of this subject can be found in Hinde, McMorland and Sim, *Land Law in New Zealand*, (1997) at pp 564-576] ❑

# TRANS-TASMAN JURISPRUDENCE

*Rembert Meyer-Rochow*

***asks whether the Courts are developing their own special relationship***

Australia and New Zealand's close proximity and good political relationship with each other has, along with CER, given rise to the development of a trans-Tasman jurisprudence.

In *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (unreported CA NSW, 417/88) a company incorporated in New Zealand sought a stay of proceedings claiming a breach of contract for the supply of items which were required for the building of a power station in New Zealand. Proceedings relating to the dispute had already commenced in New Zealand, the contract was to be performed in New Zealand. However, the contract was made in New South Wales, and provided for arbitration in New South Wales. Despite the fact that proceedings had already commenced in New Zealand, the Court found in favour of the Australian company, and refused to grant the stay of proceedings. However, Kirby P (dissenting) made some important comments with regard to the legal implications of Australia's relationship with New Zealand. His Honour stated:

> I have mentioned as relevant the fact that proceedings are on foot in New Zealand. That country is, of course, sovereign. So far as Australia is concerned, it is a foreign country. But it would be to ignore long standing historical, cultural, economic and other links to treat New Zealand as just another foreign jurisdiction. It is not. Its special status is recognised both in legislation and in many Court decisions. New Zealand, it will be remembered, is referred to in the covering clauses to the Australian Constitution. For an example of the special status of New Zealand, recognised in the Australian legislation, see eg Extradition (Commonwealth Countries) Act 1966 (Cth) Pt III. See also *Bates v McDonald* (1985) 2 NSWLR 89 at 98 where Samuels JA referred to:
>
> > the geographical proximity of Australia and New Zealand and the ease and frequency of travel between these two countries, ... their close economic and political relationship and, no less importantly, ... their common legal and political traditions.

Since these words were spoken, the Closer Economic Relations Treaty Agreement has taken still further the economic relationship between Australia and New Zealand. The Court was invited to take note of recent Memoranda of Understanding entered between the Australian and New Zealand Governments in relation to important areas of commercial law and the resolution of commercial disputes. I am not convinced that such matters can be noted within the applicable principles of judicial notice. But, even if they cannot, there is ample material which is notorious from which a Court today would take note, at least, of the closer economic and other relationships between the two jurisdictions. Courts on both sides of the Tasman should be sensitive to these realities. They should not be blinkered by legal categories more appropriate to other international relationships. Within the common law rules of flexible content, Australian Courts should play a realistic and constructive part in facilitating and not impeding the closer economic relationship with New Zealand. (*Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd*, Supreme Court of NSW (CA), No 417 of 1988, per Kirby P at p 24).

Since then, Australian and New Zealand Courts have made decisions which reflect this unique relationship.

An example is *Mathews Grant Dynamics Ltd v Johnson* (HC Christchurch, 15 Feb 1983, A 278/79). In that case, an application was made by the plaintiff for leave to serve out of the New Zealand jurisdiction a claim to recover the cost of goods it had supplied to a defendant based in New South Wales. Leave to serve in New South Wales was granted. Casey J, in a decision which Barker and Beaumont comment epitomises the New Zealand approach (*Trans-Tasman Legal Relations – Some Recent and Future Developments*, [1992] ALJ 566, 580) stated:

> It is important to recognise the speed and cheapness of air travel between Sydney and New Zealand making it comparable with travel between major centres in this country. This and our closer legal and commercial relationship between Australia makes some of the comments in earlier cases about the reluctance to involve 'foreign' residents or jurisdictions of little relevance here.

In *Vicom New Zealand Ltd v Vicomm Systems* [1987] 2 NZLR 600 a New Zealand company, operating in the field of electronics, used the name "Vicom" on stationary, advertising, and in its telex address. This company, which was initially named Malvicom International Ltd, was a subsidiary of the Australian-based company Vicom International Pty Ltd. It had received approval from the Registrar of Companies to change its name to Vicom New Zealand Ltd. The use of this name was disapproved of by another New Zealand company operating in the field of electronics, which used the name Vicomm Systems Ltd. Cooke P, finding in favour of Vicom New Zealand Ltd, stated that

> [Vicom New Zealand Ltd] is the representative in New Zealand of its parent shareholder Vicom Australia. In the interests of trans-Tasman co-operation we think, ... that as far as is reasonably possible the New Zealand law should be administered so as to protect the legitimate interests of an Australian company associated with a New Zealand company in that way.

A trans-Tasman jurisprudence appears to be developing with regard to the requirement of "trade in jurisdiction" by the tort of passing off. It was once a well-established principle in intellectual property law that a plaintiff seeking to invoke the tort of passing off must actually trade within the same jurisdiction as that in which the defendant business trades. (See eg *Alain Bernadin et Campagnie v Pavilion Properties Ltd* ("the *Crazy Horse* case") [1967] RPC 581). The reason usually given in support of this rule is that passing off protects goodwill, and that goodwill, being "the attractive force that brings in custom" cannot exist unless the party claiming to own it in fact obtains custom from that goodwill in the jurisdiction in which it brings the passing off action.

In *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd*, [1981] 1 NSWLR 196 (which was decided several years before the CER agreement was entered into), the defendant reserved its name for registration within hours after it was announced in Australia that the plaintiff proposed to incorporate in New Zealand under the name "Fletcher Challenge Ltd". An interlocutory injunction was granted to the plaintiffs, who sought to restrain the defendant from making use of the name "Fletcher Challenge". Powell J was of the view that a plaintiff's reputation could be protected by the tort of passing off even if the plaintiff did not actually operate a business in the jurisdiction in which it brought its passing off action. His Honour stated (at 205):

> [I]t is, I think, not illegitimate to hold, at least at this stage of the proceedings, that the announcement of the proposed amalgamation and of the proposed new corporate name created a new reputation, which reputation preceded, albeit, perhaps, by only a few hours, the lodgment of the application of reservation of company name. ... In my view, the relevant question is, "does the plaintiff have the necessary reputation?" rather than "does the plaintiff itself carry on business here?"

Then, shortly after the CER agreement was entered into, Jeffries J in *Crusader Oil NL v Crusader Minerals New Zealand* Ltd [1984] 1 TCLR 211, 221 made reference to the close connection between New Zealand and Australia, and noted that this closeness had been enhanced by CER. His Honour expressed the view that the *Fletcher Challenge* decision appeared to be more appropriate than the traditional "trade in jurisdiction" requirement for passing off actions between Australian and New Zealand parties.

In *Chase Manhattan Overseas Corporation v Chase Corporation Ltd* (1985) 63 ALR 345 the applicants sought to prevent the respondent, a company based in New Zealand, from using the name "Chase" in respect of its Australian operations. The applicant claimed under s 52 Trade Practices Act 1974, that the intended use of the name "Chase" in Australia by the New Zealand company would constitute conduct which was or had the potential to mislead or deceive parties in Australia to, inter alia, believe that the New Zealand company was associated with the applicant in some way. The applicant argued that its New Zealand reputation extended into Australia, and that its use of the name "Chase" in Australia was thus not deceptive. Wilcox J (at 356) agreed, stating with regard to this argument:

> In my opinion it is wrong to postulate that an overseas company commencing operations in Australia for the first time is necessarily in the same position as a newly incorporated company. There may be cases in which an overseas company is unknown in this country before commencing trade here. In other cases the opposite may be true. Many markets are international in nature. Just as an overseas company may have a "slopover" reputation sufficient to sustain a passing off action in a country where it does not trade – see *Fletcher Challenge Ltd* ... there may be cases in which a reputation precedes the newcomer so that upon the commencement of its operations, it is recognised for what it is. This is likely particularly to be the case where the newcomer is a significant and well-known company with close links with Australia, such as New Zealand.

His Honour then noted statistics presented to the Court as to the number of New Zealanders who had moved to Australia, and as to the number of people who had travelled from one country to the other over the past few years, concluding that it was therefore reasonable to suppose that

> many people resident in Australia – and especially those in business – had heard of Chase Corporation before it commenced any operations in [Australia].

In *Dominion Rent-A-Car Ltd v Budget Rent A Car Systems (1970) Ltd* [1987] 2 NZLR 395, which concerned itself with the interests of a local company against those of an international company, Cooke P, in considering whether the goodwill attached to a trader's name could extend across national boundaries stated at 405-6

> ... I think that an Australian company's reputation and goodwill can extend to New Zealand (and vice versa) and, at least if there is a sufficient business connection with this country, will be entitled to protection here. Except in special cases, such as the *Star Industrial Company* case, it seems to me artificial to analyse such a state of affairs by saying that the company has one goodwill in Australia and another in New Zealand. Rather the goodwill transcends territorial boundaries.

Cooke P thus also appeared to view passing off as a valid remedy to an Australian plaintiff who has no actual business in the jurisdiction within which it brings its claim. His Honour stated further (at 407) that

> the Courts of the two countries should be prepared as far as reasonably possible to recognise the progress that has been made towards a common market. From 1966 there was a very substantial increase in two-way trade under the New Zealand-Australia Free Trade Agreement (NAFTA) and this has been accelerated by the CER Heads of Agreement 1982 and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZ-CERTA) 1983.
>
> I am suggesting, not that these Agreements have any direct bearing on the present litigation, but that (as Jeffries J in effect suggested in [*Crusader Oil*] and another unreported case to which he there refers) they are part of a background which should influence the development of the common law in Australasia. There is an analogy, not perfect but close enough to be noticeable, with what Lord Diplock said in *Erven Warnink* [1979] AC at 743: Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.

The existence of the CER agreement has also given rise to certain legal arguments which may, but for the existence of CER, not otherwise have been made. In *Gordon Pacific Developments Pty Ltd v Conlon* [1993] 3 NZLR 443 at 450

the plaintiff had obtained judgments in the District Court in Queensland, against Conlon with regard to an agreement for sale and purchase of a property in Queensland. Settlement was not concluded, and the plaintiff suffered a loss. The plaintiff sought to enforce the judgments in New Zealand. The Court was of the view that there was no statutory provision which enabled the plaintiff to enforce the Queensland judgment in New Zealand. One of the arguments made by the plaintiff in attempting to persuade the Court to enforcement the judgment was that

> principles of private international law as they are to be applied in New Zealand should now be developed to meet present day conditions ... [and that] in particular, in the Australian context, [attention should be paid] to the agreement for closer economic relations, and to the harmony of laws in relation to commerce. (at 767)

However, Henry J declined to grant the plaintiff's application on this basis, stating:

> Desirable and timely as change may be, the assumption and the recognition of extra-territorial jurisdiction of foreign Courts is better left to the governmental arm of state rather than ad hoc decisions of the Court.

Similarly, in *Wellington City Council v A-G* [1990] 2 NZLR 281 in which the Court considered the meaning of the words "goods partly manufactured in Australia" as contained in Regn 70 Customs Regulations 1968, the city council submitted that if the meaning of the regulation in which these words were contained was not entirely clear, it

> should be construed liberally, so as to accord with the objectives of the New Zealand Australia Closer Economic Relations Trade Agreement.

Hardie Boys J appeared to approve of this submission in his judgment, and added that it was also important

> in matters of this kind some consideration should be given to consistency of approach in the interpretation of revenue and customs legislation between [New Zealand and Australia].

## A TRANS-TASMAN COURT?

Numerous commentators have called for the creation of a trans-Tasman Court. Such a Court would ensure greater consistency in Australian and New Zealand judicial decisions, and may, in New Zealand's case, be a more appropriate final appeals Court than the Privy Council.

Kirby J, (*CER, Trans-Tasman Courts and Australasia* [1983] NZLJ 304, 307) considered the possibility of a trans-Tasman commercial Court as early as 1983, commenting that there would clearly

> be some advantages in such a Court. Specialist Judges could be appointed, possibly those with familiarity in commercial law, tax and the like. Such a Court could develop its own jurisprudence. It could contribute, by consistent decision-making, to uniform interpretation of "harmonised" laws, such as are now contemplated by the CER Agreement. It might even have powers to enforce decisions in both countries. In this way, it could reinforce the initiatives being taken by the legislative and executive branches of government.

In that same year, Barker J stated (*The closer relationship and the Australasian law schools* [1983] NZLJ 309):

> Our isolation from the rest of the world, global power plays and sheer trading economics must combine to draw our two destinies closer together – the topic will not go away. ... As Britain edges closer towards ... acceptance of Common Market laws the time may come when it may not be wise to place as much reliance as in the past on British precedent. Australasia may yet see the ultimate development of the common law.

Pengilley, another advocate of the creation of a trans-Tasman Court has commented with regard to *Wineworths Group Ltd v Comité Interprofessionel du Vin de Champagne* that

> The decision also gives rise to a policy decision under the Closer Economic Relations Treaty. It perhaps once again illustrates that there are issues which are not issues of black letter law but of the interpretation of such a law. The need for a uniform interpretation of commercial matters both in Australia and New Zealand by way perhaps of a trans-Tasman Court thus becomes more apparent. ([1991] *Australian Corporate Lawyer* 16,18)

and with regard to *Fisher & Paykel* that the case

> clearly shows that there is more to CER harmonisation than harmonisation of the statutory provisions of the law. It is the adjudicative approach and adjudicative result which must also be harmonised. ... No amount of fiddling with legal mechanics will commercially solve adjudication divergence. The only way to do this is to have a common adjudicative Tribunal concluded by a Trans-Tasman Treaty. ... The only hope for [the future of CER] probably ... lies in a Trans-Tasman Adjudicative Tribunal, something long advocated by this writer ....

With regard to trans-Tasman competition issues, Pengilley has suggested that

> The obvious answer is a trans-Tasman Competition Court which is part of the legal system of, and whose writ runs in, each country. This Court would presumably have to function under a *Trans-Tasman Competition Treaty*. I see no real difficulties in agreeing on this if adequate goodwill and resolve exists on each side. The alternative is nationalistic determinations and Court remedies being subject to political discretions as to their enforcement in the country in which the judgments are not made. Inevitably there will be conflicts of law between, and other difficulties of, enforcement of judgments in each of the two jurisdictions. (*On Trans-Tasman banter and "things CER"* [1990] NZLJ 199, at 201).

A trans-Tasman Court of some form would greatly improve the process of legal harmonisation, and consideration to this matter should be given by both countries in conjunction with the various other issues which arise from the inevitable move by both countries towards becoming republics. However, there are many questions which need to be considered with regard to the creation of such a Court, including the extent of the Court's powers over Australian and New Zealand litigants and the composition of such a Court. Further, given Australia's comparatively poor economic performance of recent years, and the slowness of Australia's economic reforms, New Zealand may wish to avoid being perceived internationally as having an increased association with Australia. In Australia, there are also significant constitutional problems posed by the implementation such a concept. (See Castles (1990) 64 ALJ 721.) Nevertheless, it may soon be time for Australia and New Zealand to consider the present trans-Tasman legal relationship, and to make further moves towards achieving complete trans-Tasman legal unity. ❑

TRANSACTIONS

*edited by*

*Brian Keene*

# A SUCCESSION (ADJUSTMENT) ACT

The Law Commission formally reported to the Minister of Justice on 18 August 1997 on its proposal for a new Succession (Adjustment) Act. This report develops further proposals in earlier discussion papers which have been commented on earlier in this journal [1996] NZLJ 339-342.

The proposed Succession (Adjustment) Act, as its name suggests, is an imposed statutory regime to alter or adjust the wishes of a testator as set out in his/her last will and testament. The Act is proposed to apply to all the estates of all persons dying after its commencement.

Briefly the objectives of the proposed legislation appear to be –

- to apply the matrimonial sharing policies in the Matrimonial Property Act 1976 to estates;
- to extend those sharing policies to include de facto relationships including same-sex relationships;
- to recognise support claims for limited classes of dependents;
- to abolish the right of adult self-supporting children from making claims against an estate solely on the grounds of family relationship.

Creating uniformity between the rights of spouses before and after death seems both sensible and uncontroversial. It should be supported.

Extending the rights of married spouses to those in de facto relationships is much more difficult to justify. The test is whether such relationships are "in the nature of marriage". It is dangerously wide. It presents a strong temptation to the judiciary to interpret the term liberally and so provide to such a de facto companion benefits that he or she may never have received during the deceased's lifetime.

It is a curiosity of the argument which underpins the Commission's proposals that they criticise the breadth of the "moral duty" provisions of the Family Protection Act on the grounds that the discretions exercised by the Judges have taken awards outside of anything reasonably contemplated by the legislature at the time of enactment. Yet the Commission itself is prepared to use vague concepts such as "relationships in the nature of marriage" inviting the self same width of interpretation from judicial officers.

One of the Commission's declared objectives is the creation of uniformity of rights both during lifetime and after death. Yet the extension by the proposed Act to de facto couples gives the claimant the benefit of the equal sharing presumption after death which he/she does not have during the deceased's lifetime. Again the Commission's proposals do not seem to have attained their stated objectives in this respect.

The report cites – with seeming approval – the speech of Hon Dr A M Finlay QC who argued on introducing the Matrimonial Property Bill 1975 in favour of the same regime for de facto spouses

> while the Government acknowledges the argument that extending the law in this way might be thought to diminish the status of marriage, we are far from convinced that this would be its effect. Indeed it might equally well be said that without such a provision when wishing to avoid sharing their property and earnings couples would be discouraged from entering into lawful marriage and tempted to form irregular liaisons.

Such an observation, in today's climate, may be clearly seen to be manifestly judgmental as well as sexist. There are a wide range of factors influencing the relationships now struck both between the sexes and within them. These influences include a desire for independence both of the person and of property which is not seen to be achievable within the marital state. There are both benefits and disadvantages in that.

The law as a system, and law reformers as a group, seem to consistently lack the humility to accept that individuals make choices and those choices should not be lightly interfered with or intermeddled in by lawmakers. The Commission's proposals remain in that interventionist category.

It is time that there is a provision in the proposed legislation to permit contracting out of this equality presumption. So, the Commission argues, those who wish to regulate their affairs to exempt themselves from the Act may do so. One might equally reply that those who wish to have equality of sharing may also do so before they enter into relationships. Both sides to this debate risk missing the point. Such relationships start informally. At the outset they are not seen to have great monetary or property significance. Couples (in the widest sense) therefore will not naturally turn their mind to contracting as to property where they create legal relationships which do not currently exist or contract out of those proposed by the new Act. Naturally, by the time they identify the property issues it may be too late to avoid the equal sharing presumption arising on death of one of the partners. It is poignant to note that there is no requirement that the relationship founding the claim be current at the date of death.

Practitioners will need to consider advising all clients, not merely those presenting themselves to make wills. Of the implications of the new legislation. It will be remembered that clients with wills predating the Act will still come within its regime if they die following its enactment.

The family trust arrangements, if properly administered, will take the property out of the ownership of the deceased and so out of the ambit of the Act. The social desirability of encouraging yet more financial structures such

as trusts merits further research and study.

The abolition of any claim by self-sufficient adult children can be viewed, like the intermingling of de facto relationships with marital, as a negative force on family cohesion. The economic argument against such claims may be sound. However the present law at least recognises the desirability of testators considering the minimal relationships when settling their wills. Wise family solicitors may advise them. This percolates out into the community as supporting a recognition of the importance of the institution of marriage. To cut out the children's rights, particularly in conjunction with the support of de facto relationships, cannot be dressed up as in any way pro-family. Whether that is the right balance for a community currently struggling with a raft of issues formerly assisted by the support of family groups is a wide public policy issue which needs fuller debate.

Practitioners should remain vigilant about the progression of this proposed legislation and ensure that they make their views known to both the Law Commission and the Ministry of Justice as the Act applies to assets and property of the deceased.

The use of family trusts to avoid the incidence of such problems may well be an effective technique.

## THE FAIR TRADING ACT 1986: CONTRACTING OUT

One of the principal objectives of the commercial lawyer is to minimise client risk. To that end legal documentation has become progressively more prolix as lawyers endeavour to identify risks for their clients and exclude or reduce them to their narrowest possible confines.

Judge-made law has developed a growing antagonism to these efforts of lawyers to protect their clients. By the "contra proferentem" the canon of interpretation the Judges have interpreted exclusion clauses against the interests of the person whom they intend to favour. Sometimes this has gone to ridiculous extent. A great deal of the law relating to exemption clauses can be seen as an effort by the Judges to provide what they see to be a "public policy" balance. The strict exclusion clauses drafted by lawyers with the intention of wringing the last drop of risk out of the transaction for their client.

The counterbalancing influence is the robustness of freedom to contract. Parties must be in a position where they can order their affairs in advance by contract. Efforts by the Courts later to put uncommercial interpretations in clauses and/or to strike them down must be kept to a minimum. It is only thus that the commercial community can achieve the necessary certainty to proceed to plan their affairs and manage their business risks.

The freedom of contract principle is the underpinning philosophy of the Contractual Remedies Act 1979 s 5 which expressly provides where the contract provides a remedy the Act shall take effect subject to such provision. Exclusion clauses have also been upheld as being effective in the burgeoning area of negligent misstatement. Indeed *Hedley Byrne* itself was a case where the House of Lords held the bank's disclaimer to be operative and avoid liability.

Into this arena of freedom to contract marches the Fair Trading Act. It is a statutory regime prohibiting misleading or deceptive conduct. Can commercial lawyers by skilled draftsmanship contract out of the statutory provisions? The authorities, at first blush, seemed to suggest that the answer is an emphatic no. In *Smythe v Bayley's Real Estate Ltd* (1993) 5 TCLR the High Court considered a representation made an information sheet which provided that no responsibility was accepted for the accuracy of the whole or part of it and warned persons to make their own inquiry.

Thomas J ruled –

> I do not consider, however, that these clauses have the effect of excluding the operation of Fair Trading Act. The requirements of the Act are mandatory. In enacting the legislation, Parliament sought to protect the consumer from unfair trading and it would be inconsistent with that objective to permit a person engaged in trade to exempt him or herself from liability under the Act. In effect this would be to allow such persons to opt out of the operation of the Act and the regime decreeing fair trading in the public interest. (p 472)

There is a clear line of Australian authority under their Trade Practices Act 1974 to the same effect.

Does this mean therefore that disclaimer or exclusionary clauses are of no use given that the statutory regime? If so incorporation of such clauses in sale and purchase documents will be only as robust as the plaintiff's choice of cause of action in later litigation. It must add considerable support for those who clamour for a unified law of obligations under which the result does not depend on luck or good judgment in choosing causes of action.

However the judicial authorities do not leave the outcome as black and white as the foregoing analysis suggests. The test propounded by the New Zealand Court of Appeal in *Goldsbro v Walker* [1993] 1 NZLR 394 is having regard to the particular facts in applying the ordinary words of the section was there conduct which was misleading or deceptive. On such an interpretation the plain warning that information is not warranted as correct cannot be irrelevant.

In the Federal Court of Australia decision in *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* [1989] ATPR Digest 46-048 tenants sued upon misrepresentations said to have induced them to sign the lease. The misrepresentations were proven but there was a clause in the lease document reciting the desire of the landlord to protect himself against the subsequent litigation by the tenants as to representations inducing the lease. It continued by inviting the prospective tenant to state what, if any representations or statements were material to him or her in signing the contract. The tenant filled in that portion of the lease with the words "No such statements have been taken into account in any manner whatsoever by me". It was completed in the handwriting of one of the spouses and was initialled by both.

The Federal Court reminded itself that inducement was a necessary prerequisite of the Fair Trading Act cause of action. In view of the handwritten acknowledgment within the Deed of Lease, the plaintiffs had failed to establish that vital ingredient. Their case failed.

There are some curiosities apparent from a comparison between *Keen Mar* and *Smythe v Bayleys Real Estate* – not the least of which is that, at first sight, the representor in *Smythe v Bayleys* had been more circumspect, ie less likely to induce a contract than his equivalent in *Keen Mar*.

In *Keen Mar* the exclusionary provision was in a subsequent document. The argument was however that the misrepresentations found to be made did not have any potency because that

potency had been negated by the signed non-inducement clause found in the lease.

In *Smythe v Bayleys* the disclaimer of responsibility and warnings to make own inquiries was actually within the document alleged to support the misrepresentation. In other words, the statement was always qualified and was unlikely to have a potency when made to the unqualified representations considered in *Keen Mar*. One would have thought that would be likely.

*Keen Mar* was not cited in *Smythe v Bayley's Real Estate* which, it should be noted is a decision at first instance only. A reconciliation of the two approaches may yet require higher judicial determination.

In the meantime practitioners wishing to protect their clients in commercial dealing may see some value in following through the *Keen Mar* approach in obtaining positive and perhaps individualised rather than "standard form" acknowledgments which may protect their vendor clients from a suit post the contract when all has not gone well for the purchaser.

## PROPORTIONATE LIABILITY: AN UPDATE

The professions continue to be active in calling for a reform of the law that renders them jointly and severally liable to plaintiffs as though they were the prime cause of loss when justice suggests that at best that any such liability should be proportionate to the loss they actually cause.

The usual example cited is that of the auditor. The company through its directors and management submits accounts to the auditors which are reviewed and an audit opinion is given. The company fails. The auditors are sued although they are not the primary responsible parties. Their view, justified by the harsh corporate collapse environment of New Zealand in the 1980s, is that they become a principal focus as a "deep pocket".

In New Zealand the NZ Law Commission examined this question and decided to make no recommendation to change the law. This was influenced by their view that a plaintiff should be able to choose his defendant and, if more than one, make a full recovery from any one of them. Why such a policy is preferable to the plaintiff being only able to recover the share of loss caused by the wrongdoer was not adequately explained. Pressure at the political level has borne no fruit.

In Australia the "Davis Report" recommended that in actions for economic loss proportionate liability was appropriate. Action on that report was initiated in the commercial capital of Australia, New South Wales. That initiative has now been taken up in Canberra but the issue is whether such changes should be by Commonwealth statute rather than left to the individual states. The outcome, being dependent upon the intricate and internecine nature of Australian politics is impossible to predict.

It is informally understood that New Zealand will consider its position in the light of the Australian initiative. That is sensible and avoids the full re-inventing of the wheel. It also conforms with the objective of harmonisation of Trans-Tasman law.

A draft bill is in circulation in Australia legal circles now. The professions will be heartened to see at least this progress in a process which up until now has proceeded only at glacial speed.

# RECENT CASES

## AGENT'S COMMISSION

The problem of when an agent is entitled to commission in an on-again-off-again sales process raises issues that can often be perplexing. The decision of Tompkins J in *Albany Real Estate v Vousden* High Court, Auckland, 23 July 1997, HC 28/97 is a good case in point.

The appellant real estate agent was granted a sole agency which expired and reverted to a general agency. Through the agency ultimate purchasers viewed the property and in late August agents submitted contracts between vendor and purchaser which failed to reach any accord. The agent then advised the purchaser that there was "no point" in continuing negotiations because of the difference between the vendor and purchaser's position. The Vousdens then removed the property from sale and cancelled the appellant's agency. Within six weeks the purchasers with the persistence of another estate agent whom they had approached in relation to another property had signed a contract with the Vousdens. Albany Real Estate claimed agents commission and that claim was rejected by the District Court and it appealed.

The agency was in the usual form and provided the agent was entitled to a commission if the owner entered into a sale during its currency or after its expiration:

> to a purchaser who has been introduced during the period of this agency to the property by the Agent

Tompkins J referred to the authorities which indicated, notwithstanding the width of the agency contract there was a need to show some causative relationship between the introduction and the eventual sale. An introduction per se was not sufficient. Put another way if a second agent has become involved it is appropriate to ask which of the two was the effective cause of the sale. Tompkins J held that the test:

> was the action of [Albany] in introducing [the purchaser] and conducting the inconclusive negotiations the [effective] but not the only or [exclusive] cause of the transaction that ultimately resulted? Has there been a break in the chain of causation between her actions and the ultimate sale?

This was held to be a matter of fact and degree.

In the present case the second agent had his attention drawn to the Vousden property only because his purchaser had previously seen it through Albany. However the Albany "introduction" related to a proposal by the Vousdens to sell which had expired. Hence resolved there was no commission payable and the appeal was dismissed.

The "fact and degree" test is thus directed at the effective cause or instigation of the sale. An introduction may maintain its causal potency even though the agency has expired. However, if the sale was a new event insufficiently linked to the earlier introduction then no commission will be paid.

## DIRECTORS' INDEMNITY INSURANCE

One of the new directions of the New Companies Act 1993 was to provide a

statutory framework for the responsibility of directors of a company to both the company and, importantly, its creditors. Academic debate has raged on the extent to which these obligations merely enact existing common law principles. But whatever the outcome the Courts and the commercial community view the obligations of directors as more onerous than was ever contemplated ten years ago.

Not unnaturally commercial men closely review their risks. The popularity of Directors and Officers cover has risen sharply. Its purpose is to protect directors who become enmeshed in suits by third parties against their company.

Classically this is done by two separate policies. They are:

(a) The Directors and Officers policy ("D & O policy"). This policy is issued to named directors and covers litigation, risk, both liability and costs, against them;

and

(b) a Company Reimbursement policy which indemnifies the company against any indemnity given by the company to the officers in respect of their office.

In *New Zealand Forest Products Ltd v New Zealand Insurance Co*, Privy Council 12 July 1997, the Judicial Committee was asked to consider the proper interpretation of NZFP's company reimbursement policy. The underlying facts were that proceedings had been brought in the USA against NZFP but one of five causes of action cited NZFP director Taylor as a party to a conspiracy cause of action. Taylor became very involved in managing the litigation for NZFP as well as protecting his own position. The litigation settled $3.3m but defence costs amounted in total to more than US$58m.

NZFP had given an indemnity to Taylor thus empowering him to claim costs recovery under the Company Reimbursement policy. That policy indemnified Taylor for any amount:

> which [Taylor] has become legally obligated to pay on account of any claims made against him/her individual or otherwise, during or after the Policy Period for a Wrongful Act.

Both before the Court and the Privy Council the appellant and respondent agreed:

(a) any item of cost wholly and exclusively related to Taylor's defence fell within the scope of the policy;

and

(b) any item of costs in no way related to the defence of the claim against him not covered by the policy.

The problem arose where costs were incurred by Taylor which were for the mixed benefit of Taylor and other defendants. Should Taylor be fully indemnified against these or should they be apportioned and Mr Taylor left to exercise his legal rights to ensure that his reluctant co-defendants met their costs responsibility? The insured argued that all costs for the mixed benefit of Taylor and others were fully re-imbursable under the policy. The insurer argued that only some apportioned "fair share" of these were covered.

If the "fair share" argument were upheld then a residual liability remained on Taylor to not only ensure that his co-defendants accepted the insured's view of a "fair share" but also that his co-defendants actually made the payment. That risk obviously included not only the risk of unreasonable refusal by his co-defendants but also non-recovery because of impecuniosity.

The contrary argument for the insurer had the effect of requiring it to reimburse to Taylor considerable amounts the expenditure for which conferred benefits upon persons in addition to the insured. This, it is argued, was not only unreasonable and unfair but also contrary to US Court precedent (there being little English or Commonwealth precedent available).

In both the High Court and Court of Appeal the New Zealand Courts opted for the apportionment approach. Although the tests were stated somewhat differently in the end costs for the mixed benefit of Taylor and others were ruled to be apportioned on some broad brush policy of fairness. It is perhaps not unfair to suggest that this is consistent with the mindset of the New Zealand Courts which tend to fall back upon these more ephemeral concepts of "fairness and justice" when interpreting contracts. This is in contrast to the more classical approach of the English superior Courts which is to strictly review the contract and interpret its wording objectively without employing such glosses.

That is just what the Privy Council did. Although it showed some interest in American authorities, in the end it held the issue was one of construction of the terms of the policy (p 5). Its opinion on that topic was:

> on the ordinary meaning of the words which would have been used it is reasonable to understand that the cover would extend to the whole costs incurred in the defence where the officer was the sole defendant. Why then should the meaning of the words change simply because there is another defendant who is not covered by the policy? Moreover if an uninsured co-defendant was bankrupt or otherwise without means it would seem an odd result of the insurance that it should not cover the whole of the officers' costs even although some of them related also to the defence of the co-defendant. Once it is accepted that the costs are not confined to those which relate solely and exclusively to the officer it is hard to find anything in the language which prevents the cover extending to all costs which also related to another defendant. On the contrary the language points to the conclusion that all such costs are covered.

Upon this basis the appeal was upheld. The case was remitted back to the High Court for fact findings which would allow judgment to be entered in accordance with the Privy Council's opinion.

Two significant points emerge from this decision.

1. The benefit of these insurance provisions are to be determined upon the proper construction of the insurance contract without regard to any extraneous considerations of fairness and reasonableness between the contracting parties. The contract itself sets out their legal arrangements. The Courts should interpret and enforce contracts according to their tenor.
2. The value of the finely honed minds of the Law Lords sitting on appeals from New Zealand Courts; their focus is on terms of the bargain. It proves yet again the value of not only a second tier appeal but also of the need for high quality judicial skills being brought to bear on the resolution of appeals. The New Zealand Courts' approach must be brought back into line with the proper judicial function of interpreting and applying the law – not imposing on the public the Courts' views of some wider and indefinable sense of "justice". ❑

# CREATING CYBERLAWYERS?

*Mark Perry, The University of Auckland*

*asks whether current cyberhype is net dreams or a glimpse of the inevitable*

Cyberjargon litters the media. It is virtually impossible to read a serial publication or watch a television news report without coming across some mention of computers and the Internet. Behind this media phenomenon is more than just a passing fad of Batmanesque proportions. On a micro scale, chips are ubiquitous and for the most part so commonplace that we do not even notice that we are using them. On the macro scale there has been a transilience in the way that information is gathered, managed, processed and promulgated. The discipline of law is primarily concerned with handling and interpreting information, whether it be primary sources of "the Law" or data describing a situation. Little law has been published this decade that is not available in electronic format, the major exception being text books and even these are increasingly accompanied with a CD-ROM, disk or reference to an Internet site for updates. Computer software is starting to handle information in such a way that information systems can respond to needs of users. Intelligent agents and "push" systems can pre-select and deliver content to your desktop. The challenge for legal education is to use communications and information technologies to the best advantage, and accommodate changes in the legal paradigm. The trauma associated with a rapid transformation in a system unused to quickly reacting will undoubtedly influence the current conceptions of undergraduate and postgraduate studies, continuing education of the profession and academic research. The access to legal information by those without legal training will also have far-reaching implications. However, it is necessary to realise that there is a problem with the approach to information technology in the current system of legal education. Here I point to some issues emerging at the interface between legal education and the application of information technology by focusing on only two progeny of this new age that have gained some recognition, primarily in the context of traditional university undergraduate law degrees. Computer Aided Information Retrieval facilitates rapid and simple access to legal materials and provides an example of an implementation of technology that has gained general acceptance and is widely used in legal education. On the other hand, Computer Aided Learning has had little impact in New Zealand, despite its promise of pedagogical benefits such as student-centred and cooperative learning.

## COMPUTER AIDED INFORMATION RETRIEVAL

The most commonplace evidence of the impact of new technologies on student lawyers is in the presentation of their assignments. These are now typically laser printed and well presented. Handwritten work, apart from exam scripts, has become the exception. However, it not simply the mundane output of the printed text that has changed, but the sources of materials used in their creation. Within the last four years many tools have been introduced to allow the easy searching and retrieval of legal information by law students. The law library has traditionally been thought of as the lawyers' laboratory, or at least the "container" of the law. This is less true now than it ever was (I preferred the analogy of the library to a larder, the lawyers' mind as a kitchen and the output proved by mastication of assignments). Unless research requires the use of older materials, finding the relevant sources for legal analysis is no longer a case of burrowing through endless volumes of paper. Today the student is more likely to engage in electronic data mining. Computer Aided Legal Research is not a new concept – researchers and the profession have long been familiar with Lexis-Nexis as a source of primary and secondary legal materials. Within a minute a student can access well in excess of one billion law and business related documents in one database – analogous in volume to a library with around one thousand times as many items as the hard copy held in any New Zealand law library. The significant change in the last five years for law students in New Zealand is the relative ease with which large quantities of primary and secondary materials can be searched.

Law students now have access to legal materials that have "virtually" expanded our small hard copy collections (relative to US law schools) to a resource base on a par with those of any school worldwide. It is not simply the volume of materials available: the functionality of the resource is different. Students can now use computer terminals to search primary and value-added legal materials of both New Zealand and overseas databases. All New Zealand law schools have introduced a core of accessible databases. The range may differ a little from university to university but typically electronic versions of statutes, regulations, law reports, Briefcase, Linx and access to the few useful New Zealand Internet sites. Lexis, Index to Legal Periodicals, Legal Track, AustLII and web searchable databases give students international resources only dreamed of by the most advanced researcher just a few years ago.

There are a many factors that have driven the large-scale introduction of sophisticated text retrieval facilities. The changing technology has undoubtedly contributed: the falling cost of hardware, the availability of electronic materials, improved software and the maturity of the communications infrastructure. Students come to Law Schools with greater skills in using computer based tools and have the expectation that electronic materials will be available. The cost effectiveness of electronic materials is highly appealing to law libraries faced with higher costs of hard copy and storage. Faculty delight in the research opportunities offered by the materials. The cyclic acceptability of reference to the laws of other jurisdictions is also in an upswing. The pedagogical benefits of broadening student access to such resources are rarely made explicit – it is accepted as self-evident that the avail-

ability of more research materials will lead to opportunities for a greater understanding of the field of study. The attendant problems may not be so obvious. The student needs greater powers of discrimination as well as a deeper understanding of the processes they are engaging. For example, the incidence of citation of inappropriate or unreliable authorities is rising. The Nth quote from a US District Court on a personal injuries claim inserted in ACC related assignment may have been added simply because the student found similar facts and ignored the principles involved. The citation of http://www.xyz.edu/~students/j-doe/random-thoughts-95/temporary/laws.html may not only be without merit, but the provenance of the source is not likely to be either known nor checked by the marker. The majority of text retrieval systems still use basic word matching techniques, although the progress in natural language processing is starting to become apparent with the implementation of intelligent agents and concept searching. However, the student needs to know what type of system they are using, and the significance of their results. This requires not only teaching the skills required to retrieve text, but also a greater understanding of the structure of information systems. Electronic legal materials are not simply digitised books. The text is the same but the substance is entirely different. The electronic versions create a new environment of "law" with new attributes and potential.

Law schools endeavour to give students instruction in the use of these legal information systems through their law libraries, tutorials or research and writing programs. However, such programs tend to be peripheral to the main stream of a curriculum that already is packed with "essential" courses, and by necessity they are forced to focus on the technical aspects of access and ignore the jurisprudential considerations of legal information. This will undoubtedly change within the next decade as the importance of the latter gains greater acceptance. The unbounded access to communications also opens the doors to plagiarism, whether deliberate or accidental, that is much more difficult to detect than under the earlier environment where physical boundaries provided containment.

## COMPUTER AIDED LEGAL LEARNING (CALL)

The use of computers as an individual teaching tool attracts a range of descriptions such as Computer Based Training, Computer Aided Instruction, but all are generally describing computer programs that facilitate student-centred learning. Until recently these have been restricted to courseware run in isolation on individual machines, but recent developments make use of remote facilities. Although there have been some ad hoc developments in New Zealand, this is an area largely unexplored in our law schools and the extent of integration into the curriculum has been small. Typically, individual teachers have taken it upon themselves to create packages ranging from the simple question-answer type routine to more sophisticated hypermedia modules that engage the student in problem solving and on-line research (such as the prototype "Virtual Court" at Auckland). A brief comparison to CALL in the United Kingdom illustrates one approach to bringing computer courseware into more widespread use. Central government funding was provided in 1989 under the Computers in Teaching Initiative to set up centres to promote technology based learning within the various university disciplines. There are now 24 such centres. The centre for law is coordinated at the University of Warwick. The Law Courseware Consortium offers a package (Iolis) on compact disk that "covers around 40 per cent of a typical undergraduate law degree and includes: 70 workbooks containing around 200 hours of information and interactive exercises; a hypertext resource book with the full text of over 1,200 relevant legal items (cases, statutes and articles); [and] a legal dictionary" (*Iolis Brochure*, The University of Warwick). The individual cost to a student for the CD is around NZ$120, or around the cost that the New Zealand law student will be paying for a year's worth of paper handouts. Despite the attractiveness of such a package, Iolis has been only moderately successful to date. The reasons for low acceptance of courseware, not only in law, include political and organisational reticence (status, reorganisation and cost). There is also academic distrust of the quality of the materials (the "not made here" syndrome), ignorance of the technologies used, technophobia and a lack of awareness of the benefits offered. The position in New Zealand is worse as there are no such off-the-shelf courseware packages for law. Our universities have realised that there are educational benefits to be gained from such systems, and are slowly making progress in setting up the infrastructure to ease development. In the meantime, however, it is still mainly up to the individual academic who would have to devote a lot of time creating content, with little financial support or recognition for the work involved.

## COMMENT

These two instances present early examples of the revolution in information and communications that will affect all disciplines in higher education, in particular law. In the United Kingdom the Dearing Report 1997, para 13.1 comments:

> [T]he innovative exploitation of Communications and Information Technology (C&IT) holds out much promise for improving the quality, flexibility and effectiveness of higher education. The potential benefits will extend to, and affect the practice of, learning and teaching and research. C&IT is also, we argue, needed to support high quality, efficient management in higher education institutions. There is scope to reduce costs in the future and the potential is great, but implementation requires investment in terms of time, thought and resources in the short term.

A host of opportunities and difficulties must be addressed in the new environment, such as remote studying, the structure of law courses, the relationship with the profession, equity of access and so forth. Today it is possible to study for a postgraduate law degree in other jurisdictions without leaving the country. It is impossible to be effective in legal research or practice without using computers and communications systems (unless you are fortunate enough to have an assistant who will use them for you). In the last few years, within various jurisdictions, I have heard senior academics say "I don't need e-mail, I find fax more than sufficient for my needs", "the law doesn't change so much – neither will the needs of law schools" and other comments dismissive of the utility of communications and information technology in legal education. However, the science of legal research has already undergone a revolution, the means of learning is changing, and the legal paradigm is facing transmutation. In the long term, hiding our collective heads inside volumes of Pollock will neither help nor hinder the progression of these changes, but it will do a disservice to the students of today. ❑

# LEGAL ETHICS AND LEGAL EDUCATION

*Tim Dare, The University of Auckland*

*ponders the Cotter-Roper report*

## THE COTTER-ROPER PROPOSALS

There is nothing new about the suggestion that something should be done about the ethics of lawyers. Sadly, there is a widespread and ancient perception that they are grasping, callous, self-serving, devious, indifferent to justice, truth and the public good. The recent report on legal ethics and education by Brent Cotter and Christopher Roper *Education and Training in Legal Ethics and Professional Responsibility* (New Zealand Law Society, 1996) is but the latest in a long line of treatments, dating back at least to Jesus Christ himself who complained that lawyers "lade men with burdens grievous to be borne" and yet "yourselves touch not the burdens with one of your fingers" and which includes the suggestion by Shakespeare's revolutionary that "The first thing we do, let's kill all the lawyers". Cotter himself was the author of a similar report for the Canadian profession.

Cotter and Roper's proposals are less dramatic, though still controversial. The proposals, the authors report, "are foreign not just to legal ethics in New Zealand but indeed to legal education throughout the world". They start with the judgment that the profession faces an ethical crisis, evident in the Renshaw Edwards defalcation and in a general concern "that the sense of being a profession is rapidly being lost". Recent surveys confirm widespread dissatisfaction with the ethical standards of the profession among practitioners themselves, and events subsequent to the report involving members of the judiciary, together with a rather ambiguous report on the wine-box affair from an ethical perspective, can surely have only fed widespread public cynicism about the ethics of the profession.

Their central recommendation is that legal educators – the law schools, the Institute of Professional Legal Studies and the New Zealand Law Society – provide an integrated and coordinated legal ethics curriculum spanning academic study, professional training and continuing legal education. Within the law schools, they favour the introduction of separate compulsory papers, though they would accept the introduction of ethics into the existing core curriculum. The IPLS is to introduce formally assessed ethics instruction, and the NZLS is to develop a series of ethics modules to be attended by existing practitioners within two years. If the educators do not agree to these proposals, the authors recommend they be compelled to do so by the NZLS and Council for Legal Education, even if that means expanding the existing legislative authority of those bodies.

The integrated curriculum is to be based upon a set of specified objectives. In brief, those who complete the curriculum will have been introduced to the nature and responsibilities of the profession, to various perspectives (philosophical, historical, economic, etc) from which one might view legal practice and to a range of ethical issues and principles relevant to legal ethics. So armed, they will be able to evaluate the profession's effectiveness with respect to its obligations, to identify and evaluate the responsibilities of lawyers in various roles and contexts, to "engage in a process of ethical reasoning", and respond appropriately when faced with conflicting obligations. They will develop their own attitudes and values toward the profession and professional responsibility. Finally, they will be able to conduct their professional work competently, efficiently, and professionally.

I aim to set out those features of legal practice which generate ethical concern and to explore possible responses. I hope we will end up with both a brief overview of legal ethics and an analysis which will allow us to see the strengths and weaknesses of the Cotter and Roper report more clearly. Perhaps we will even go some way toward meeting one of the goals of the report, viz., to suggest that legal ethics is a subject worthy of academic attention.

## THE RENSHAW EDWARDS FALLACY

Cotter and Roper point to the Renshaw Edwards affair as the most striking manifestation of the ethical crisis facing the legal profession in New Zealand. The reference is unfortunate. It plays into the hands of critics such as Richard Mahoney of the Otago Law School who say that the perceived crisis is the result not of subtle ethical failures but of lawyers stealing clients' assets, and that "you don't need a course in legal ethics to know it's wrong to steal clients' money" *New Zealand Education Review* March 26 1997, 1.

On this last point, at least, Mahoney is no doubt right. But the objection misses the point, albeit in a way invited by Cotter and Roper's reference to Renshaw Edwards. No doubt many people do associate lawyers with the vices of dishonesty and deviousness because of well-publicised cases of straightforward dishonesty. But such cases do not really seem to explain, let alone justify, the particular content of the common feeling about lawyers. Even though there are plenty of spectacular cases of misappropriation by accountants, there is no perception that the accountant's role is "of its very nature" dishonest. The difficulty for lawyers is that there is a widespread perception that even when lawyers act four square within their roles – even when they act as good lawyers – they display the vices of dishonesty and deviousness. The widespread suspicion of lawyers' ethics flows less from cases of misappropriation than from the standard view of the day-to-day business of law.

At the heart of the difficulty is a conception of the lawyer's role according to which lawyers owe special duties to their clients which render permissible, or even mandatory, acts that would otherwise count as morally impermissible.

A simple case may bring the nature and significance of the conception into focus. Joseph Zabella worked for John Pakel. Zabella was better off than his employer and from time to time loaned him money. Eventually Pakel owed Zabella $5000. The two drafted and signed a simple contract, but Pakel declared bankruptcy before the debt was repaid. Some time later Zabella sued claiming that, subsequent to the bankruptcy, Pakel had made a new promise to repay the debt. The new promise would have blocked the bankruptcy defence, but because it was not in writing Pakel was able to plead a statute of limitations to prevent legal enforcement. The defence was successful though the Court noted explicitly that the statute did not extinguish Pakel's moral obligation to repay Zabella. The immorality of Pakel's reliance upon the statute was all the more striking since by the time of the suit Pakel had become the well-paid Chief Executive Officer of the Chicago Savings and Loan Association, and could have repaid the money without hardship. Though it felt obliged to allow the defence, the Court made clear it thought Pakel a rat-bag, who being "in a position of some affluence ... should feel obliged to pay an honest debt to his old friend, employee, and countryman". *Zabella v Pakel* 242 F2d 452(7th Cir 1957)

*Normally one who knowingly helps another obtain an immoral end acts immorally. But ... It is not for lawyers to judge the moral merits of their client's objectives*

Surely the Court is right about Pakel: somebody who relies upon a technical rule of law to avoid paying an honest debt to an old friend who helped them in the past, who is then in need, when payment would not significantly reduce their own welfare, acts immorally. What, though, of Pakel's lawyer? Normally one who knowingly helps another obtain an immoral end acts immorally. But the conception of the lawyer's role sketched above gives lawyers a different and straightforward answer. It is not for lawyers to judge the moral merits of their client's objectives. Not only did Pakel's lawyer do no wrong in advising him to plead the statute of limitations, and in representing him with all of his professional zeal, he had a positive professional duty to do so. And whatever the moral status of the client's goals and the means used to attain them, that status does not reflect upon the character of the lawyer.

This conception of the lawyer's role relies upon a broader picture of the structure of ethical obligation, according to which such obligations attach primarily to social roles. There are numerous roles within communities, and individuals inevitably occupy more than one: I am a friend, a son, a parent, a university lecturer, a sometime lawyer. As I move from role to role the obligations and permissions to which I am subject alter, and, as *Zabella v Pakel* demonstrates, those which apply to me in one role may conflict with and take priority over those to which I am subject in another. The conduct of Pakel's lawyer seems to violate a plausible maxim of "ordinary" or general morality, but, the claim goes, his conduct is not properly judged from that perspective alone. The fact that he was acting within his professional role provides him with a institutional defence.

It has seemed to some that the idea of "role-differentiation" provides an adequate answer to Macaulay's famous question, "whether it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire?" David Salmon (ed) *Macaulay's Essay on Bacon* (Longmans, Green, and Co; London, 1904) 37 The roles which come with the forms of dress, are quite literally subject to different moral standards. There are things one *is* permitted and perhaps even required to do as a lawyer which it *is* wicked to do as a civilian. Hence lawyers could be indifferent to the "knavery of their calling", thought Michel Montaigne, provided they kept their personal and professional personalities distinct from one another. For his own part, he said, "I have been able to concern myself with public affairs without moving the length of my fingernail from myself .... The Mayor [of Bordeaux] and Montaigne have always been two people, clearly separated". Montaigne "Of Husbanding Your Will" in *The Complete Works of Montaigne: Essays, Travel Journal, Letters* Donald M. Frame (ed) (Hamish Hamilton; London, 1958) 766-784, 770 and 774.

This conception of the lawyer's role, according to which lawyers may be allowed or even required to act in ways we would normally think immoral, makes clear why a concern for legal ethics can neither be fully explained nor adequately addressed by reference to cases of misappropriation. Although there may be a connection between the conception of the lawyer's role as strongly role-differentiated and the incidence of such cases, still those who steal do not act as lawyers when they do so. The conception suggests a more troublesome and pervasive problem; namely, that even lawyers who remain within their professional roles may be obliged or allowed to act in ways judged by many to be immoral. Furthermore, the analysis may go some way to explaining why lawyers themselves are dissatisfied with the ethical standards of their profession. In so far as the dominant conception accurately captures the moral position of lawyers, it raises the likelihood of conflict between personal and professional moral obligation. Such conflict, or the threat of it, seems very likely to cause discomfort for practitioners, perhaps even amounting to what Anthony Kronman has recently described as a crisis of morale "that strikes at the heart of their professional pride": *The Lost Lawyer* (Belknap Press; Cambridge, Mass, 1993) 2.

## WHY TOLERATE ROLE-DIFFERENTIATION?

It will be no surprise that the role-differentiated conception has come under considerable critical attention. For the purposes of this brief paper it will do to portray the critics as sharing an ambition to weaken the distinction between professional and general morality. But I believe that the conception is basically the right one, and that the task for advocates of legal ethics is to provide an adequate defence of that view. In the remainder of this paper I aim to provide an outline of the criticisms and defences of role-differentiated obligation.

We can begin with the idea that there is something at least a little counter-intuitive about the idea of role differentiated obligation. Why would we accept a model of the lawyer's role which provided permissions or even obligations to act contrary to the ethics by which others live and by which lawyers live when outside their professional roles?

The first answer appeals to the value of social roles such as those performed by lawyers and claims that we can have

the benefit of those roles only if their occupants are subject to specific "role-differentiated" obligations and permissions. Our community, for instance, thinks the provision of competent legal representation to be socially worthy and morally justified. Suppose we also believe that its provision depends upon clients being prepared to make full and frank disclosure to their lawyers, just as the patient must describe all of the symptoms to the physician. Suppose further, that we believe clients will be prepared to make such disclosure only if they are confident that lawyers will maintain confidentiality. If clients are not sure about this, they may withhold information which they judge to be prejudicial. But it is easy to imagine cases where clients are mistaken about what is prejudicial: a woman who has killed her abusive partner may think the history of abuse makes things worse, being evidence of a motive or some such, where in the right circumstances it could support an appeal to the battered woman's syndrome defence or a more straight-forward plea of self-defence. Lay-people may deny themselves their legal rights by withholding information they judge to be prejudicial but which would in fact assist the lawyer in identifying and securing their legal interests. We place lawyers under stringent duties to maintain confidentiality, this argument has it, because we think that is the way to secure legal interests and hence obtain the benefit of a justified social practice and institution. We recognise, of course, that the duty to maintain confidentiality may occasionally allow or require lawyers to keep quiet about things general morality would call upon them to disclose. The value we place upon adequate representation, and the belief that the duty is a necessary condition for its provision, however, leads us to build the duty into the lawyer's role.

*the duty to maintain confidentiality may occasionally allow or require lawyers to keep quiet about things general morality would call upon them to disclose*

The "derivative" argument for role-differentiated obligation shows why the occupants of social roles, such lawyers, may avail themselves of role-specific obligations and permissions. The argument also shows, more specifically, why given roles carry *particular* obligations and permissions. To put the point in terms of the Code of Ethics, the derivative justification explains why the Code contains the provisions it does – why there are provisions dealing with confidentiality and with conflict of interest, for instance – and why those provisions should be taken seriously.

This account is broadly sympathetic to Cotter and Roper's proposals. It too stresses the significance of knowledge of the nature of professional roles, of their justification, and of recognition of the social significance of those roles and the values which underpin them. Its capacity to inform the design and interpretation of codes, may make it especially useful to the ongoing revision of the rules of professional conduct they recommend. And the reasoning involved in identifying and employing these derivative arguments seems to be consistent with that Cotter and Roper have in mind when they speak of the process of ethical reasoning used to evaluate the appropriateness and implications of professional roles. Thus many of the objectives specified in Cotter and Roper's report are supported by the derivative argument and hence by the role-differentiated model.

## PUBLIC V PRIVATE VALUES

But one of their objectives needs to be treated with a considerable care. They repeatedly give priority "the lawyer's own values". They explain that they amended their original definition of professional responsibility so that "the understanding first be of the individual's own values and attitudes". Similarly, they expand on their second objective – to provide an introduction to a range of ethical issues and principles underlying legal ethics – by saying that "students will be encouraged to uncover their own ethical framework ...." Finally, their fifth objective is precisely to have students "develop their own attitudes and values with respect to the legal profession and professional responsibility".

There is at least a sense in which it is important that lawyers have the appropriate "personal" moral view. It is important that they have the right regard for the ethical demands of their professional roles. It is equally important, however, that they appreciate that they should not rely upon their own values in determining how they should act within those roles.

There are I think at least two important reasons to favour a role-differentiated over what we might call a "character" based approach to legal ethics. The first turns on an account of the function of law. The central question in contemporary political philosophy is how is it possible that there may exist over time a stable and just community of free and equal citizens profoundly divided by reasonable religious, philosophical and moral doctrine? A central part of the liberal response to this question has been the establishment of procedures and institutions which aspire to an ideal of neutrality between the reasonable views represented in the communities to which they apply. The members of a pluralist community, the idea goes, will often be able to agree on the structure of neutral institutions and practices even where they cannot agree on the right outcome of a policy question as a substantive matter. Of course these institutions and practices cannot guarantee outcomes which will suit all the reasonable views. The hope of liberalism, however, is that even those whose substantive preferences do not win the day on this or that occasion will have cause to accept the decisions of these institutions as fair and just. At the very least, they must have reason to believe that their views have been taken seriously and that the decision procedures have not simply turned the individual preferences of some members of the community into public policy to be imposed on all.

This view about the role of law in pluralist societies has consequences for the ethical obligations of lawyers. They act improperly when they substitute their own judgments for those of the procedures, acceptance of which makes pluralist community possible. An appreciation of the role of law should lead us away from rather than toward a character-based approach to legal ethics.

This discussion provides a response to a recent and important contribution to the legal ethics debate and which has echoes in the Cotter and Roper report. Anthony Kronman has argued that the legal profession is in the grips of "a spiritual crisis which strikes at the heart of [the lawyer's] professional pride" and threatens the very soul of the profession itself. (at 2) The crisis has resulted from the demise of a professional ideal – the ideal of the "lawyer-statesman" – which portrayed the outstanding or model lawyer as a person of practical wisdom possessed of a range of honourable and more or less peculiarly legal character traits. With its demise lawyers have come to regard law as an essentially

technical discipline requiring no particular character or virtue on the part of its leading practitioners, Judges, and teachers. Kronman aims to revise and revive the ideal in the hope that "we may hope to find a foundation for the belief that to be a lawyer is to be a person of a particular kind, a person one may reasonably take pride in being. (Kronman "Practical Wisdom and Professional Character" (1986) 4 *Social Philosophy and Policy* 203-234, 208)

As the "lawyer-statesman" epithet suggests, Kronman takes lawyers to have a significant leadership role. In the political sphere, the lawyer-statesman seeks a certain kind of political integrity, namely one which obtains despite the existence of significant and ineliminable conflict. The discussion of the role of law and lawyers given above allows us a better account of these matters. First, note that the "procedural" story is directed precisely at securing political community in the face of ongoing substantive dispute. Law is an essential part of the effort to secure stable and just political community between the advocates of diverse views of the good. Given this role, the procedural approach provides a response to Kronman's spiritual crisis as well: on the procedural account the various law jobs are extraordinarily important in pluralist communities and hence are ones in which lawyers can and should take pride. One might think, indeed, that some such story would be a source of considerably more comfort to lawyers than Kronman's – it tells them, after all, that what most of them are doing has moral and political value. It seems not unlikely that any current crisis of morale would be made worse by Kronman's conclusion that contemporary lawyers belong to the generation which killed the lawyer-statesman!

Other reasons to be wary of character-based approaches to legal ethics focus not upon the political or social significance of law in general, but upon the nature of lawyer-client relationships. We do not tend to know our professionals personally. Nonetheless, we often, of necessity, place ourselves in positions of vulnerability to them in a way and to an extent which we would typically reserve for much more intimate relationships. In these latter relationships we have grounds – our intimate or personal knowledge of the individual – to make assessments of the character of the person to whom we are vulnerable, of their motivations, their priorities and so forth, which explain our willingness to place ourselves in their hands. But because most of us do not have this kind of detailed knowledge of our professionals we cannot rely upon the character of our professionals as we rely upon the characters of friends. The clients of professionals typically rely upon relative strangers, to whom they stand in relationships of considerable inequality of expertise, for things of importance, when they cannot reliably assess the diligence or expertise of the professional. Clients do not have access to information about the character of their professionals in a way which would make it reasonable to ask them to place themselves in positions of vulnerability in reliance upon character-based considerations. (This analysis may capture the compelling aspects of the idea that the professional is the client's "special purpose friend". See Charles Fried "The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale L J 1060-1089)

Given the nature of professional-client relations, it is important not only that professionals are ethical, but that clients and potential clients have some way of knowing the ethical stance of practitioners even though they do not know them or their moral views personally. The adoption and promulgation of a distinct professional morality is a way of making the ethics of the profession public in a way that the personal ethics of its members cannot be. Clients get the benefit of this "public ethics" however, only if it is indeed given priority over personal ethics in members' dealings with the public. The client need only know what values the professional role requires the professional to adopt and that the professional is a role-occupant, to know what values at least should govern the professional's conduct in the relationship.

***Teaching ethics, is largely a matter of teaching about institutions and practices and the values that underpin them. It is surely the task of universities to teach about those institutions and practices***

## THE ROLE OF THE UNIVERSITIES

This discussion allows us to engage with other, related, aspects of the Cotter and Roper report. At a number of points they address concerns about the legitimacy of universities promoting particular attitudes and values. Hopefully the preceding account draws some of the teeth of this "evangelical" concern. Teaching ethics, on this view, is largely a matter of teaching about institutions and practices and the values that underpin them. It is surely the task of universities to teach about those institutions and practices, and they cannot do so adequately without examining and assessing the underlying justifications, any more than they can properly teach contract law, for instance, without at least giving attention to the priority of individual choice which underwrites western contract law and explains and justifies its doctrines. Perhaps this response will also go some way to addressing concerns about compelling legal ethics education. Again, if we are prepared to compel those who complete a legal education to learn about a range of institutions and practices, then we seem committed to addressing the underlying justifications of those institutions. Cotter and Roper raise the perennial question of relativism: whose values are to be taught. Once more, the preceding story may provide an answer. The values we seek to impart are those public values which underlie and inform the institutions and practices of law.

Finally, notice that though it is important to retain distinct professional values, it is also important that role-occupants take those values seriously. Personal and professional moralities, though distinct, are importantly inter-related. A proper regard for the values of the roles they fill must be part of the personal morality of role occupants.

This is to say that I must hope that my professional does take her role-differentiated obligations seriously. And this is precisely what legal ethics courses should be directed toward. We should seek to give our lawyers (and other professionals) knowledge of the special, role-differentiated, permissions and obligations which attach to professional roles, and respect for the justifications of those permissions and obligations. If we can do this, we will provide protection for clients, guidance for lawyers, and reason to regard law as a respectable and important profession whose practitioners may take pride in their calling. ❑

# ACCOUNTABILITY FOR TEACHING STANDARDS

*Ross Knight, Barrister and Solicitor, Auckland*

***assesses the potential for legal liability for teaching standards and adherence to course prescriptions***

## INTRODUCTION

The Education Act 1989 became law on 1 October 1989 ("the Act"). It is described by its long title as:

An Act to reform the administration of education.

It was and remains an innovative piece of law championed by the then Minister of Education, the Hon David Lange who adopted, for the most part the recommendations of the Picot Task Force commissioned in 1988 to review education administration. The Act governs the activities of primary, secondary and tertiary institutions.

This paper begins with a brief overview of the statutory scheme of the Act as it relates to the status, powers and duties of school boards of Trustees and Tertiary Councils, with emphasis on some specific and important areas of operation and practice.

Issues of accountability will be considered having regard to the provisions of the Act, and the general law of New Zealand, with a final comment on the way forward and the potential for reform.

## STATUTORY FRAMEWORK

Attendance and matters of discipline are dealt with in Part II; control and management is dealt with in Part VII; financial administration of schools is dealt with in Part VIII; Part XIV relates to the establishment and disestablishment of tertiary institutions; Part XV relates to administration of tertiary institutions; Part XVI relates to courses and students, including fees for domestic and foreign students.

The Act vests in school boards and councils of tertiary institutions, full powers of management subject to certain controls and restrictions. The Act guarantees every person who is not a foreign student, free education at any state school between the ages of 5 and 19. It follows, therefore that tertiary education is neither guaranteed nor free.

A school board may make any bylaws it thinks necessary or desirable for the control and management of the school; the board has complete discretion to control the management of the school as it thinks fit in each case subject to the general law of New Zealand.

A school principal is described in the Act as the board's "Chief Executive"; The principal must comply with the board's general policy directions, but subject to this, has complete discretion to manage day-to-day administration as is seen fit in each case subject to the general law in New Zealand.

Parents have a responsibility to ensure that their children regularly attend school; failure to do so is an offence and liable to summary conviction. Boards and principals have a corresponding obligation to ensure attendance of students at school and may appoint an Attendance Officer to police these obligations.

Comprehensive disciplinary provisions require both principal and school boards to act judiciously when considering suspensions and expulsions. In *M & R v Palmerston North Boys High School Board of Trustees* (unreported) High Court, Palmerston North, 5 December 1990, Justice McGechan described the obligation to act judiciously as "fair play in action".

In quashing suspensions and expulsions in that case, Justice McGechan held that the disciplinary powers of the Act, must be used with care and not automatically. Schools, he said must "pause and consider", whether in all the circumstances of a particular case the penalty (suspension or expulsion) is warranted, as a matter of discretion; "results must not be fixed, they must be fair".

The tide had turned somewhat when Justice Williams handed down his decision in *Maddever v The Umawhera School Board of Trustees (No 10)* (unreported) High Court, Whangarei, 24 September 1992. In that case Justice Williams was critical of the use of the judicial review process to address day-to-day decisions made by school boards and principals. He opined that judicial review was an unsuitable vehicle to deal with school matters but that if used, it should be used sparingly and not as a panacea for any disagreement between parent and school. Surprisingly there is no reference in Justice Williams' decision to the earlier decision of Justice McGechan in the *Palmerston North Boys High* case. That aside, Justice Williams' observation did not dissuade litigants from pursuing the remedy of judicial review in matters of discipline.

In *H v C & A* (unreported) High Court, Hamilton Registry, 24 March 1994, Justice Penlington considered an interim application for judicial review of a decision made by a secondary school board to suspend a pupil for contravening a school rule relating to drugs. The plaintiff sought interim relief (by being reinstated at the school) pending a final decision. The Court did not find there was a serious issue to be tried warranting interim relief. The school contended that there were other options available to the pupil, more particularly, enrolment at other schools; were he to do that, he would not be prejudiced. Moreover, the school contended that reinstatement (albeit on an interim basis), would send the wrong signal to the school community and would suggest arguably that leniency was being shown for a very serious offence.

The 1989 reforms have provided a commercial framework for educational institutions. With the exception of

some stalwarts, few would debate the "business unit" analogy.

In the context of the general law of New Zealand, schools and tertiary institutions must also be subject to the common law. Notwithstanding the breadth of their discretions, they must comply with awards and employment contracts, honour commercial contracts and observe administrative law standards ie principles of natural justice.

Routinely, day-to-day management will be subject to such statutes as the Official Information Act 1981, the Local Government Official Information and Meeting Act 1987, the Bill of Rights Act 1990, the Employment Contracts Act 1991, The Health and Safety in Employment Act 1992, The Human Rights Act 1993, and The Privacy Act 1993 – just to name a few. At last count there were something like 34 Acts, Regulations and other specified sources pertaining to the education sector.

***until recent times English Judges have held that the university/student relationship was not "contractual", relying instead on the concept of membership, disputes being settled internally by the Visitor***

## CHARTERS

In the case of schools, charter "shall be deemed" to contain the aim of achieving, meeting and following the national education guidelines. In the case of tertiary institutions the council of each institution, "shall ensure" that the institution has a written charter of goals and purposes appropriate for the type of institution concerned.

The requirement for a charter was one of the innovations of *Tomorrow's Schools*. In *Maddever* (supra), Mr Justice Williams said:

> The Statute brought about a marked evolution of decision-making away from the Minister of Education and the Department of Education so that schools became the basic unit of education administration. The primary mechanisms in the Statute to achieve the legislative objectives were the novel concept of Boards of Trustees who were given by s 75 broad powers to manage schools and the idea of the school charter.

## ACCOUNTABILITY OF SCHOOL BOARDS AND TERTIARY COUNCILS

Almost all decisions of school boards and tertiary councils are reviewable under the Judicature Amendment Act, 1972. The crucial question will always be whether the decision taken falls within the statutory definition of "statutory power" or "statutory power of decision" under the 1972 Act. See *McMannis v Palmerston North Boys High School* (supra); *Maddever* (supra); *H v C & A* (supra); *M v The Board of Trustees of Palmerston North Boys High School* (unreported) High Court, Palmerston North CP No 36/95, 24 December 1996.

There is now a growing interest, both in this country and overseas in the potential for claims in contract and/or tort against school boards and tertiary councils in matters of educational negligence/malpractice. Claims have failed, largely for reasons of policy.

Educational malpractice/negligence occurs when a student suffers harm as a result of incompetent or negligent teaching.

The argument is: teachers are regarded as professionals and therefore a student who has had the misfortune to suffer incompetent teaching, thereby sustaining injury, (albeit not physical injury) should be able to sue that teacher or the teacher's employer.

In the United States, cases dealing with educational malpractice claims have been consistent in finding that the cause of action should be rejected on policy grounds. See Ramsay – "Educational Negligence and the Legislation of Education" (1988) 11 UNSW Law Journal 184.

The most common policy considerations arising are:

(i) Given the diversity of educational theory, it is not possible to devise an appropriate standard against which a teacher's instructions can be judged in order to determine whether it was negligent;

(ii) There are many variables, which may be physical, neurological, emotional, cultural (or environmental) that can account for each child's failure to learn;

(iii) To allow such claims to succeed would open the flood-gates; schools would be exposed to many claims and would waste much time and money defending them;

(iv) It would be impossible to assess the level of achievements students might reach had the mistakes not been made and, accordingly, an appropriate amount of financial compensation could not be properly calculated. See Ramsay (supra) pp 47-48.

Traditionally, internal procedures of educational institutions (day-to-day administration and management) have been considered more or less sacrosanct and beyond the reaches of the Court. See *Rich v Christchurch Girls High School Board of Governors (No 1)* [1974] 1 NZLR 1 and *Edwards v Onehunga High School Board of Trustees* [1974] 2 NZLR 238 cf *McMannis* (supra).

In the late 1960s and early 1970s, a number of cases involving higher education institutions came before the Court in the United Kingdom, one being *Glynn v The University of Keele* [1971] 2 All ER 89. In this case, the University of Keele took action against Mr Glynn, found sunbathing in the nude on university property. He was disciplined by the university and after an internal appeal failed he took legal action to have part of the disciplinary sanction overturned.

The case added fuel to the rather complex debate about the nature of the institution/student relationship which was going through a transitional period at that time. This case along with others mentioned earlier in this article before the New Zealand Courts post-1989, support the proposition that students have a "relationship" with the educational institution they attend, which relationship has legal status that will be recognised by the Court.

In New Zealand the institution/student relationship has gone through something of a transition since the inception of *Tomorrow's Schools*. The earlier emphasis on testing/interpretation of disciplinary rules, constrains and controls, has shifted; there is a new emphasis now on the student being a party to a learning experience. Each is now more concerned with what can be done to improve/maintain/enforce, the relationship rather than with what cannot be done. Flexibility of choice, wider access to higher education and the reasonable expectations of the customer make this inevitable and welcome. See Farrington, *The Law of Higher Education*, Butterworths, London, 1994 p 322 para 7.9.

Up until recent times English Judges have held that the university/student relationship was not "contractual", relying instead on the concept of membership, disputes being settled internally by the Visitor. See Farrington p 327.

In New Zealand, it is submitted this area is fertile ground for further development of the laws of contract and tort, not to mention, the potential to extend the application of the Consumer Guarantees Act 1994 to schools and tertiary institutions.

In *Grant v Victoria University of Wellington* (CP 312/96) (a novel claim, and a test case in New Zealand terms currently before the High Court in Wellington), the defendant university asserts in an interlocutory application to strike out the statement of claim (pending) –

> The relationship between the defendant and its students is statutory not contractual, being governed by the relevant provisions of the Education Act, 1989 and the internal statutes made by the defendant pursuant to that Act.

In its alternative ground for striking out the statement, the university attacks the alleged contractual arrangements between the parties.

The issues are not new: Farrington pp 329-30 writes:

> The legal relationship between an individual prospective student or applicant and an institution is formed when a contract is entered into between legally competent parties (the institution and the applicant) for the admission of the applicant either unconditionally or on satisfaction of certain conditions, whether to the institution itself, or a faculty department or other division.

He goes on to say at pp 330-331:

> The relationship between the institution and the applicant who is not yet a student (a member in a chartered university) can only be founded on contract. The contract is formed when an offer of a place is accepted by the applicant. ... It appears that in other Commonwealth jurisdictions, in cases turning on the existence of a contractual relationship with a student, it has been suggested that the applicant makes an offer on the basis of an invitation to treat set out in the prospectus and that the contract is concluded by acceptance by the institution .... The institution makes an offer for acceptance by the candidate. The necessary consideration required in English law for the existence of a contract is the promise by the applicant, in accepting the offer, to pay the appropriate fee ....

In the first case of its type in the United Kingdom, the House of Lords, in *E (a minor) v Dorset County Council* [1994] 4 All ER 640 considered the liability of schools and teachers for the intellectual development of their students. Their Lordships found that where children appear to be experiencing difficulties with their school work, teachers have a duty to take care when assessing and advising on the educational needs of those children. This case involved three separate claims concerning three different students all with learning difficulties. Each claim had been brought against the local education authority responsible for the student's education. The claims (consolidated into the one proceeding) allege breaches of both a statutory and common law duty to students. All three students had special needs; on their behalf it was alleged that the relevant education authorities had been negligent when diagnosing, advising on and taking action with regard to these special needs.

The House of Lords found that the relevant statute had not created a right to bring an action in tort for breach of statutory duty to educate; that at common law the employees of a local educational authority owe a duty to take care when assessing, advising on and determining children's educational needs. The educational authority was then vicariously liable for the negligent acts of its staff. The Court made it clear that teachers and not just principals are also liable when they are asked to give advice and they know that the advice will be communicated to the parents.

> ***"The relationship between the defendant and its students is statutory not contractual, being governed by the relevant provisions of the Education Act, 1989"***

Each case was referred back to the trial Judge to determine whether the relevant educational authority employees did in fact breach the standard of care owed to the students. In the case of advice given by the head teacher and an advisory teacher, Their Lordships observed that the trial Judge would have to decide whether the advice was in accord with the views that might have been entertained at the time, by reasonable members of the teaching profession.

In 1982, in an address called "Legal and Social Responsibilities for Teachers", the Hon Justice Kirby of the High Court of Australia said:

> If teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents. ... In due course, ... we will see whether the teacher's legal duty of care goes beyond protecting pupils from physical injury in the playground and science laboratory to what is perhaps the more relevant and usually more profound professional injury that can result from indifferent, ill-motivated, incompetent or just plain lazy teaching ... such a test case [may be] a path or agent for educational change and accountability of schools and teachers to the pupils and their parents.

## THE NEW ZEALAND EXPERIENCE

In *M & R v Syms* (supra) a claim to review the decision of a school board to expel a student from a boarding hostel, the Court found that the school board was not exercising a statutory power of decision in relation to expulsion from its boarding establishment for the purposes of the disciplinary provisions of the Education Act. The Court found that there was a contract in place of a commercial nature providing for the payment of money in exchange for accommodation, and services. Expulsion of the student from the boarding establishment simply amounted to the termination of a private commercial arrangement.

In *Grant v VUW* the plaintiffs allege, among other things:

- There was an agreement between them and the defendant on the defendant accepting their enrolment into the particular course of study;
- The agreement included an express term that the defendant university would provide educational services and the plaintiffs would pay tuition fees;

- The agreement included implied terms that the course would provide the plaintiffs with a thorough knowledge and understanding of the issues to be covered in the course and that the course would be of a reasonable post-graduate standard.

The plaintiffs claim that the defendant breached the agreement in that:

- The course did not provide them with thorough knowledge;
- The level of teaching fell short of a post-graduate level;
- Supervision was inadequate and of a poor standard;
- Financial resources allocated were inadequate.

As a result of the alleged breaches, the plaintiffs claim they have suffered in:

- Wasted expenditure on university fees;
- Loss of opportunity to undertake another course of satisfactory quality;
- Loss of employment opportunities during the period enrolled;
- Loss of future job opportunities as potential employers know about the inadequacies of the course;
- Future training requirements to bring the plaintiffs to the standard of knowledge and experience that they should have been in after completing the course had it been up to standard;
- Frustration, annoyance and distress.

All in all, the plaintiffs seek damages totalling $345,482 together with interest thereon from the date of the breach to the date of judgment.

As mentioned there is pending an application by the defendant university to strike out the claim, alleging among other things that:

- The relationship between the defendant and its students is statutory not contractual being governed by the relevant provisions of the Education Act 1989;
- Alternatively, there is no reasonable basis for applying into any contractual arrangements between the parties the terms pleaded as being breached;
- There are good reasons of principle and policy relating to the academic freedoms and independence of universities such that these "policy" reasons operate to negate the existence of any justiciable duty of care of the "educational malpractice" nature alleged.

With the exception of *Grant v VUW* the contractual and commercial nature of the arrangement between student and institution has never before been tested. The claim is in both contract and tort.

The claims arose prior to the passage into law of the Consumer Guarantees Act 1994. Therefore, that Act is not pleaded. However, it surprises this writer that the Consumer Guarantees Act has not previously been used in relation to claims for breach of statutory duty/obligation.

It is submitted that Part IV of the Consumer Guarantees Act applies to the education sector. Section 28 provides:

> Where services are supplied to a consumer there is a guarantee that this service will be carried out with reasonable care and skill.

It is an attractive proposition to say that educational institutions (school boards in particular) are free to administer and manage, subject to any enactment and the general law of New Zealand including this Act. It has been argued that the Consumer Guarantees Act may not apply to state schools because:

- State education is largely free and more in the nature of a state gift; and
- There is no obvious contractual relationship between school and parent.

That is a contestable view in this writer's opinion. The provision of a free education does not mean there is no contractual relationship between parents and schools. Arguably, a contractual relationship exists. In this new environment of *Tomorrow's Schools* some institutions are very aggressive in marketing their services; in those schools where enrolment schemes are in place, the expectation of "pursuit of excellence" services is often committed to writing along with the entry requirements which in some cases include the level of "school donation" expected. Some support for this view may be found in s 38 of the Consumer Guarantees Act, relating to the effects of cancellation by a consumer. It is there provided that:

> Where a consumer cancels a contract for the supply of services under this Act – (they) the consumer shall be entitled to recover from the supplier a refund of any money paid or other consideration provided in respect of the services unless a Court or Disputes Tribunal orders that the supplier may retain the whole or part of the money paid or other consideration provided by the consumer.

Arguably, the other consideration "provided" by the consumer might comprise such nebulous things as:

(i) The payment of the school donation;
(ii) An enrolment fee, thereby providing the school with a component to its overall operations grant;
(iii) A parent providing free services in or around the school in lieu of payment of a school donation.

## IN CONCLUSION

The architects of *Tomorrow's Schools* sought to put in place a legislative frame work that would encourage more flexibility and autonomy in matters of education administration. Some institutions have struggled, others have flourished. For the most part the Act has been a success story. However, in jurisprudential terms, *Tomorrow's Schools* is still in its infancy.

Up until relatively recent times, there has been intense focus on the disciplinary procedures contained in ss 13 to 18 of the Act. See *McMannis*, *Maddever*, *H v C & A*. It is submitted that *Grant v VUW* signals a new focus. It promises to provide exciting and lively debate, especially in matters of policy.

In this era of performance management (now a mandatory requirement for the school boards) it is perhaps not surprising that the users of educational institutions are becoming more discerning about the standard of services offered or provided. Overseas jurisdictions have been slow to change but the discussion does seem to be gaining in momentum. It is too early to speculate with certainty where the law is going. Suffice it say, that as the administration and management of educational institutes becomes more onerous with the passage into law of new Acts, the traditional rights and responsibilities of provider and user will, out of necessity, be forever to change. ❑

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# FIRST YEAR LAW: SURVIVAL OF THE FITTEST?

*Richard Scragg and Andrew Stockley, University of Canterbury*

*survey first year law selection and teaching in New Zealand*


As our universities become increasingly consumer-driven, the five law schools are in the fortunate position of offering a "product" for which demand far outstrips supply. The rising cost of tertiary study has enhanced the attractiveness of law, with its visible career prospects and supposed lucrative rewards. While the number of modern language students plummets, the law schools face a sanguine future. The number of students wanting to study law remains high and continues to rise. In 1996 the five law schools received some 3000 applications to enter first year law; in 1997 there were just under 3500 applications.

The barriers to a legal career are nevertheless significant. From 3500 applications, around 2400 students were accepted for first year law. Of those wanting to study law 30 per cent never made it to the starting blocks. Of the 2400 students who did, it is likely that around 1800 will pass the first year course (25 per cent of those taking first year law having dropped out or failed in 1996). Those who do pass will then compete for the 1200 or so places available in second year law. The vast majority admitted to the second year will eventually graduate with a law degree.

First year law serves as the gateway for graduating LLB. Entering, passing, and doing well enough to be accepted for second year are the key barriers. Each of these steps is administered independently by the individual law schools. The Council of Legal Education regulates admission to the profession but exerts no influence over who is accepted for first year law or the criteria upon which some are allowed to proceed. There are marked variations among the five law schools in terms of entry to first year law, what is taught during that year, how it is taught, how it is examined, and its relevance for admission to the second year. All of this is in contradistinction to the uniformity of approach and tight control of the Council of Legal Education over the professional legal studies course which follows the degree.

This paper is driven by the authors' experience at the University of Canterbury as two of the lecturers of the first year law class and as the Tutors for Second Year Admissions, responsible for determining who is selected to advance into second year law. We have surveyed all five law schools as to the way in which they administer, teach and examine first year law. Some of the figures we have received are approximations but the conclusions are no less startling. There is a significant diversity of approaches among the law schools at the first year level. We doubt that the extent of this diversity is understood by the students who apply to study law. We also doubt that those responsible for administering first year law are aware of the extent of the incongruities among the five law schools. The question, to our mind, is whether a diversity of approaches has led to a disparity of results. If only a third of those wishing to study law will graduate LLB, how important is the choice of law school for ultimate success?

## GAINING ENTRY

The minimum qualification for school leavers entering university is three Bursary passes; provisional entrance is available on the basis of Sixth Form Certificate. From their twentieth birthday applicants enjoy entry as of right. Admission to university is not competitive but admission to the study of law may be, depending on the individual university. New Zealand's universities permit limitation of entry to courses where the universities cannot supply adequate facilities to cater for the number of applicants. On this basis, the rationale of limitation is logistical, not academic. Currently, Auckland, Waikato and Victoria operate limited entry with fixed ceilings on numbers for their first year intake. Canterbury did the same until last year but now, in company with Otago, has an open entry policy. For someone determined to study law but rejected by a North Island university, the advice might be to head south.

### Open entry in the South

Canterbury lifted limitation of entry restrictions in 1996. The 1995 class had been fixed at 425 students. With open entry, the first year class increased to 561 in 1996 and 610 this year. Otago's first year intake has increased from 548 in 1996 to 601 this year.

Open entry has its advantages. There is no prejudging of aptitude for law. Anyone can attempt first year law and advance on merit. One might also suspect that monetary considerations are not irrelevant. Higher student numbers attract more money for the university and for the department, and first year law students represent relatively easy money at that: they can be packed into large lecture classes without increasing the number of teaching staff and tutorials can be taken by senior students at comparatively low cost.

### Limited entry in the North

In contrast, the North Island law schools turn away almost one in two applicants. At the start of this year Auckland received 921 applications for 500 places, Waikato 450 for 200, and Victoria 820 for 450 (although Victoria offers an

additional 60 places by way of its "summer school" first year course).

Auckland allocates places according to applicants' most recent academic results. For students coming direct from school this normally means the grade point average (GPA) across their five best Bursary subjects. For students who have been at university the GPA is calculated from their most recent year of full-time study or equivalent part-time years (with slightly differing rules for undergraduates, graduates, and holders of higher degrees).

Waikato also looks at Bursary and university results, but employs fewer fixed criteria. There are guaranteed places for students who achieved A Bursaries the preceding year (providing this included English). For students entering direct from the sixth form, Waikato guarantees a place for those who score eight or less across their best four subjects in Sixth Form Certificate (results range from four to 36, the former representing the top of the scale).

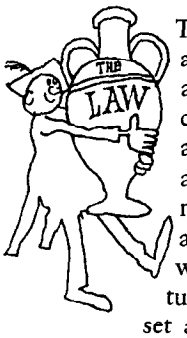
Victoria offers guaranteed places to A Bursars or sixth formers who achieved 12 or less. For all other students there is a highly precise – and consequently inflexible – mathematical formula. Students coming from school are assessed on the best of their sixth or seventh form results. Students who have been at university are assessed on their best year of work at that level. Once an average has been ascertained for each applicant this is multiplied by a value which varies from 0.8 for an average based on Sixth Form Certificate to 1.25 for an average derived from an Honours or Master's degree (thus a 70 per cent average at Master's level is worth more than the same average in the sixth form year). Bonus marks are then added, ranging from five for a seventh form year studying abroad to 15 for a higher degree.

If significant numbers of students are to be denied entry to first year law, it is interesting to note that the North Island universities have chosen to do so by looking to applicants' grade point averages and best year of academic results. United States universities have developed complicated tests for measuring potential aptitude for law. Waikato aside, which seeks evidence of literacy (by having passed Bursary English, for example), no attempt is made to check that the subjects being averaged have relevance for law: a good chemistry student will always outrank a middling history scholar.

### Preferential quotas

Using academic achievement to determine admission to first year law is not as simple as it might appear. The North Island universities have all faced the question of whether exceptions are necessary or desirable. As put by WK Hastings, Deputy Dean at Victoria: "If a law school admits Maori students on a quota because they would not be admitted otherwise, that law school acknowledges that social, economic and racial discrimination factors have operated to discourage those students in their prior academic achievement." ("Victoria University of Wellington Law Faculty Maori Quota", *ALTA Newsletter*, Summer 1996-7, p 5.)

Victoria sets aside 45 of its 450 first year places for Maori who would not otherwise gain admission. Students who apply for the Maori quota are interviewed on a marae by a panel including a law school representative, a Maori Law Society delegate, and Maori elders, all of whom must be satisfied that the applicant is likely to succeed in legal study and that he or she will then give back to Maori the benefit of the skills acquired. Victoria also makes provision for "special circumstances" applications. These include "circumstances of economic, social or educational disadvantage" and/or "significant work and life experience that would be relevant to the successful completion of a law degree". (Victoria Law School, *Bachelor of Laws Years 1 and 2*. 1997. p 13.)




Auckland goes considerably further. Twenty per cent of its first year places are awarded to different quota groups. There are up to 49 Maori quota places. Applicants are interviewed by a Maori panel and places are allocated on the basis of academic ability and interview results. A minimum of 250 in Bursary (a 50 per cent average) is required, although this is waived for the five places reserved for mature Maori applicants. Up to 20 places are set aside for indigenous Pacific Island residents, three places for disabled students, and up to 20 places for mature applicants. The latter quota does not include a minimum Bursary requirement. Mature applicants must be 24 years or over and are evaluated upon work and study experience, reasons for wanting to study law and for wanting to do so at Auckland. Further places are made available for full fee paying (ie overseas) students.

Interestingly Waikato, founded with a commitment to a bicultural approach to legal education, imposes no set quotas. Academic achievement is not however the sole criterion for admission: "Students aged 20 or over with other qualifications and experience may also be admitted on the basis of such considerations as personal qualities and past employment and other relevant experience .... The School also endorses the equity provisions contained in the Charter of the University of Waikato. Accordingly, the School monitors its intake to ensure that students in nominated equity groups are not disadvantaged by the selection process." (*University Prospectus*, 1997, p 29.) Professor Margaret Wilson, the founding Dean, wrote in 1993:

> The objectives of the School ... require that an opportunity be given to students who may not normally be admitted to law school. The current admissions policy requires all students to be "academically prepared". This releases the School from the arbitrary decisions that result from a fixed grade entry qualification, but requires a close scrutiny of the students' academic capability. There is no point in admitting students who cannot cope with the work. The School does not have a quota system for categories of students, such as Maori, mature students or Pacific Islands students as do ... other schools. The Admissions Committee looks at the academic qualifications, relevant work experience and non-tertiary qualifications of the students where there is no formal tertiary qualification. The School has had only three years' experience at admissions policy and procedures. The emerging pattern is that students normally require 285 marks in their Bursary exams if they apply from secondary school, and B/B+ if they come with another degree or university courses .... The result of this admissions policy is a School profile which includes nearly 58 per cent women students, 20 per cent Maori students, and nearly 40 per cent of "mature" students who include graduates and students with no tertiary qualification.
>
> ("The Making of a Legal Education in New Zealand: Waikato Law School" (1993) 1 *Waikato Law Review* 1, 8.)

In terms of gaining entry to law school, the less than outstanding candidate would be advised to shop around. Canterbury and Otago have no restrictions (and thus have no need for quotas or special considerations). All applicants are admitted to first year law, regardless of potential – or lack thereof. The cull occurs in the end of year examinations and when those who pass seek entry to second year. Auckland, Waikato and Victoria exclude some candidates from the beginning. The basis upon which they do so is similar but the details are often quite different. They all look to academic achievement over legal aptitude, but where Auckland focuses upon the most recent year of study, Victoria looks to the best year. Auckland defines mature students at 24 but Waikato at 20. Auckland utilises a range of specific quotas, whereas Waikato employs more general – and flexible – considerations.

*Victoria places most weight upon legal method, followed by Otago, Auckland, Canterbury and Waikato in that order*

## THE COURSE OF STUDY

As taught in New Zealand, first year law consists of two distinct parts. The first can be entitled "legal method", and involves introducing students to the skills of legal reasoning and writing. The second part is harder to attach a simple title to. This part aims to introduce students to the ways in which the New Zealand legal system has evolved, is structured, and operates today. As such, it gives an overview of the whole legal system. It might be loosely described as "law and society". The two parts are given different emphases and are taught in different ways at each of the law schools.

### Legal method

Half the lectures given to first year students at Auckland are concerned with legal method, namely case law reasoning and statutory interpretation. All the tutorials are designed to develop skills in these areas. The 1996 final exams required students to analyse a previously unseen judgment and to relate statutory provisions to hypothetical scenarios. As with the lectures, half the exam marks were given over to legal method.

Unlike the other law schools, Waikato has divided its first year programme into three separate courses: Legal Systems, Legal Method, and Law and Societies. The second of these courses focuses upon case analysis and statutory interpretation, both by way of lectures and small group exercises. Seventy per cent of the 1996 final exam involved analysis of a previously unseen judgment which included elements of statutory interpretation, and application of that analysis to a hypothetical fact pattern. The other 30 per cent of the exam was given over to an essay question which, while reflecting subjects covered in Waikato's Legal Method course (precedent, legal ethics, research), might be categorised as falling within the law and society part of the course at other law schools.

Victoria devotes three-quarters of its lectures and tutorials to legal method. This is reflected in the final exams. In 1996 75 per cent of the marks were allocated to case analysis and statutory interpretation. Unlike Auckland and Waikato, case analysis does not involve deconstructing an unseen judgment in order to identify the issue, material facts, ratio and the like. The lectures provide detailed scrutiny of a line of common law cases; the exam gives a hypothetical judgment including application of and commentary on these cases which the student must then evaluate. Victoria also has a distinct approach to statutory interpretation. Whereas the other law schools discuss the different principles of and aids to interpretation and require students to apply these to hypothetical statutes and fact patterns, Victoria teaches students to follow a specific process. Steps given much greater emphasis include identifying relevant ambiguous words, looking at possible dictionary definitions, giving ordinary usage examples, and analysing the statutory context.

Just over a quarter of Canterbury's lecture hours relate directly to legal method. This is substantially boosted by the tutorial programme which focuses upon developing skills in this area. The large majority of tutorials involve legal method exercises and legal method constitutes 50 per cent of the final exam marks. As at Auckland and Waikato, students are required to analyse a previously unseen judgment and there is a similar statutory interpretation problem. Unlike those two law schools, but in some ways similar to Victoria, students are also taken through a line of common law cases (presently the posting rules) and are required to apply principles and cases to a novel fact pattern.

Around sixty per cent of Otago's lectures are on legal method and this also forms the basis of the tutorial programme. Of the final exam marks 62.5 per cent are allocated to case analysis and statutory interpretation. As at Victoria, case analysis focuses upon learning and applying a line of common law decisions (no analysis of a previously unseen judgment is required). There is heavy emphasis upon the admissibility of evidence in the statutory interpretation section.

Of the five law schools, Victoria places most weight upon legal method, followed by Otago, Auckland, Canterbury and Waikato in that order. There are significant differences: whereas 75 per cent of Victoria's lectures, tutorials and final exam marks relate to legal method, at most 33 per cent of Waikato's first year programme can be said to do so. Tutorials at the four older law schools are predominantly concerned with legal method; the same cannot be said of Waikato where only one of the three first year courses deals with this area. Statutory interpretation and case analysis forms the core of legal method studies, but here too there are marked divergences. Victoria and Otago stand out for the particular emphases they give to statutory interpretation and for taking case analysis to mean applying a line of learnt common law decisions rather than deconstructing a previously unseen judgment.

### Law and society

Time spent and marks allocated for law and society issues are the inverse of the figures given for legal method. Two of the three Waikato courses deal with topics such as legal history, the Courts, judiciary and legal profession, and Maori law and Treaty issues. Reflecting Waikato's commitment to biculturalism, the 1996 Legal Systems exam would have allowed a candidate to answer three-quarters of the questions by reference to the Treaty and Maori law issues. The Law in

Societies course aims to examine the context of law and, as such, looks at different economic models, and race and gender issues.

Auckland's law and society section bears similar ideological overtones to Waikato. The examiners seek some critique of the legal system and award half the marks for Treaty questions. Disempowerment through property ownership and feminist legal theory are two of the other topics taught and examined.

Canterbury, like Auckland, allocates 50 per cent of its final exam marks to law and society issues. The exam questions are, however, more conservative in nature and reflect a broader range of topics. Legal history, the Treaty, the legal profession and access to justice, the modern Court system, and checks upon government are all given relatively equal weight in terms of both lectures and assessment.

Victoria also provides a broad overview of the New Zealand legal system, but does so by way of introduction and with considerably less lecture time (25 per cent versus almost 75 per cent at Canterbury). Only 25 per cent of the final exam marks are allocated to law and society, represented by a single essay question.

Otago is unique for the emphasis it places upon legal history, assigning one in three lectures to this topic. The Treaty is included under this head, but in a comparatively minor and distinctly historical manner. Legal history comprises 25 per cent of the final exam marks, a fact which would have been unremarked in the 1960s but is dramatically different from the other law schools in 1997. A further 12.5 per cent is allocated to questions on the judiciary, legal profession, and justice system, which are covered during the discussion of case law reasoning.

As with legal method, the law schools differ markedly in what they teach and examine of New Zealand's legal system, and the weighting they give to knowledge in this area.

## THE METHOD OF TEACHING

### Teaching time

There are striking differences in terms of how much time first year students can expect to spend in the classroom at each of the law schools. At Auckland the legal system course is taught in half a year. There are two two hour lectures a week spread over 12 weeks; that is to say, 48 lecture hours, and in addition ten rounds of tutorials lasting one hour each.

Victoria is the only other university to teach first year law in a single semester although, unlike Auckland, this only applies to a small minority of its students. Victoria has instituted a "summer school" programme, limited last year to around 60 students, compared with 450 who take the full year course. The summer school involves four ninety minute lectures a week spread over 12 weeks. This amounts to 72 lecture hours to which are added 12 ninety minute tutorials. Class contact time is much the same as for the full year course for which there are two eighty minute lectures a week and a weekly one hour tutorial.

Canterbury and Otago provide similar amounts of classroom instruction to Victoria. They have three one hour lectures a week (72 lecture hours) and weekly one hour tutorials (although these are slightly less frequent at Canterbury, 15 rounds to Otago's 22).

If Auckland has substantially fewer class contact hours than the other law schools, Waikato has substantially more. Each of its three first year courses involves three hours a week in the classroom. In Legal Systems and Legal Method there is a one hour lecture and a two hour "stream" (a small group class of about 25 students); in Law and Societies there is a weekly tutorial in place of a stream.

*Waikato students take three law and four non-law papers in their first year. At Victoria, Canterbury and Otago the proportion is much less*

Differences in classroom hours are reflected by the number of non-law papers first year law students are expected to take. Waikato students take three law and four non-law papers in their first year. Law constitutes just under half their total workload. At Victoria, Canterbury and Otago the proportion is much less: a quarter to a third of the average workload. At Auckland the legal system course counts for two points out of a total of 14 or 16 points to be taken. The amount of "law" taken in first year law can differ significantly according to the university chosen.

The intensity of study must also differ according to whether the course is a full year or single semester one. Quite able students may take some time to master the skills of legal reasoning and analysis, of which they are likely to have had no experience in previous academic study. Although less intensive, a full year course allows time for greater absorption of material and step by step development of legal method skills. Victoria's summer school programme and Auckland's half year course are out of step with the teaching of law elsewhere, the latter particularly so given the substantially reduced teaching time entailed.

### Class sizes

First year lectures are given to relatively large classes at all five law schools. Auckland's intake is split into two. This year's lecture class comprised 286 students in the first half year and 226 in the second. At Canterbury and Otago, enrolment of over 600 students for a full year course has meant that the class is divided into two streams for the whole year. The same lecturers repeat their lectures to both streams. Canterbury started the year with 250 in its first stream and 350 in the second (class sizes being dictated by lecture theatres available). Otago's streams were more evenly divided with around 300 in each. Class sizes are smaller at Victoria with three streams of 150 students (and a much smaller group of 60 for the summer school). Unlike the other universities, there is a different pool of lecturers for each stream although they share a common syllabus and exam. Lectures at Waikato are delivered to a class of 200 students although, as mentioned, two of the three subjects have significant small group teaching in the form of a weekly two hour "stream" for classes of 25 students.

The number of lecturers involved in teaching first year law varies. Waikato with its three separate courses and small group teaching "streams" makes use of around 15 lecturers at the first year level. Eight or nine lecturers are involved at Victoria, each stream being taught by a team of three. Three to four lecturers teach the half year course at Auckland,

while three lecturers are responsible for the full year course at Otago and seven for that at Canterbury. One may assume that the more lecturers the class sees, the greater diversity of topics and approaches students will be exposed to. Conversely, fewer lecturers may mean more consistency and more time to develop particular topics.

The larger the class and the smaller the number of lecturers, the greater the burden upon each lecturer involved. Dealing with students who seek assistance and exam marking are two of the most time-consuming chores for lecturers of large classes. Canterbury and Otago, with 600 students each, face the most obvious problems in this area, although Canterbury comes off better with seven lecturers as opposed to three sharing the load. Three lecturers are responsible for each stream at Victoria, but with only 150 students a stream, the demands of large class teaching are less onerous.

### Lecture styles

Open entry has meant large classes. One might have assumed that this would inhibit the range of teaching styles employed, but the evidence suggests no such pattern. Socratic lecturing (requiring students to read materials ahead of class and to answer questions put by the lecturer) is the primary teaching style used at Victoria, and is presumably one of the reasons for dividing the class into relatively small streams of 150 students. Waikato with small group teaching of 25 students in both Legal Systems and Legal Method also emphasises the importance of interactive question and answer teaching (although, as at Victoria, this is not entirely even, non-socratic or "straight" lecturing being used for the Law and Societies course at Waikato and the introductory segment at Victoria). Nevertheless Otago, with two streams of 300 students each, also manages to include some interactive teaching and class discussion: not nearly to the same extent as Victoria or Waikato, but quite significant in the segment of the course dealing with case analysis and not unimportant for statutory interpretation. Auckland and Canterbury, on the other hand, adhere to the traditional university model of the lecturer speaking and imparting knowledge with little class participation, leaving interactive teaching to tutorials.


Professor Terry Carney of the University of Sydney has warned against the perils of large class teaching: "High student demand must not be permitted to conceal the high price which the public will pay if legal education is treated as a high volume commodity which can be mass produced via lecture groups numbering in the hundreds, rather than through the intensive small group work required if skills and ethical precepts are to be properly developed." ("Meeting New Challenges", *ALTA Newsletter*, Winter 1997, p 4.) All five law schools run tutorial programmes in an effort to provide some small group instruction. The primary forum for teaching nevertheless remains the lecture theatre. If open entry has not discernibly restricted the range of lecturing styles available, it has produced the largest classes. Many of the first year students at Canterbury and Otago would not have been admitted to law at Auckland, Waikato or Victoria, and their previous academic performance is weaker than those who gained non-quota places elsewhere. One question for Canterbury and Otago must be whether these larger classes, with their less academically able component, in any way slow down lectures or tutorials and impede the progress which could have been achieved under a restricted entry régime. If so, do the best students suffer for being in open entry as opposed to limited entry (and more academically capable) classes? If not, are lectures being pitched at a level comparable to the other law schools but beyond the capabilities of those who would have been excluded elsewhere?

## THE MANNER OF EXAMINING

### Course work and its weighting

The content of the final examination papers set by each of the law schools has already been detailed. The weight given to these exam papers varies. At Otago the final exams (two three hour papers) count for 100 per cent. Course work involves preparing for tutorials and there are four voluntary opinions (on tutorial topics) and three voluntary tests (on the different parts of the course): these are however by way of practice not assessment. At Auckland and Victoria the final exam (one three hour paper) counts for between 80 and 100 per cent. Additional work at Auckland comprises preparation for tutorials and a single terms test (on case analysis) which can count for 20 per cent of the assessment if this is in the student's favour. Victoria has more course work. In addition to tutorial and lecture preparation, there are two tests, two opinions (one of each on case analysis and statutory interpretation) and one essay. Students must average 40 per cent (and attend 75 per cent of tutorials) in order to sit the final exam; the two tests can each count for ten per cent of the final grade if this is in the student's favour.

At Canterbury the final exams (two three hour papers) count for between 60 and 90 per cent. Course work includes a written assignment for each tutorial round (marked by tutors in order to provide feedback), two tests (on case analysis and statutory interpretation) and two essays. The tests and essays are voluntary although the best or only one completed counts for ten per cent of the final grade; the others can each contribute ten per cent if this is in the student's favour.

Waikato, with three separate courses, requires the most in-term work and also gives it much more weighting for the final grade. The Legal Systems course requires preparation for each "stream", two tests and one assignment. The course work counts for 33 per cent of the final grade, the exam (one three hour paper) for 67 per cent. In Legal Method and Law and Societies the course work counts for 75 per cent and 70 per cent of the final grades; the exams (two hour papers) are only worth 25 per cent and 30 per cent respectively.

### The exams

The exam papers themselves have already been discussed. The law and society component of the first year course is in almost all cases examined by way of essay style and problem questions. Waikato's 1996 Law and Societies exam paper is interesting for allotting 25 per cent of the marks to multi-choice questions. This style of question is problematic. Two examples give a sense of the intellectual rigour required. Question 24 reads:

> The Matrimonial Property Act 1976:
>
> (a) reflects a monolithic view of the family;
> (b) was a setback to women's struggle for equality at the time;
> (c) discriminated against Maori women in particular;
> (d) all of the above;
> (e) none of the above.

Question 25:

The Employment Contracts Act 1991:

(a) has increased the gap between rich and poor;
(b) has seen Maori and Pacific Islanders lose proportionally more jobs than other races;
(c) has seen women's wages and conditions drop from pre-Act levels;
(d) all of the above.

Otago's emphasis upon legal history has already been mentioned. The manner in which it examines this area is also somewhat unusual. In 1996 five per cent of the final grade was awarded for indicating the source of five quotations. Again two examples must suffice:

(c) "... the commonalty of the whole realm shall distrain and distress us in all possible ways, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed according to their pleasure, saving harmless our own person ..."

(d) "... I will not wreak vengeance on your daughters when they commit whoredom or on your daughters-in-law when they commit adultery, for you yourself make off with whores and sacrifice with harlots."

*Question 25:*
*The Employment Contracts Act 1991:*
*(a) has increased the gap between rich and poor;*
*(b) has seen Maori and Pacific Islanders lose proportionally more jobs than other races;*
*(c) has seen women's wages and conditions drop from pre-Act levels;*
*(d) all of the above.*

The 1995 final exam awarded a similar proportion of marks to filling in blanks from different quotations. To give one example:

(iii) "The ___ of ___ we have buried, but they still rule us from their graves.' Maitland, *Forms of Action*, p 296."

## PASS-FAILURE RATES

1996 pass-fail rates for first year law varied significantly. As might have been expected, schools with limited entry recorded much higher pass rates. There was a 97 per cent pass rate at Auckland, 96 per cent at Waikato, 85 per cent at Victoria, 76 per cent at Otago, and 55 per cent at Canterbury. Whereas seven students failed at Waikato and 14 at Auckland, 123 failed at Otago and 300 at Canterbury (including students who did not sit the final exams). The variance between Canterbury and Otago appears particularly surprising. Both schools operate open entry policies and both had classes of around 550 in 1996. Both could be expected to attract candidates of a similar calibre. One must assume that either Otago's teaching is markedly more effective or that Canterbury practices considerably more stringent marking. The latter would appear the more reasonable assumption given that during Canterbury's last year of limited entry (1995) there was a 71 per cent pass rate (106 students failing). Even with limited entry, Canterbury was passing a much lower ratio of students than the North Island universities and was failing a higher percentage of students than Otago does with open entry.


Remembering that Auckland, Waikato and Victoria turn away hundreds of applicants, what advice might be offered to the less than outstanding first year aspirant? Otago stands out for accepting anyone and offering a good chance of passing. There is a better than even chance of being accepted at Auckland and, once in, very few fail. Victoria and Canterbury stand relatively even. In 1996 Victoria turned away as many students as Canterbury failed. Whereas Canterbury appears to mark more stringently than Otago, the same can be said of Victoria and Auckland. Waikato has a high pass rate, but the chances of being accepted are lower than at any other law school.

## ADVANCING INTO SECOND YEAR

For those accepted into first year law, Waikato does however possess one great advantage. All who pass at first year are guaranteed a place in second year law. Viewed against a 96 per cent pass rate, admission into first year is the most significant hurdle to surmount.

All the other law schools admit substantially fewer students into second year than pass at first year. Auckland passed 484 first year students in 1996; it offers around 270 second year places, 69 of which are reserved for different quotas and some of which will go to graduates or students who passed first year law in another year and are now returning to the subject. Victoria offers 300 places in each second year subject (30 of which are reserved for Maori quota students); some 150 students were turned away this year. Canterbury offers 200 places in each second year subject (20 of which are subject to quotas). This year it received an average of 280 applications for each subject – not including many students who passed but passed poorly and would not have applied for second year knowing that they had little chance of acceptance. Otago passed 385 first year students in 1996; it offers 200 places in second year law.

### Varying criteria

If all the law schools except Waikato only allow a proportion of those who pass first year to advance in the degree, the criteria employed for deciding who can enter second year are by no means consistent.

Students who complete first year law at Auckland or Victoria are ranked according to their grade point average (GPA) across all subjects. At Auckland the law grade counts for two points and this is added to the most recent and best 12 non-law points achieved. A GPA of around B+ is normally required. Victoria uses the same mathematical formula employed for determining entry to first year. Earlier this year it was reported that this meant that students were required to achieve an A average in their first year. Victoria's Dean, Professor Brian Brooks, noted that one student who missed out "had an A+ in legals but Bs in other subjects". ("Legal Overload At Victoria", *New Zealand Education Review*, 12 March 1997.)

Canterbury and Otago take a quite different approach. Their essential criterion for second year is performance in

law. In recent years a student at Canterbury with a B– or above in law who passed most of his or her non-law subjects could expect to be offered a place in second year law. Otago requires a C+ average across non-law papers and then ranks students according to their mark in law.

This leads to the anomaly that a student receiving an A+ in first year law and Bs in other subjects would be accepted without hesitation at Canterbury and Otago while declined at Auckland and Victoria. One would have thought that aptitude in law had been clearly proven and any formula which ruled otherwise casts doubt not on the student but on the formula itself.

Canterbury and Otago's emphasis upon the legal system grade has encouraged some students who have passed first year law, but insufficiently well to advance into the second year, to repeat the course in the hope of gaining a better grade. Canterbury attempts to discourage such repeats by stressing that the student will waste 12 points if the grade is not improved and by allowing direct entry to second year for students who have previously passed first year law who go on to achieve a B+ average in related non-law subjects at second or third year level (related subjects meaning that political science and history will have more relevance than statistics or chemistry). Otago offers more direct discouragement by providing that students who repeat legal system in consecutive years will be credited with the average mark for the two attempts (unless a substantial improvement is recorded).

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All the universities make provision for admitting transfer students. Some candidates undoubtedly seek to change university if this will work in their favour. Waikato takes a relatively high number of transfers each year, some 30 to 40 students, who in many cases have presumably been limited out of second year in Auckland. Auckland, by way of contrast, adopts by far the harshest line towards transfers. They are treated as a quota grouping with no more than five places available and they must have passed not only first year law but also at least one second year paper. Students limited out of second year at other universities need not apply: "Transferring Law students cannot be considered under any other quota, including the general admission quota." (Auckland Law Faculty, *Student Handbook 1997*, p 66.)

Graduates are considered separately from undergraduates who have passed first year law. In most cases graduates are seeking to take first and second year law papers concurrently and at Canterbury and Otago the standard of the complete academic record will be what counts. In several cases the graduate will have passed first year law several years previously and will be hoping that having completed a non-law degree will now count in his or her favour. Auckland and Victoria stipulate specific benchmarks to be achieved. The latter's mathematical formula has already been detailed. Auckland provides for calculating a GPA based on the graduate's most recent year of full-time study (or part-time equivalent), although the student may apply to have an earlier year considered as being more representative. In the case of graduates with a Master's degree or a postgraduate diploma, all papers completed for that degree or diploma will go towards calculating the GPA.

Students limited out of second year would be advised to look carefully at the criteria employed by each of the law schools. Transferring university or completing non-law papers with a view to being accepted under a different rule are two of the options available. Anecdotal evidence suggests that a number of students know how to play the system. An Auckland graduate who received a B+ in first year law but an insufficient GPA across his other most recent non-law subjects successfully transferred into second year law at Canterbury this year. Another Auckland graduate who only received a C– in first year law but then gained a diploma with an A– average (which included some group work) was accepted into second year law at Auckland on the basis of the GPA rules for graduates. Students who are mobile and can shop around may increase their chances. One suspects, however, that many others are unaware that the rules for entering second year vary so substantially among the law schools.

### Quota places

Limited second year entry means that four of the five law schools operate preferential quotas at this level. Auckland and Victoria's quota systems are similar to those for entering first year law. Auckland has an elaborate scheme, offering up to 32 places to Maori, 13 to indigenous Pacific Island residents, two to disabled applicants, and 15 for mature applicants. A minimum average of C+ is required, but otherwise the factors to be taken into account and process for determining quota places is as for the first year. Victoria reserves up to 30 places (of the 300 in each second year subject) for Maori applicants. Special circumstances applications can also be made as at first year.

With open entry, neither Canterbury nor Otago operates a quota system at first year. Both make provision for Maori entry to second year. Canterbury sets aside ten places for Maori who have passed legal system but at a lower standard than required to advance into second year. Otago has an alternative entry category for Maori but effectively makes decisions on an ad hoc basis given the small number of Maori studying in Dunedin or seeking special entry to second year law.

### Continuing in law


The point has already been made that the large majority of students accepted into second year will proceed to take the LLB One final disparity between the law schools is nevertheless worthy of note. There are significantly higher pass rates for second year law – and less deterrent to failing – at Auckland and Otago. In 1996 there was a pass rate of 95 to 98 per cent for the second year subjects at Auckland and a 95 per cent pass rate at Otago. This compares with an 80 to 85 per cent pass rate at Victoria and an 80 to 90 per cent pass rate at Canterbury. Once a student gains admission to second year at Auckland or Otago, he or she can continue studying law despite failing exams. Ironically, a student studying for a double degree at Auckland may be required to drop back to a single degree if his or her GPA falls unacceptably, but may in this case continue studying law so long as the non-law degree is put aside. At Victoria and Canterbury there is considerably less tolerance. A Can-

terbury student must pass at least half his or her second law courses in order to be allowed to continue. At Victoria, a student who fails a second year course must apply for re-entry under the standard mathematical formula. Failure will have the effect of lowering the student's GPA, meaning that continuing with law may prove unlikely.

The disparities already noted – for entering first year law, passing the course, gaining admission to second year, and for passing and being able to continue at that level – are such that one can only wonder what the results would be if a survey were to be conducted of grades awarded by the law schools in later years of the degree, or if the content and standards of Honours requirements were to be examined, or the calibre of Master's courses monitored and compared.

## CONCLUSION

It is not surprising that pressure of numbers has meant that entry to first year law and advancement to the remainder of the LLB are tightly regulated. The five law schools determine who is allowed in, what is studied, how many pass, and who reaches the second year. What is surprising is how significantly different are the approaches taken by the individual law schools to all these questions.

*some 3500 university students evince an interest in studying law. Should the law schools be so concerned to teach only those who have the makings of future lawyers?*

Diversity is no bad thing. All the law schools produce large numbers of capable graduates. Good lawyers can emerge from quite different systems. What seems unusual – and unfair – is that a student's chances of studying and succeeding in law can vary so markedly according to the choice of law school. The incongruities among the law schools are significant – yet we suspect they are little known or understood by the 3500 candidates who applied to study law earlier this year.

By opting for open entry to first year law and by looking primarily to results in the legal system course for determining admission to second year, Canterbury and Otago have at least made aptitude in law their overriding criterion. Auckland, Waikato and Victoria, by excluding hundreds of applicants from the start, and in the case of Auckland and Victoria, by admitting to the second year largely on the basis of performance in non-law subjects, decide who gets in and who advances on the basis of academic, not legal, capability.

This is not to denigrate limited entry. Open entry is leading to inexorably larger classes, which are themselves inimical to effective study. Open entry mistakenly assumes that any student has the potential to study law. Canterbury's failing of 300 first year law students is no more justifiable than Victoria's turning away 370 applicants who wanted to study the subject. Statistically, students with less than an A Bursary have very little chance of passing the first year at Canterbury. (Educational Research and Advisory Unit, University of Canterbury, *ERAU News*, June 1995.) Limitation of entry may well have benefited them by requiring them to undertake a year of university study which would have afforded them the opportunity of developing their academic abilities before attempting one of the more difficult university subjects and which would then itself have been a ground for application for a place in legal system.

Our concluding thought relates to the 1700 or so students who are either not admitted to first year law or who fail the subject, in many cases due to not having the academic capability or training for legal study. The law schools, for all their differences as to how many they accept, how they select, what they teach, how they teach and examine, and how they decide who goes on, are nevertheless all engaged in playing a win-lose game: some students will win and be allowed to proceed to the LLB and, if desired, a legal career; others will lose and be rejected from or cast out of law school.

The fact remains that some 3500 university students evince an interest in studying law. Should the law schools be so concerned to teach only those who have the makings of future lawyers? If the universities have decided that all 3500 have the academic ability for tertiary study (and this might be questionable, but is being answered in the affirmative as universities are pressed to become more competitive and be driven by monetary considerations), is it for the law schools to say to almost one in two that we will not teach you anything of law or, if we do, will do so at such a level that you will in all likelihood fail? The dangers are obvious and have been seen elsewhere: polytechnic law degrees to cater for those the university rejects; university and student pressure to teach and pass larger numbers; summer schools and ever increasing numbers of non-advancing and relatively worthless passes.

One solution is for there to be two quite different first year law courses. A legal system course, restricted to those with sufficient academic potential to cope with law as it is currently taught at first year and who, if they pass, can expect to advance into second year. A second, non-advancing, course, entitled "legal studies" or the like, open to any student who wishes to learn something of the law and which might allow the best students, by developing their writing and analytical skills and by having undertaken a year of other university studies, then to apply for and gain entry to the legal system course. There are numerous examples of other university departments accepting all students who apply but requiring them to take different courses on the basis of ability. Engineering, modern languages, and mathematics provide three prominent examples at Canterbury. More staff would be required, but would be paid for from greater student numbers. The legal system class would be taught at a higher level than the legal studies one, with the advantage that students would learn according to their abilities and a high proportion of students in both classes could be expected to pass. First year law as presently structured seems unnecessarily wasteful if it denies (by rejecting them outright or by failing them in a course for which they were never suited) 1700 university students the opportunity of learning something of the law which might stand them in good stead as citizens and in whatever careers they pursue.

Healthy differences of approach among the five law schools go hand in hand with arbitrary, puzzling and inconsistent disparities. The best students undoubtedly succeed wherever they study law but there are many cases where it is less certain that the winnowing process provided by first year law represents a survival of the fittest. The introduction of "legal studies" would not in itself overcome the inconsistencies which currently exist, but it might at least take some of the emphasis away from competing to get into and to advance in law, and place it on increasing legal knowledge and skills among all university students interested in law and what it means for society. ❑

# BOOK REVIEW

*Richard Scragg, The University of Canterbury*

## *reviews* Lawyering Skills and the Legal Process *by C Maughan and J Webb (Butterworths, London, 1995)*

Maughan and Webb, lecturers in law at the University of the West of England, state the purpose of this text in their Preface: "This book is an attempt to bridge the gap between academic and practical law" (v). "Most academic law courses do not go beyond the study of law in the abstract. ... Lawyers in practice, on the other hand, ... have to develop a broad range of skills to deal with all sorts of issues, both legal and non-legal" (v).

The authors' approach to their task is a skills-based, problem-solving one. In consequence, this book is of immediate interest to New Zealand readers. In New Zealand, professional legal training is skills-based. Pursuant to the *Gold Report* (1986), this style of training was introduced in 1988 as a replacement for the old "professionals" course. Since then the Institute of Professional Legal Studies (IPLS), on behalf of the Council of Legal Education, has used this method of training for preparing candidates for admission as barristers and solicitors.

Virtually ten years of skills-based training notwithstanding, recent research has shown that many practitioners have little appreciation of the nature, function and aims of this type of training. Alison Fulcher and Anna Tutton, both Branch Directors of the IPLS, working together, and Sandy Hirstich in a separate project, have published such findings. As the most recent review of the IPLS makes clear, skills-based training is to remain the method of instruction for professional legal education in this country (*Review of Practical Legal Training in New Zealand*, Council of Legal Education, 1996, p 33). In these circumstances, Maughan and Webb's book serves a valuable function in explaining skills-based training, both in terms of its theoretical basis and its method of equipping aspiring practitioners for the law office. It also provides a full course of instruction which law firms could readily adapt for use in their in-house training programmes, enabling them to build on the foundation laid by the IPLS.

The book begins with learning theory, putting it into context with an exploration of the "art of lawyering" and an explanation of the concept of "experiential learning", that is to say, learning from your experiences as to how to conduct yourself the next time a similar problem arises.

The text then proceeds to problem solving, taking the reader "through the steps of information gathering, theory development, evaluation and implementation and basic library research" (35). One of the attractions of the book for practitioners is that the authors are "practical" in their approach and this is very clear from their chapters on problem solving where they are at pains to take account of the "business" and "ethical" dimensions of legal problems (81). They address these issues relative to problems which lawyers have to confront in their practices.

The remaining two-thirds of the book is given over to the skills of interviewing, writing and drafting, negotiation and advocacy. These chapters explain both how to perform these skills effectively and why it is important to be able to do so. The chapter on the skill of writing is concerned with the need for clear and accurate expression. With total clarity themselves, the authors explore the concepts of correctness, appropriateness and Standard English. They understand the need to structure a sentence and to express it in an appropriate register for effective communication. They explain the rules of punctuation and the use of the apostrophe. As the authors put it, good writing is the result of judgment about clarity, precision and elegance (207).

Drafting is dealt with as a separate skill. The authors recognise that the language of legal documents has unique features. The drafting lawyer aims to create a correct and complete statement of a legal relationship which will withstand scrutiny in the event of litigation. The challenge, in terms of language, is "the extent to which the often complex requirements of the draft can be rendered in elegant, easily understood English" (226). The authors provide a number of exercises to help the reader meet this challenge.

The chapters on interviewing and negotiation are a useful adjunct to the IPLS course. Interviewing subsumes advising which is not dealt with separately but the authors draw a distinction between advising and counselling. Advising requires the lawyer to take a guiding role in the interview; counselling requires presenting the client with options and enabling the client to make a choice. The chapter on negotiation examines the range of negotiating strategies, and provides exercises so that readers can experience these different approaches for themselves.

The final chapter is concerned with advocacy. This chapter discusses the skills needed by the advocate and sets exercises so that the skills may be practised.

By the end of this book, the reader who began it with no understanding of skills-based training will have a clear grasp of what it involves and its importance as a method for equipping would-be and newly qualified practitioners for their profession. In addition, the reader will also have a valuable source book on which to base a programme of training. Those readers who are inspired to explore skills-based training further might like to turn to "Teaching Lawyers' Skills", edited by Maughan and Webb (Butterworths, London, 1996) and to the individual titles in the new Butterworths (Australia) Skills Series. Skills-based training occupies an important place in legal education in this country. "Lawyering Skills and the Legal Process" makes the essence of this type of training accessible and deserves its place in the literature of the subject. ❑

# REVOLUTIONS, REFERENDUMS AND THE TREATY

*F M (Jock) Brookfield, Emeritus Professor, University of Auckland*

***ponders New Zealand's constitutional origins and the coming republic***

Bernard Brown in the poem entitled "To Light Applause", which closes his book *Surprising the Slug*, has some advice adaptable for elderly academics whose difficulty is "knowing when to stop, when to shut up", and which perhaps should have prompted me to withdraw my offer to give today's seminar:

> Simply, abruptly, terminate
> the act. Say thanks
> most daffily, and go.
> This circle is, or was,
> your stage, so be
> your age before
> they shut you down.

Well, a warning to retire with a good grace when one should and certainly not to re-appear, hauntingly, at the lectern a few years later.

Still, retired academics do come back sometimes to deliver seminars and in this case there has been the excuse that I wanted to talk about some matters arising from my valedictory lecture of November 1993, "Parliament, the Treaty and Freedom: Millennial Hopes and Speculations" ([1994] NZLJ 462; P A Joseph (ed), *Essays on the Constitution* (1995) 41).

## LEGITIMATION OF REVOLUTION BY TIME

A theme of that lecture, already developed in previous writings of mine (in part from the judgment of the Queensland Court of Criminal Appeal in *R v Walker* [1989] 2 Qd R 79), was the partial legitimation of the Crown's authority over New Zealand by the passage of time and the durability of the New Zealand constitutional order. The Crown, it was argued, in taking full sovereignty, took more than was ceded to it by the Treaty of Waitangi in the double sense that it took more than kawanatanga or governance ceded by art 1 and also – and this of course is obvious – took from tribes who, not being party to the Treaty, had ceded nothing at all. The legitimation over time of the revolutionary seizure of power in excess of what was ceded has been partial only in that it has not absolved the Crown from its obligations under the Treaty, albeit those obligations have to be understood and given effect within the legal system.

The Hon Simon Upton, in his column in *The Dominion* (1 May 1995) and *The Press* (2 May 1995), gave a fairly full account of the relevant part of the lecture and accepted my view of the country's partly revolutionary constitutional origins and of the legitimating effect of time; but he did not agree with me on the need for a written constitution to protect the Treaty. The Hon Douglas Graham followed him to much the same effect, very shortly after in an address to Rotarians (*New Zealand Herald*, 4 May 1995); but as reported he did not refer to my view that a written constitution was needed.

Then came the widely published, sweeping and polemical responses of two prominent and influential academics: Professor Ranginui Walker and Professor Jane Kelsey, of this University. Let me take Professor Walker first. I quote from his interview with Hineani Melbourne, as reported in her *Maori Sovereignty: the Maori Perspective* (1995) 23.

Ms Melbourne reports (at 31-32) "Ranginui is disgusted by the stance taken by Simon Upton and Doug Graham on sovereignty. He sums it up as ... 'We stole your sovereignty fair and square!'" Then after a reference to my view as having been adopted by the two Ministers, she quotes Professor Walker further (at 32):

> They [ie the Ministers] are finally admitting that the Treaty was a sham document – that we didn't cede mana under the Treaty. We ceded kawanatanga which is not the same thing. They have finally admitted that the Treaty isn't the basis of the Crown's sovereignty – rather it was taken by military force. And they say that over time that becomes legal! What a thing to say!

That of course, untypically of Walker, is simply an explosion of anti-colonialist indignation rather than an argument. Kelsey expresses similar indignation, but with a little more attempt at argument, in her widely read and influential book *The New Zealand Experiment: a World Model for Structural Adjustment?* (1995; 1997). She links (at 342) the two Ministers' statements with what she sees as "threats" by "the government" to charge Annette Sykes and Mike Smith "with sedition", for predictions that there would be violence if (to put it shortly) certain radical demands are not met. These threats she sees (at 344) as hypocritical in light of, again to put it shortly, the government's ultimately revolutionary origins.

Specifically of Simon Upton, she writes (at 343) that he "resurrected the essence of a speech from a retired law professor delivered some eighteen months before".

I comment by way of an aside that, if an essence can be resurrected, no resurrection was necessary in this case. The

lecture was waiting to be published, annotated and slightly revised, in Philip Joseph's *Essays on the Constitution*; and, in the meantime, the bare text had been published in the December issue of the NZLJ, just a few months before the Ministers used it.

Professor Kelsey quotes Mr Upton on the legitimating of the Crown's revolutionary seizure of power (at 343); though she does not mention his statement – again following the tenor of my lecture – that despite the legitimation in some measure of the revolutionary extension of the Crown's power the Treaty "still speaks". Then, after dealing with Mr Graham, she continues (at 344):

> Here were two Ministers of the Crown legitimising revolution – indeed, privileging it over other constitutional processes. Yet the same Crown was claiming the moral and legal authority to indict for sedition those Maori who promoted "revolutionary" means to recover what the colonial state had forcibly taken away.

She has since returned to the attack in her essay "From Flagpoles to Pine Trees ...", in P Spoonley et al (eds), *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (1996) 177 at 177-179, along the same lines, except that the linking with the alleged government threats to prosecute for sedition is not made. (This time the retired professor is identified as Jock Brookfield but still there is no reference to where the text of the lecture may be found.)

The criticisms of Professors Kelsey and Walker are directed against the Ministers. However, full discredit to whom it is due. Behind the Ministers' statements that have prompted the polemics of the academics lies my own work. The ideas of the legitimating effect of time on a partly revolutionary acquisition of power, as developed in the New Zealand context in respect of the Crown, are mine. I would be concerned to defend them in detail. However neither Walker nor Kelsey has dealt with the detailed case already presented. Until that is done, sweeping, facile, rhetorical dismissals of those ideas do not carry the debate very far, however acceptable or politically effective they may be with some readers.

Indeed, in these important constitutional matters, what we have from the Professors are simply polemical discourses, unrelated to any attempt at careful argument. (Admittedly, in post-modern times some may see the discourses as none the worse for that.) Both writers sometimes express themselves in neo-Marxist terms, those of the Italian political leader of earlier in the century, Antonio Gramsci (see references below). In Gramsci's terms, Walker and the Maori nationalist lawyers (such as Moana Jackson and Annette Sykes, but well represented also in some of the Law Faculties) are, with Kelsey as a strong ally, among the "organic intellectuals" of a Maori counter hegemony; who are taking part in the ideological battle – Gramsci's "war of position" – against the hegemony of the "colonial" state. In this war of position, political effectiveness may well be seen as primarily important. Perhaps one should not be surprised if arguments of the sort I am criticising – even simple explosions of indignation – are thought to be a proper means of attempting to achieve it.

Of course political effectiveness is achieved by the winning over of readers by the discourses presented. The readers of Kelsey's *The New Zealand Experiment* must now number many thousands. I am hoping that some at least of them, even if inclined, to accept much of her powerful indictment of the "experiment" (after all, the book's main theme), may be sceptical about her treatment of the constitutional matters now being discussed. I hope some of Walker's readers may be similarly sceptical.

There are two points that might occur to the sceptic and which I now develop in making my own comment.

First, common sense suggests that, in general, nothing morally outrageous occurs where, under a constitutional and legal order established by a successful revolution, active dissidents living within the jurisdiction and protected by its laws are held to a new allegiance; and become liable for their actions, either for treason or the less serious seditious offences, against the new order. The only condition, as stated in a Pennsylvanian case arising from the revolutionary war of independence against the British (*Respublica v Chapman* 1 Dallas 53 (1781); 1 Lawyers Ed 33)is that those who have been against the revolution must have a reasonable time in which to leave the country before they can be so liable. Subject to that, one ought not to be surprised to find prosecutions for sedition or even for treason against the new government occurring fairly soon after the revolution is complete. Certainly after the Fiji revolutions of 1987, prosecutions for seditious speech or actions (though I think all ultimately withdrawn) were promptly brought under the new revolutionary legal order: against dissident chiefs on the island of Rotuma in 1988 (Law Report, *Fiji Times* June 1988); and, in 1990, against some University of the South Pacific teachers for burning the new Fiji constitution (see eg (1990) 60 *Pacific Islands Monthly*, no 12,17).

> ***in these important constitutional matters, what we have from the Professors are simply polemical discourses, unrelated to any attempt at careful argument***

In the case of New Zealand, the revolution was, after all, largely complete by late last century or early this, in becoming by and large effective throughout the whole country. That sedition and even treason laws of the legal system established by it should in principle be applicable to present-day Maori dissidents, as to other citizens, is not extraordinary in a world where a great number of constitutional orders are based ultimately on revolutionary seizures of power.

Secondly, the sceptical reader may notice that Kelsey gives no references for the sources for the threats of prosecution allegedly made by "the government" against Ms Sykes or Mr Mike Smith. The New Zealand Experiment is well equipped with references in many matters but in this there is none to tell the reader what exactly was said and by whom and where the reader may ascertain it. In her account, "the government", presumably the Cabinet, threatened prosecution of those two persons and (again presumably) had only to direct the Attorney-General to take proceedings for the threat to be carried out. But the Cabinet has no power to make such a direction. Professor Kelsey's account is not consistent with the legal and conventional independence of the Law Officers of the Crown (and, for that matter, of the police) in the instituting of criminal prosecutions.

A *New Zealand Herald* reference (5 May 1995), which she could have given, reports a police announcement that a legal opinion had been sought as to whether proceedings for sedition could be brought – as to whether there was a case

against Sykes or Smith. If there is evidence that the police were acting under government pressure, Kelsey should have told us what it is. In fact, as she notes, no proceedings were brought. No doubt that was, as she indicates (*The New Zealand Experiment* at 342), "wise". Prosecutions would not have been in the public interest, whether or not, in the imperfect state of the New Zealand law of sedition, there was a case against either.

## KAWANATANGA: DID IT EXTEND TO MAORI?

I pass now to questions closely related to that of the partly revolutionary origin of the Crown's authority in New Zealand: did the kawanatanga ceded by art 1 of the Treaty extend to Maori (and if so how far) or was it limited to Pakeha? What was included in the tino rangatiratanga reserved to the chiefs by art 2? Professors Walker and Kelsey have both expressed or indicated views here; but before I mention them let me refer to the view of Professor Sir Hugh Kawharu on the meaning of kawanatanga:

> What the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death. (Quoted in Report of the Waitangi Tribunal on the Kaituna River Claim (Wai 4; 1984) at 14.)

To some extent, Walker is of like mind with Sir Hugh, holding that the chiefs understood kawanatanga to mean "the establishment of a system of government to provide laws that would control British settlers and bring peace among warring tribes". ("Immigration Policy and the Political Economy of New Zealand", in SW Greif (ed), *Immigration and National Identity in New Zealand* ... (1995) 282.) They understood that art 2 confirmed their "own sovereign rights" – their rangatiratanga – in return for this "limited concession of governance". Governance or kawanatanga was in his view a subordinate power: in *Kawhawhai Tonu Matou: Struggle Without End* (1990) he writes (at 93) that in New Zealand's case the Governor "governed at the behest and on behalf of the chiefs".

Now Kelsey. In "The Treaty of Waitangi and Maori Independence – Future Directions" (1990) 9th *Commonwealth Law Conference Papers* 249, she said:

> The Crown was granted the limited power of kawanatanga – in this context clearly seen by Maori as a subordinate power aimed primarily at achieving law and order amongst settlers, thereby protecting Maori rangatiratanga.

One notes the qualifying word "primarily". That word drops out, in the account of kawanatanga she gives in "Restructuring the Nation: the Decline of the Colonial Nation-State in Aotearoa/New Zealand" (in P Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law* (1995) 177). In her words (at 180 – her emphasis) – "The English Queen was granted rights of kawanatanga (governorship in the sense of delegated authority) over her people." She contrasts this with the tino rangatiratanga reserved to Maori by art 2 – "... supreme authority or independence ... of the Hapu, collectively through the rangatira or chiefs, over their lands, villages and way of life." (Compare the strongly expressed similar views of the prominent Maori lawyer Moana Jackson – see references below.)

Again, interviewed for Carol Archie's *Maori Sovereignty: the Pakeha Perspective* (1995) 103, she is reported (at 105) along the same lines and as being "quite clear about what the Treaty means and that those who say it is ambiguous simply do not like what it says".

But recently there comes a change, at least tentatively, to a possibly more qualified view. In her essay "Globalisation and the Demise of the Colonial State..." in L Trainor (ed), *Republicanism in New Zealand* (1996) 137, though writing (at 139 and 151) of tino rangatiratanga as the "absolute authority" of the iwi and hapu and (at 151-152) of kawanatanga as "subordinate authority", she allowed (at 152) that "it is a point of debate whether that was only over ... [Queen Victoria's] own or extended to Maori".

*If kawanatanga extended over Maori, the question is how far did it extend; and whether, if it was to be effective, it could be the subordinate authority that Walker and Kelsey say it was*

The concession, tentative though it is, is an important one. If kawanatanga extended over Maori, the question is how far did it extend; and whether, if it was to be effective (eg in the maintenance of law and order among Maori, if it extended to that), it could be the subordinate authority that Walker and Kelsey say it was.

I in no way defend the power that the Crown and Parliament have exercised over Maori, in – I must speak here in general terms – the wholesale attack on Maori culture and the wresting of land from Maori by confiscation, by unfair purchases, and by the work of the Native Land Court – grievances that are slowly, and often controversially, being redressed. Further, I in no way defend the failure of the Crown to set up the partly autonomous Maori districts, for which provision was made in s 71 of the New Zealand Constitution Act 1852 and which would in some appropriate measure have preserved rangatiratanga.

There are however at least two assertions of power and authority by the Crown over Maori which are to be seen either as proper exercises of kawanatanga or – on the view which Moana Jackson holds and which Professor Kelsey has tended to hold – as improper intrusions upon tino rangatiratanga, for which the Treaty provided no justification whatever. (And on that view any justification could only be by way of legitimation over time, in acquiescence or acceptance by Maori.)

First, there is the indirect enforcement of the law against slavery – that is, common law as possibly strengthened by the Imperial Abolition Act of 1833 (3&4 Wm IV, c73). (I say "possibly" because it is uncertain whether that Act ever applied to New Zealand.) Maori slavery, in particular in the enslavement on the Chatham Islands of the majority of those Moriori who survived the invasion of Taranaki Maori in 1835, is at present being considered by the Waitangi Tribunal in the claim by Moriori descendants (Wai 64). Part of the case of the Moriori is, in effect, that the Crown, after it incorporated the Chathams into the colony of New Zealand in 1842, failed to accord them the protection of the rule of law from their Maori conquerors. I have seen some of the material before the Tribunal but of course any definite comment must await its report. But I think one can say that, on the mainland and perhaps on the Chathams also, the

ending of slavery came about gradually through the consent or acquiescence of Maori influenced by missionaries who required chiefs to free their slaves, rather than through the direct intervention of colonial law.

Nevertheless it seems that the possibility of that intervention was an important factor in the background, at least in the treatment of slaves. That is shown in the now celebrated letter written by the Waikato chief, Tamati Ngapora, in February 1848, to Governor Grey (quoted in part in the historical evidence of Dr Ashley Gould to the Waitangi Tribunal (Wai 64), at 34; see further reference below). Troubled by the breakdown in Maori society brought about by the impact of colonisation, Tamati Ngapora asked the Governor for help in maintaining chiefly authority over his slaves – clearly an important part of his rangatiratanga that he expected to retain. But the chief acknowledged the effect of the law, in writing that:

> Formerly, if slaves were disobedient, they would be killed. If a slave disobeys now we cannot kill him, lest the laws of the Europeans should be infringed upon.

Secondly, the ending of tribal feuding. This affords a more direct example of the intervention of colonial law – again, either in a proper exercise of kawanatanga or in a gross exceeding of it.

In *Making Peoples: a History of the New Zealanders.*(1996), Professor James Belich writes (at 267-268) that "[a] useful definition of sovereignty or real empire is that the sovereign power removes the capacity of its subjects to make war among themselves". He continues: "An indicator of the persistence of Maori independence was therefore the persistence of Maori feuding". He notes that Ngapuhi featured quite prominently in this. Giving instances of lethal feuds in the period from the 1860s to the 1880s, Belich mentions the 1888 instance of the battle between two hapu near Whangarei – possibly, he says, the last tribal battle in Maoridom. Four were killed and four wounded before the battle was ended by traditional mediation.

Belich (at 268) contrasts with this a near tribal battle of 1903, again in the North, which was prevented by combined police and military intervention. The account given by Richard Hill in his *The History of Policing in New Zealand*, vol 3, The Iron Hand in the Velvet Glove (1995), at 243-244 (which Professor Belich cites),shows that the Ngapuhi chief Iraia Kuao had threatened to shoot rival tribal claimants to a block of land near Kaikohe, asserting that his rangatiratanga reserved by the Treaty allowed Maori customary law to operate in such circumstances. The intervention of colonial law was modest but apparently effective: Kuao and his principal followers were bound over for 12 months to keep the peace under the Justices of the Peace Act 1882 and his opponents in a conciliatory gesture went surety.

To that example of the enforcement of the law to prevent tribal feuding, I tentatively add another and earlier one. In *R v Niramoana* (1880) O B & F 76 (CA) Maori defendants were fined for forcibly taking possession of customary land, in the Tauranga district, from other Maori. The case was brought under the common law as strengthened by the medieval Statutes of Forcible Entry of the English Parliament 1381-1429 (see now s 91 Crimes Act 1961).

Let me go back to Professor Kelsey's concession that it is a point of debate whether kawanatanga extended over Maori. I hope the debate will take place. Of course much work to assist it has already been done, by the historians. Issues that will arise in the debate include the two matters I have briefly discussed: were the ending of slavery and of tribal feuding included in kawanatanga? And if not, were they desirable things nevertheless, legitimated (if for no other reason) by time and by what came to be the shared morality of both Maori and Pakeha; and to be set, as a modest but real counterbalance, against the great ills to Maori society wrought by colonisation.

***The removal of the monarchy without the consent of the Maori Tiriti signatories, will merely add to the Government's loss of legitimacy in the eyes of Maori***

## THE REPUBLIC: SEPARATE REFERENDA

So far this paper must seem to show a lot of disagreement between Kelsey and me; a little less between Walker and me. So it is pleasant now to turn to some ground which I have in common with both of them: in regard to the coming republic. Clearly Kelsey (*The New Zealand Experiment* at 346-347; "Globalisation ..." in *Republicanism in New Zealand* at 149 ff) sees the coming republic as the occasion for basic constitutional reform that would establish in some form the dual Maori-Pakeha polities within New Zealand that she has long advocated.

Necessarily, the Prime Minister's suggestions (see latterly the *New Zealand Herald*, 20 February 1997) of one referendum of the whole electorate as the basis for establishing a republic apparently of minimal change, with no other fundamental constitutional reform, would in her view be quite unacceptable. A passage in *Nga Pepa a Ranginui: The Walker Papers* (1996), at 74-75, shows that, as one would expect, such suggestions would be unacceptable in Professor Walker's view also. Well, they would in mine, also.

Then Andrea Tunks, in her useful summary and discussion of the views of some leading Maori on the republicanism issue ("Mana Tiriti" in *Republicanism in New Zealand* 113), writes (at 118):

> The removal of the monarchy without formal consultation with and the consent of the Maori Tiriti signatories, will merely add to the Government's loss of legitimacy in the eyes of Maori.

For some support from the other camp, so to speak, in the present ideological war, both Professor Kelsey and Ms Tunks, dealing with the matter in more detail than Professor Walker, could have cited Sir Robin Cooke, as he then was, and me as I still am. Taking an idea from the prominent Maori lawyer, Joe Williams, I suggested in "The Monarchy and the Constitution Today: a New Zealand Perspective" [1992] NZLJ 438 that the move to a republic would be the occasion for Maori to stipulate for protection of the principles of the Treaty in the new republican constitution. I have repeated and developed the same view since. Lord Cooke, without going so far as to favour protection of the Treaty in a written constitution, has written ("The Suggested Revolution against the Crown" in *Essays on the Constitution* 28 at 38) "... it is not easy to believe that a Court could responsibly hold republicanism lawfully established without reasonably substantial Maori concurrence".

As to what degree of protection of the Treaty can or should be expected in the republic I do not want to say more

here. I do not think there is the least chance that the dual Maori-Pakeha polities advocated by Kelsey will be established. I must leave that unargued in this paper. But I do want to deal with, if only briefly, the change to a republic as the occasion for basic constitutional reform that will include the protection of the Treaty or its principles, and the possible need for separate referendums of Maori and Pakeha on the republican issue (or concurrence by other appropriate means in the case of Maori). Here I turn to the contrary view on those matters of Dr Andrew Stockley, of the Canterbury Law Faculty, in two recent essays: "Becoming a Republic? Issues of Law" in *Republicanism in New Zealand* 81 at 98-102 and "Parliament, Crown and Treaty: Inextricably Linked?" (1996) 17 NZULR 193.

Stockley considers that the New Zealand Parliament has the legal power to abolish the monarchy without a referendum. But if there should be approval by referendum, one of the electorate as a whole is all that is needed. While Maori should be consulted, their concurrence in a separate referendum is unnecessary. The State's obligations under the Treaty of Waitangi, whatever their exact nature, would survive the transition to a republic. He rejects suggestions, including those made by Andrea Tunks and, less radically, by me, that the move to a republic would provide a proper occasion for Maori to stipulate for basic constitutional reform to protect Treaty rights. However desirable such reform, the issue is a separate one and not to be linked with that of the republic.

*the referendum of Maori should be separate for reasons of political morality. After all, the only ground for even a single referendum of the whole electorate is in political morality*

I have to acknowledge that the case he puts is a strong one, more especially as I agree that Treaty obligations would survive the transition, however it is accomplished. But I think it is very likely indeed that, when the move to a republic comes, Maori will seek a constitutional settlement that will secure the Treaty or its principles in some form in a new republican constitution; and that if necessary they will try to establish through the Courts the right to a separate referendum, as a pre-condition for the abolition of the monarchy and as one of the facts of constitutional life that will securely establish the new Constitution. Legal steps for the separate referendum might be a necessary part of Maori political strategy. Without replying in detail to Dr Stockley here, I briefly summarise some considerations that could be part of their case and, in my view, make it a strong one:

First, it is hard to see the Crown and its assumption of power and authority over New Zealand, as other than foundational to the country's succession of constitutions. The legal power of Parliament is itself ultimately dependent on the partly revolutionary assertion of power by the Crown that began in 1840.

Secondly, if that is so, it can be strongly argued that Parliament cannot lawfully abolish the foundation upon which it is based. But if it purports to do so with the support of separate referendums of Maori and Pakeha (as well as, presumably, with a substantial majority in the House of Representatives) there can be no doubt that the Courts would validate what would be a revolutionary change.

Thirdly, the referendum of Maori should be separate for reasons of political morality. After all, the only ground for even a single referendum of the whole electorate is in political morality (in particular, in the democratic nature of New Zealand society); for there is no basic constitutional rule making any such requirement. The moral need for the separate concurrence of Maori may be less obvious. But there is a basis for it in the Crown's dealings with Maori over the years, which induced the perception very many Maori still have of the personal nature of their relationship with the Monarch as a result of the Treaty and the fears (even though constitutionally unjustified) that the establishment of a republic will weaken the Treaty. Further, there is the fact that the Treaty, made as if it were a personal compact between Queen Victoria and the Chiefs, is one of the Acts of State upon which the authority of the Crown, though enlarged by revolution, is based.

Admittedly, the Crown has changed from the imperial unity it was at the time of the Treaty to, in our case, the present day Crown in right of New Zealand. But the making of that change without Maori concurrence affords no basis for making the further change without that concurrence.

In all of this I differ from Dr Stockley in placing much greater weight than he does on Maori perceptions of the matter and on the historical origins of the Constitution. I do however allow that if the move to change to a republic were in fact made on the result of one general referendum of the whole electorate, with Maori consulted but their concurrence not obtained by separate referendum, a Court would be likely to recognise the reality of what had been done and validate the revolutionary change.

On the need for the establishment of the republic to be the occasion for the constitutional recognition of the Treaty in some form, as against Dr Stockley I continue to agree in part with Professor Kelsey and Ms Tunks. My important difference with them is, obviously, over the degree of constitutional recognition that can and should be expected.

## Further references

FM Brookfield: "The New Zealand Constitution: the Search for Legitimacy" in IH Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 1; "Maori Rights and Two Radical Writers: Review and Response" [1990] NZLJ 406; "The Treaty of Waitangi, the Constitution and the Future" (1995) 8 *British Review of New Zealand Studies* 4; "A New Zealand Republic?" (1994) 8(2) *Legislative Studies* 5; "Republican New Zealand: Legal Aspects and Consequences" [1995] NZ Law Rev 310.

Gramsci: *Selections from the Prison Notebooks of Antonio Gramsci* (1971) (and see eg P Ransome, *Antonio Gramsci: a New Introduction* (1992), 196-197, and WL Adamson, *Hegemony and Revolution: a Study of Antonio Gramsci's Political and Cultural Theory* (1980), 226-227).

Moana Jackson: "Maori Law, Pakeha Law and the Treaty of Waitangi" in *Mana Tiriti: the Art of Protest and Partnership* (1991) 14 at 19; "The Treaty and the Word: the Colonisation of Maori Philosophy" in G Oddie & R W Perrett (eds), *Justice, Ethics and New Zealand Society* (1992) 1 at 6-7.

Tamati Ngapora to Governor Grey, 19 Feb 1848 (enclosed with despatch to Earl Grey, 3 April 1848). See 6 British Parliamentary Papers Relating to New Zealand (1847-1850), Correspondence with Governor Grey (presented to Parliament by Command, July 1849), No 7. ❑