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GOVERNMENT UNDER LAW?

Over the next three years we are likely to have to face up to a question which for the last nine years has been lurking below the surface.

That question is whether there is any content to the concept of law other than the commands of the sovereign, justified these days by reference to the doctrine of the mandate, provided only that the sovereign acts in a form which the sovereign is, presumably, free to change at any time.

There is widespread rhetorical consensus on the rule of law. But the consensus ends as soon as one asks what the rule of law consists of. Law Society hierarchs are frequent users of the expression but seem to have no idea what it might mean at all. Many lawyers use the expression "rule of law" to mean "rule by law" so that presumably, the more laws we have governing more of life the more rule of law we have.

Some seem content with the concept that law is merely the commands of the sovereign. It is not clear what part in that picture is played by international human rights documents, which clearly set out to limit what even a government supported by the majority might do. The problem is that this leads to the view that human rights consist of what is to be found in international human rights documents which are simply the products of processes as flawed as the legislative process.

Then we have Judges who believe that the law must change to reflect changing social values. Of course, social values that do not correspond with the Judges' own views, such as belief in more severe sentencing of criminals or perhaps oppression of politically favoured minorities, are to be ignored. The idea that one of the purposes of a system of law consisting as far as possible of rules of predictable content is to protect individuals and their interests from changing majority values seems to have gone by the board.

Jennings, the socialist jurisprudentialist, argued that a separate concept of the rule of law was unnecessary. The supervision of the majority at elections was sufficient to ensure that the government did not infringe basic rights. This is a wholly amoral view which imports no special values into the legal system and implies that if a nation decides by a majority to send all the members of a minority to the gas chambers, the role of lawyers is simply to ensure that the correct forms are filled in beforehand. Is this what the Law Society means by the rule of law?

All other jurisprudentialists appear to believe that there is some content to the rule of law and all would agree that it includes the concept of government under law. That has been part of the English tradition since 1215 when the King was forced to sign a document including certain guarantees. This is the true point of Magna Carta.

In the context of the New Zealand system that cannot mean that the government is bound only by the last Act of Parliament, since it can itself arrange the passing of almost any Act, and so we are back to square one.

If it is to mean anything it must mean that there are Bills which it would be improper for Parliament to pass. In other words the law does have some content separate in existence from the content of Acts of Parliament and judgments. And lawyers are supposed to be the guardians of that law.

There are a number of conventions surrounding the legal system. Appointments to the judiciary are not subjected to political scrutiny or criticism. One analyses the content of judgments, not the track record of Judges. The Attorney-General is entitled to the benefit of the assumption that he or she has taken decisions detached from questions of government policy.

But these conventions only make sense on the assumption that there are legal values which it is the business of the legal system to uphold. These would include that statutes are interpreted and precedents applied without fear or favour, the latter of which requires that no effort is to be made deliberately to benefit any particular class of person, nor to support a government policy which has failed to find expression in an Act of Parliament.

These assumptions and conventions make no sense if one believes that the law is simply one instrument of policy, one means by which the government sets and achieves its goals. If that is the case, then there is no sense in Judges adopting a formalistic approach. They should enforce what the government really meant (eg by referring to the Minister's speech in the House) or change interpretations to ensure that old laws pursue new policies.

But politicians and Judges who hold such views and pursue such courses of action cannot then claim the benefit of the traditional conventions and restrictions on comment.❑

Erratum

The gremlins got into last month's editorial. The key sentence in para 6 should, of course, have read "The applicable convention is, of course, that the Governor-General calls on to form a government, the person who commands the support of the House". Thanks to the one practitioner who pointed this out.

FAREWELL TO PHILIP KIRK

P J Downey

with a slightly expanded version of remarks made on 21 January 2000 at the public farewell function for Philip Kirk on his retirement as managing director of Butterworths. This version says more than was actually said, but no more than was intended! The author spoke from a short list of headings rather than a text and has purposely retained the informal nature of the remarks

On the tomb of the architect Sir Christopher Wren in St Paul's Cathedral, London, there's an inscription that reads something like – "If you would see his memorial look about you". It's a long way in time and geography from Christopher Wren to Philip Kirk, but the invitation to look about you is an appropriate one on this occasion as Philip retires after 20 years with Butterworths – 16 as managing director. The recently constructed, custom-designed building which Butterworths now occupies is a solid physical expression of the success that the company has been under Philip's direction. The building is a far cry from the premises of 1984. I would also invite those managers who are here to look at one another and recognise that they are members of the successful working team that Philip has built up – sometimes, inevitably, by trial and error! He leaves for his successor a company in good heart and in good hands.

Philip Kirk says farewell

Philip has made reference to Brian Blackwood and to Sir Alexander Turner. It's sad that neither of them are now with us because each would have expressed his appreciation of, indeed his admiration for Philip's work, in a more vigorous, and a more elegant way than I can hope to do. Those of you who have had the opportunity of hearing them speak of Philip on other occasions such as at the annual staff Christmas parties will know well what I mean.

It was in 1984 that Philip became general manager (and later managing director) of Butterworths. He then invited me to join the company full-time as legal publishing director while continuing to edit *The New Zealand Law Journal*. I appreciated the initiation then, and I have continued to be grateful for the opportunities Philip gave me until I reached the company's compulsory retiring age in 1992. The eight years I had as a director, and the subsequent eight years I have had as – what shall we say? – a consultant have made me very conscious of Philip's qualities as a chief executive, his drive, his determination, his willingness to innovate and his commitment to quality. Philip of course does not have a legal background. He was a chief executive. He built on what was there. He sought and got authors who could provide reliable and useful service for the profession. He was always conscious of the profession as the customers of Butterworths whose needs the company exists to meet.

Reference has been made to *The Laws of New Zealand* as the landmark publication that distinguished Philip's time with Butterworths. This is certainly so, and it's especially important as emphasising that New Zealand law has become quite distinct from Australian as well as English law. The work is now fully established and will remain as a continuing part of Philip's legacy

There is though another publication that should be particularly associated with Philip's years at Butterworths. The *New Zealand Law Reports* have of course long been published by Butterworths, but due to various circumstances they got very much behind. While nominally still the publisher Butterworths had become no more than the distributing agent and the bill collector. The problem however was that it was Butterworths with whom the profession dealt and therefore the company's reputation that was affected. The Reports were almost two years behind when we managed to get the publishing responsibility back in-house and changed the format and compilation procedures. Getting timely official law reports published is I suggest the other major accomplishment to mark Philip's time with Butterworths.

As managing director of the New Zealand company Philip's main energies have of course been devoted to the local scene. But he has a wider involvement through being a member of the international Board of the Butterworths Group. This has meant he has had to have a truly worldwide outlook, particularly since Butterworths has taken over, or become involved in, several European legal publishing houses in recent years. That experience too has been of value for us in New Zealand.

To be personal for a moment I just want to say that I'm grateful to Philip for his many kindnesses to me. We didn't always see eye-to-eye of course. The final responsibility was always his but we could talk and that was what was important. The next word of thanks I have in my jotted notes is "patience". I take it from your laughter that you remember Philip, a few minutes back, expressing thanks to me for teaching him patience. Perhaps Phil you didn't mean that I was a good teacher but that over the years I gave you many opportunities to practice patience!

NEW MD: RUSSELL GRAY

Russell Gray, new managing director of Butterworths New Zealand

introduces himself to the profession

I joined Butterworths as managing director on Monday 28 February 2000. I believe that my service industry background in the banking, finance and trustee industries, puts me in a good position to develop strong relationships with Butterworths' customers and to ensure customers' expectations are exceeded.

Russell Gray

In the mid seventies I started with BNZ and from 1985-96 held various senior management positions in Countrywide Bank. During this time I got to know well members of the legal profession, as this was a sector of the market I dealt closely with, particularly as South Island regional manager for Countrywide based in Christchurch and again when I was in charge of the establishment and management of the bank's Small Business Division based in Auckland.

In late 1996 I moved into the trustee industry as general manager Personal Trusts at the Public Trust Office. In this role I helped to develop a "sales and service" culture and encouraged the Public Trust to shift to a more customer focused, commercially oriented organisation.

In September 1997 I was approached to set up a "greenfields" technology based mortgage origination company. The company, "Mortgage Express" is a joint venture between AXA NZ and Harcourts Group. The company has successfully operated in an e-commerce environment, originating residential mortgages for customers using the Internet to achieve on-line loan application and approval.

It is from this company that I am moving to join Butterworths and I am most excited about moving into the legal publishing industry.

To complement my work experience and assist me manage a rapidly changing environment, I completed an MBA through Henley in the UK, graduating in May 1999.

The pace of change for us all will continue to accelerate and I am determined to ensure that Butterworths is at the leading edge of e-commerce solutions for the benefit of customers.

I am greatly looking forward to dealing with members of the legal profession and other customers and to ensuring that Butterworths continues to maintain its high standard of service and delivers to its customers high quality hard copy and electronic products.

Legal publishing has a fundamental role within the legal system. Legal books – and I include the CD-Rom and On-line publishing within the term – are truly the raw material of legal practice and not just its tools. They represent what cloth is to a tailor more than his sewing machine, what timber is to a carpenter more than his hammer and saw. They are a stock that has had to be continually replenished. Back in the 14th century Chaucer noted the importance of law books for lawyers when he wrote of his Sergeant-At-Law that:

> From Yearbooks he could quote, chapter and verse,
> Each case and judgment since William the First.
> *(version of David Wright)*

Even 600 years ago lawyers were dependent on books to earn their fees! So, Philip, in publishing books as the raw material for the profession you have made your own valuable contribution to the legal system.

I used to try to explain this importance of legal publications, and other matters, to new employees in introductory talks. On one occasion I asked for feed-back and was amused to be told that I had explained that without Butterworths providing books for the profession and the Judges, the rule of law would fail and Western civilisation would collapse! Perhaps I hadn't meant to go quite that far, but her somewhat cheeky response did show that she'd got the point.

Peter Cheeseman, CEO of Butterworths International, talks to Adele Jenkins, Lara Stewart and Sue Schreuder. Kerrie Phipps is to the left.

Well what I want to say, Philip, is that from having worked closely with you for a number of years I have good cause to recognise and appreciate what you have done. I have reason to be personally grateful to you; and as I've written elsewhere, the legal profession has benefited from your publishing expertise, and also from your vision for and the beginning of the application in New Zealand of the developing electronic information age. ❑

WORLD TRADE BULLETIN

Gavin McFarlane of Titmuss Sainer Dechert and London Guildhall University

finds the patient convalescing

ORDER OUT OF CHAOS

After the debacle of Seattle in December, there has been a long period of wound licking at the World Trade Organisation headquarters in Geneva. This has been punctuated by occasional brave statements about the way ahead, but sadly there is an extremely wide variety of opinions floating around as to precisely what is to be done, and how to achieve progress. A number of meetings have taken place between various interested parties at trade representative level at which expressions of intent have been made, but not much more. A search is on for some kind of honest broker who may be perceived as following a middle path between the two opposing wings of unrestricted free trade on the one hand, and environmental and employment concerns on the other. Some have lighted on Murasoli Maran, the current trade minister in New Delhi. India is believed by some states in the western free trade camp to have the best chance of throwing a bridge over the various rifts which occurred at Seattle. But Mr Maran appears to be playing hard to get, and his government may prefer to maintain its position as one of the leading critics in the developing world. There are plenty of Indians who have no love for the WTO and its policies, particularly in the area of agriculture on which so many of its population depend for a living. There have already been riots in various Indian states over the GM seeds, the products which are incapable of being sown again in the following season. Maran has indicated that he would only be prepared to use his good offices with the developing world on certain conditions. Principally this means that he wants what he regards as non-trade issues completely suppressed in any future trade round. But his terms point up sharply the difficulties which lie ahead, because it is the matters broadly espoused by the non-governmental organisations at Seattle which have incurred his wrath. In an effort to placate the NGOs, the developed states have proposed setting minimum standards for employment and environmental matters, tied into a sanctions regime for those countries which failed to comply. Mr Maran has said that he wants none of this. He is highly critical of the way in which these matters were handled at Seattle. Because India was one of the small inner circle of states admitted to what he describes as a kangaroo Court, the charmed inner circle of states which were attempting to run the show in Seattle, he says that he saw for himself these attempts at "blatant protectionism". He like much of the rest of the developing world considers that there is a competitive advantage for them here, and that forcing them to come up to labour and environmental standards dictated by the west would cause this edge to be abandoned. There is a way of putting this which is unflattering to the advanced world. According to such critics, the west got rich in centuries past at a time when child labour was widely exploited in those western countries which are now seeking to control it in the developing world. And they add that the west should not forget that a number of states in the advanced world did not hesitate in the same period to fell their own forests in order to create wealth from lumber, so who are they to lecture the developing world about the environment. Mr Maran is clearly not going to be an easy touch as high ranking WTO officials and western trade officials try to get him on-side.

WINTER SPORTS IN DAVOS

January saw the gathering of the great and the good in this Swiss resort for informal talks on world financial matters, which inevitably strayed on to the related matter of international trade, and the Seattle fiasco. President Clinton has taken the opportunity to repeat the commitment of his country to the concept of free trade, but once again has hedged this statement around with asides designed to placate the environmental and employment pressure groups. But he did not suggest a date for renewal of the WTO talks, nor attempt to suggest any means of breaking the logjam over the agenda for a new trade round. Still there are moves to get talks between the two largest participants under way once more. The EU and the United States are currently trying to see if some common ground can be found; there is a general desire to avoid a splintering of the WTO into a collection of individual trading blocks scattered around the world, based on unilateral agreements. Meanwhile some progress is being made back in Geneva, as outstanding negotiations on agriculture and services under the Uruguay round have been set up.

A SUGGESTION FOR MIKE MOORE

The WTO Director-General has been played very much onto the back foot by the collapse of the Seattle talks and the bitter wrangling which has since ensued. Mike Moore is on record as recently asserting that the WTO is "very much in business". But there is not much optimism that talks on any new trade round will get under way for at least a year, due to the settling in period following the US presidential elections. Mr Moore needs to move fairly rapidly with some initiatives to ensure that if and when the WTO member states are prepared to get together again, the deep seated problems which took things off the rails before will have been ironed out. This is going to call for all Moore's political skills, but it is essential that he comes up with something very radical; the worst approach that he can adopt is simply to sit in Geneva quiescently and try to let things take their course.

That way the train will inevitably run into the buffers once again. He is confronted with a situation in which all around the world public opinion has turned sharply against much of the WTO's work. Unfortunately for the WTO, as its policies have developed with each successive trade round, it has come more and more to impact on matters which are squarely in the public eye, about which informed opinion has become increasingly concerned, and undoubtedly more and more vocal. The issues of loss of local employment following WTO dispute decisions in for example the banana case, the attempts to impose genetically modified food, the importation of hormone treated beef, all have captured the public imagination, and any future developments in these areas will inevitably become the subject of intense media interest and debate. Somehow he has to persuade both the developed countries to make realistic concessions in these areas, and the developing world to stop viewing any moves as an attempting to undermine their competitive advantage.

THE DISCRIMINATION ISSUE

There is another area in which Mr Moore has an opportunity to pull off a coup which will ensure his place in WTO history. Built into the rules of the WTO agreements is the principle of non-discrimination. In essence this provides that a state which has signed up to the WTO agreements must not in the course of applying them discriminate between its trading partners, nor may it discriminate between its own and another state's goods, services or nationals. The principle is enshrined in the trade related investment agreement which was part of the Uruguay round of GATT. In consequence it has been found by developing countries to be a fetter on their freedom to develop their domestic industries, and it is certainly weighted in favour of the developed world which is anxious to export its wares in this area. It means that the member state cannot insist on employing its own labour within its own territory, nor can it give special treatment to its own companies while they develop their fledgling industries; this is particularly disadvantageous to them in the areas of new technology. There are of course two sides to this scenario, as is usual in international trade matters. In the past there has been an over dependence on protection of this kind for local industries in the third world, which have in reality been simply barriers to trade, in order to prevent the entry of more efficient exports from the developed states. But the insertion of the non-discrimination principle has gone to the other extreme, and third world members of the WTO now claim that it is so absolute in its terms that it is allowing the developed states unrestricted entry to the underdeveloped economies; as a result these developing states are unable to take the first faltering steps towards establishing their own infant industries in areas which are for them novel. This is an area which Mike Moore should subject to fresh scrutiny. Some kind of modification appears to be called for, perhaps along the lines of limiting domestic protection to a certain number of years after notice has been given of the establishment of a particular new industry in a third world country. What is needed now is the application of imagination to get WTO matters moving once more; the whole world is looking to Mr Moore to provide leadership.

EU AND MEXICO REACH ACCORD

Away from the excitement of the WTO negotiations- or more accurately the lack of it- individual states are continuing to negotiate their own trading terms. To some extent this augurs well for the future of the general international system, for it underlines the need felt within the community of nations for some kind of regulated system. It also reflects the general progress which is being made towards more open economies. The European Commission has just endorsed the results of unilateral negotiations between the European Union and Mexico. As a result exports of goods from the EU into Mexico will receive the same treatment there as is currently extended to imports from the United States and Canada. Within the next four years over half of imports from the EU will be admitted to Mexico on a duty free basis. The remaining tariffs- some of which are currently as high as 35 per cent- will be reduced to a maximum ceiling of five per cent, and all duties in this trade will have been removed by 2007. In the service sector, the EU will also benefit from the same terms as are extended to Canada and the United States. This will allow the strong European sectors of telecommunications and financial services to compete on a most favoured nation basis. It effectively means that the member states of the EU will be in the same trading relationship with Mexico as Mexico's other partners in the North American Free Trade Area [NAFTA]. The arrangement does lend credence to the view that before many years have passed, there will be some kind of formal link up between NAFTA and the EU. The problem which has to be addressed before something of this nature takes place is how to cater for the small states which remain outside these ever larger economic trading blocks. ❑

MEDICAL MASS-MURDER

Nicola Peart, The University of Otago

reports from the University of Bristol on the Shipman *case*

On 31 January 2000 Dr Harold Frederick Shipman became Britain's worst serial killer when he was convicted of murdering 15 of his female patients between 1995 and 1998. Forbes J sentenced him to 15 life sentences and recommended that he spend the remainder of his days in prison: "the crimes you stand convicted of are so heinous that life must mean life". (*The Times*, 1 February 2000, p 3) This may not be the end for Dr Shipman. Police have evidence to lay a further 23 charges of murder but the Crown Prosecution Service have decided not to go ahead with these charges on the ground that the level of publicity has made a fair trial impossible. Police are investigating many more patient deaths, and it is estimated that Dr Shipman may have killed as many as 150 patients in his 30 year career as a doctor.

He killed mainly elderly female patients by administering lethal overdoses of diamorphine. He forged their death certificates and told their families that, unbeknownst to them, their loved ones had been suffering from heart disease for some time. He insisted that a post mortem was unnecessary because they had died of natural causes. He also amended his victims' computerised medical records before lodging a hard copy with the local Health Authority. These tamperings contributed to his downfall. Though he was a computer enthusiast, he was unaware that the GP program he used included an audit facility which revealed his amendments.

Remarkable as it may seem, his killings were not discovered until he clumsily forged the will of his last victim, Mrs Grundy, bequeathing himself her £380,000 estate and disinheriting her daughter. The unlikelihood of this gift, together with grammatical errors and a slightly strange signature led Mrs Grundy's daughter to investigate the validity of the will. Mrs Grundy had not mentioned leaving her entire estate to her GP even though she was close to her daughter. Besides, the errors were quite out of character. Once her daughter realised it was a forgery, her suspicions about her mother's death were also aroused. Mrs Grundy had been fit and well immediately prior to her death. She had never complained of any heart problems.

Shipman's motives remain unclear. His victims were not terminally ill. Their last consultation usually related to minor ailments. So mercy killing was not the motive. Nor did he seem to be after their money, though he did apparently remove the odd trinket from his victims' houses. These mementoes were subsequently found in a drawer in his surgery. (*Panorama*, BBC 1, 31 January 2000) The forgery of Mrs Grundy's will was the first time he showed any mercenary intent. Police detectives believe that he needed to control situations and enjoyed the god-like power of life and death. This may be related to his inability to save his mother from a slow cancerous death when he was 15.

Dr Shipman's actions were a gross abuse of the doctor patient relationship. The trust and respect he enjoyed over many years were the very reason that he was able to kill so many people without raising suspicion. As Forbes J said to Shipman during sentencing:

> You took advantage of and grossly abused their trust. You were, after all, each victim's doctor. I have little doubt each of your victims smiled and thanked you as she submitted to your deadly ministrations. None realised yours was not a healing touch. ... The sheer wickedness of what you have done defies description. It is shocking and beyond belief. (*The Times* ibid)

It was indeed beyond belief. Nobody thought it could happen: not his patients, not his colleagues, not the undertaker, not the coroner, not even the police. (*Panorama*) Yet it did.

Shipman was a solo GP who overprescribed and stockpiled morphine, altered medical records, avoided post mortems and got fellow doctors to co-sign cremation certificates without difficulty. His earlier addiction to pethidine and 1976 conviction for obtaining the drug by deception were not known by most of his colleagues in the area. His very high death rates over several years and the unusual circumstances of the deaths (mostly sudden, while fully clothed, sitting in a chair, showing no signs of illness and five sudden deaths in his surgery) were not questioned until 1998. The coroner was notified and he asked the police to investigate discreetly. However, they found insufficient evidence of wrongdoing and Dr Shipman went on to kill a further three patients, including Mrs Grundy. The medical adviser in that first investigation has been suspended.

The glaring loopholes in the general practice system are now the subject of several inquiries, all of which are aimed at establishing how such a disaster can be avoided in the future. The spotlight is firmly on the medical profession's ability to regulate itself. As a start the government announced on the day after the trial ended that in future all doctors would be required to report any death or serious incident in their surgery and disclose previous convictions or professional censures. Shipman did not inform the local Health Authority of his previous drug problem and related conviction when he needed their permission to become a solo GP in 1991. At the time of his conviction the General Medical Council merely issued a warning to Dr Shipman. It did not impose any conditions on his practice nor did it notify his future employers. The GMC would have told the local Health Authority had it been asked, but it was not asked.

The British Medical Association has long been calling for changes to the legal requirements for death and cremation certificates and to the procedures for dealing with

sudden deaths. (BMA Press Release 31 January 2000) At present, the doctor who signs the death certificate is not required to see the body if he or she has attended the patient in their last illness within 14 days prior to death. Nor is the doctor obliged to notify the coroner of sudden or unexplained deaths. That is the responsibility of the Registrar of deaths. The BMA has recommended that doctors, other health professionals and undertakers have a statutory obligation to notify any concerns to the coroner. Yet, when that was done in 1998 it was not enough to stop Dr Shipman.

The second signature on a cremation certificate is usually a mere formality because the co-signing doctor may see the body but seldom examines it. The Royal College of General Practitioners has suggested that the co-signatory should be a specially trained doctor. The BMA has also asked for changes to the system of registering deaths and recording cremations to allow for better collection of data and monitoring of unusual events.

The local Health Authority has requested that information about individual GP death rates be collected to enable it to detect sudden increases. This information is not currently collected and there is some concern that the data may be misinterpreted. In Dr Shipman's case this information would have shown that his death rate was three to four times higher than expected, but the first police investigation attributed this to his elderly patient population.

The prescription, storage and destruction of drugs is governed by the Misuse of Drugs (Safe Custody) Regulations 1973 and the Misuse of Drugs Regulations 1985 promulgated under the Misuse of Drugs Act 1971. Shipman was clearly in breach of those regulations, when he prescribed drugs for one patient and then used them for another. He was also required by law to maintain a register of any drugs he had in stock and to destroy unused stock drugs in accordance with the procedure laid down in the regulations. (Paras 15, 19-24 Misuse of Drugs Regulations 1985) But Shipman's breaches were not detected. This suggests that compliance with these regulations is not well monitored.

Nor are the Misuse of Drugs Regulations watertight. They do not clearly regulate the registration and destruction of unused drugs returned by patients or their relatives – a common practice if patients die at home. (Paras 6(2) and 26 Misuse of Drugs Regulations 1985; BMA Press Release 31 January 2000) Shipman overprescribed morphine for his terminally ill patients, retained the drugs left over after the patient died and administered them to his victims. He also collected drugs for his patients from the pharmacy and may have siphoned some off before delivering them to the patients. When he was arrested he had enough morphine for 1500 lethal injections. The Royal College of General Practitioners has suggested that only the patient or a relative be permitted to collect prescribed drugs from the pharmacy and that they should return any unused drugs to the pharmacist for destruction. (*The Guardian* 2 February 2000)

Medical practitioners are likely to be advised to purchase new computer software which would flag any alterations made to medical records more than 24 hours after the initial entry. This would have enabled the medical adviser in the first investigation to spot the changes made by Shipman and that could have prevented the last three deaths.

The government and the profession have long been concerned about the isolation of solo GPs and the poor performance of some doctors. Changes recommended include regular meetings with other GPs, reappraisal of their competence and retraining for those performing below standard. Though these measures are aimed at ensuring that doctors are competent, it is thought that they could also prevent criminal behaviour or lead to early detection.

The General Medical Council has come in for a lot of criticism over its handling of Dr Shipman both in relation to his 1976 drug conviction and in relation to its failure to suspend Dr Shipman from the register when his crimes first came to light. Shipman is still fully registered and will not be struck off until March. In response to these criticisms, the GMC has decided to conduct an inquiry into its involvement in Dr Shipman's drug conviction, though it is likely to conclude that its actions were understandable in terms of the powers it had in 1976. (Finlay Scott, Chief Executive GMC, *The Guardian*, 3 February 2000, p 3) The GMC's failure to suspend Shipman was due to the limits on its emergency powers, which preclude it from suspending a doctor once a criminal investigation has begun.

The GMC has been trying to reform its rules and procedures for some time, but it is a "slow-moving beast". (*The Guardian*, ibid) In December 1999 it released proposals for changes to its Fitness to Practice procedures. More importantly in the light of the Shipman case, the chairman of the GMC announced on 9 February that legislative changes would be made to broaden its suspension power and its power to prevent re-registration of doctors. The GMC will also include lay members, though its disciplinary proceedings will continue to be dominated by doctors. These changes were hailed as "a new deal between medicine and society", by the chairman of the GMC. (BBC 1 News, 9 February 2000)

If all of these changes are implemented, they may go some way to restoring the public's faith in the medical profession. However, as the BMA acknowledged in its press release on 2 February: "it is difficult to envisage any law that could have prevented the crimes of which Harold Shipman has been found guilty". Dr Shipman was an aberration. He was a murderer who happened to be a doctor. However, his actions have seriously harmed the public's trust in its doctors and the consequences will be felt for many years to come.

Could such a case happen in New Zealand? Quite possibly, in spite of all the reforms in the last decade. Some of the changes proposed above have already been implemented in New Zealand. The medical profession is acutely aware of the need for robust measures if it is to enjoy public confidence in its ability to regulate itself. As in England, the problems associated with solo practices are readily appreciated and steps are being taken to reduce the risks of isolation. The Cartwright Inquiry has increased public vigilance and questioning of doctors and this more than anything else may prevent a Shipman like disaster happening in New Zealand. ❑

INTERPRETATION ACT 1999

Padraig McNamara, Simpson Grierson, Auckland

reviews the new rules on interpretation

The Interpretation Act 1999 came into force on 1 November 1999. It repealed the Acts Interpretation Act 1924, which in turn was based heavily on the Interpretation Act 1888. Familiar provisions, such as s 5(j) of the 1924 Act and those in s 20 concerning the effect of repeals, have been replaced, by and large, by shorter, simpler provisions with the same effect.

This article focuses on s 5 Interpretation Act, the most important of the three sections in the Act concerned with general principles of interpretation. The article is aimed at those who use an interpretation statute as an aid in interpreting legislation, rather than those who rely on it when preparing and drafting legislation. It asks whether the new provisions in Part 2 are likely to cause a significant change in the Courts' approach to statutory interpretation. Although the answer is probably "no", I suggest that the significance of the Interpretation Act should not be underestimated, for two reasons. First, the Act places the text of an "enactment" (defined in s 29 as "the whole or a portion of an Act or regulations") at the centre of any process of interpretation, which arguably the 1924 Act did not. Second, as an interpretation statute is a key – a Rosetta stone – to interpreting all other enactments, its simplification benefits not only lawyers and Judges, but the public generally. To that extent, the Interpretation Act may be seen alongside statutes such as the Official Information Act 1982 and the Fiscal Responsibility Act 1994 as important constitutional legislation allowing the public to participate in public affairs.

NEW PURPOSIVE PROVISION

Section 5(1) Interpretation Act states that the "meaning of an enactment must be ascertained from its text and in the light of its purpose". This subsection is unchanged from cl 5(1) of the Bill introduced into Parliament in 1997. It differs from cl 9(1) of the Bill included by the Law Commission in its report "*A New Interpretation Act: To Avoid Prolixity and Tautology*" (NZLC R17, 1990) only in omitting a reference to the context of the enactment (see below).

The Law Commission's report discussed in some detail whether a purposive provision – a direction to those interpreting legislation to have regard to the purpose of the legislation – should be included in a new interpretation statute: see paras 33-65. The report noted the existence of essentially the same purposive provision in the New Zealand statute book for over a century, as s 5(7) Interpretation Act 1888 had been re-enacted almost identically as s 5(j) Acts Interpretation Act 1924, which stated:

> Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit;

The Law Commission noted that while the original reason for s 5(j) may have been to prevent the narrow reading of legislation so as to preserve the common law, two reasons for retaining a purposive provision in some form were of greater importance. First, a purposive provision helps ensure that the Courts give effect to the law as enacted by Parliament, in accordance with the doctrine of parliamentary sovereignty. Secondly, adverse inferences (such as an intention to change fundamentally the established approach to statutory interpretation) could be drawn from repeal of a purposive provision of such long-standing (see paras 40, 52, 59, 60, and 61).

This second concern did not prevent the Law Commission from recommending a purposive provision which was shorter and less tautologous than s 5(j). Notably, its suggested provision did not refer to "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act or of such provision or enactment". The Commission noted that a purposive approach sometimes requires that a narrow rather than a fair, large, and liberal interpretation be adopted. The Justice and Law Reform Select Committee took the same view in dismissing a submission by the Chief District Court Judge favouring the retention of s 5(j).

There are additional reasons for departing from the direction to adopt a fair, large, and liberal construction. First, the Courts have long held that this approach was not applicable to criminal law and tax statutes, which are to be strictly construed. A second, more recent constraint on the application of s 5(j) is the direction in s 6 of the New Zealand Bill of Rights Act 1990 that wherever "an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning". Similarly, the "principle of legality" may be used to read down statutory provisions purporting to displace fundamental rights: see for example *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 All ER 400, 411 (HL).

Section 5(j) was not then a universally applicable direction to those interpreting legislation, although in fairness it is doubtful whether those drafting s 5(j) ever intended it to be. One might speculate whether the Courts will apply s 5(1) of the 1999 Act less selectively than s 5(j), because it leaves open the way in which the Courts should interpret an enactment in the light of its purpose – whether that be narrowly, broadly, or otherwise.

IMPORTANCE OF THE TEXT

The Law Commission's 1990 report warned that too ready an adoption of either a purposive approach to statutory interpretation, or one which sought to protect rights such as those in the Bill of Rights, might "deny or diminish the significance of the particular statute in its specific context and the words used in it" (para 57). If the purposive approach to statutory interpretation developed out of a concern to ensure that a literal interpretation did not frustrate the purpose of an enactment, nevertheless in common law jurisdictions the literal meaning of an enactment has always been the starting point in any process of interpretation.

Yet the Acts Interpretation Act contained no direction, whether in s 5(j) or elsewhere, to adopt the literal approach. In the absence of any express reference to the text of an enactment as opposed to its purpose, laypersons at least could be forgiven for assuming that a purposive approach to construction was to be adopted before a literal approach. It was left to the Courts to state the relationship between the literal and purposive approaches:

> In determining the meaning of any word or phrase in a statute the first question is always to ask what is the natural or ordinary meaning of the word or phrase in its context in the statute? It is only when that meaning leads to some result which can not reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase: *Pinner v Everett* [1969] 3 All ER 257, 258-259 (HL) per Lord Reid.

Similar statements appear in the judgments of New Zealand and Australian Courts (see eg *Parris v Television New Zealand Ltd* (CA 87/99, 21 October 1999) and *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423-424) and in leading texts on statutory interpretation (eg Bell and Engle *Cross on Statutory Interpretation*, 3 ed, 1995, 49).

The reference in s 5(1) Interpretation Act to the meaning of an enactment being ascertained not only in the light of its purpose but from its text is, in the writer's view, a substantial improvement on s 5(j). The benefits and limitations of the purposive approach have been well documented (see eg Burrows, J F *Statute Law in New Zealand* 2 ed, 1999; *Bell and Engle*). The key point is that the purposive approach has always operated in conjunction with the literal approach, or more particularly, to redress the limitations of or difficulties which arise in applying the literal approach. It has never been a complete substitute for it.

Section 5(1) may do no more than state the coexistence of the two approaches, although it is possible to argue that the literal approach is given greater importance: the meaning of an enactment is to be ascertained "from" its text and only "in the light of" its purpose. The writer remains doubtful that the Courts will see s 5(1) as shifting the balance between the two approaches. The position is likely to remain that "strict grammatical meaning must yield to sufficiently obvious purpose": *McKenzie v Attorney-General* [1992] 2 NZLR 14, 17 (CA). Indeed Burrows concludes that s 5(1) "is basically just a re-enactment of s 5(j) in plainer and more economical terms" (p 141). But s 5(1) is important in so far as it simplifies and consolidates the principles of statutory interpretation, thereby making the statute book more accessible to all who read it.

RELEVANCE OF "CONTEXT"

The Select Committee rejected a submission from the New Zealand Law Society suggesting that the word "context" should be included in cl 5(1) of the Bill as originally recommended by the Law Commission. The Select Committee's report suggested that "a direction to take 'context' into account may lead to a more liberal approach to statutory interpretation that departs from the words of the statute and therefore the purpose of Parliament". The Law Commission had not defined "context" in its draft Bill, and the imprecision of the word was one of two reasons given in the explanatory note accompanying the Bill as introduced for not including a reference to "context" (the other being the "liberalisation" reason noted above). However, the Law Commission's report referred to the rest of the enactment, the area of law and the wider social and political context from which the legislation arises, and relevant treaty obligations as matters which could be considered as part of the context of an enactment (NZLC R17, paras 71-72).

The Select Committee was no doubt aware of the "more liberal approach" already having been adopted without a direction to have regard to "context" in the Acts Interpretation Act. The Courts, presumably, did not need further encouragement. That approach is certainly defensible in terms of the principles regarding the respective roles of the legislature and the judiciary, and parliamentary sovereignty, outlined in the Select Committee's report. Furthermore, the inclusion of additional matters in s 5(1) would necessarily water down the emphasis on the text of the enactment and its purpose (or that of the enactment as a whole). Then there would be the question of whether the subsection properly expressed the relative weight to be given to the competing interpretative factors – should the expression "in the light of" apply both to the purpose and to context? Section 5(1) as enacted bypasses these issues.

The reality, of course, is that the Courts will continue to have regard to the type of contextual matters referred to by the Law Commission in any event. This is evident from the judgment of the Court of Appeal in *Parris* which, being dated 21 October 1999, was delivered before the commencement of, but with express regard to, the Interpretation Act. Baragwanath J, delivering the judgment of the Court stated at p 4:

> The exercise [of statutory interpretation] begins with the language used by Parliament in enacting the particular measure and consideration of the facts in its light. Where that yields no clear answer the Court will have recourse to well settled techniques of statutory interpretation. Their purpose is to determine what result best squares with the policy of the measure in so far as that can be deduced from any pointers provided by Parliament, including the specific measure, the Interpretation Act 1999, and if necessary analogous legislation and the presumptions of the common law.

Similarly in *Tyler v Attorney-General* [2000] 1 NZLR 211 (CA) another decision in which the Court of Appeal had regard to the Interpretation Act notwithstanding that it had not yet come into force, the Court looked to other legislation to assist it in interpreting the scope of a discretion under s 90(2) Social Security Act 1964. This subsection allows the chief executive of the Department of Work and Income to grant a community wage to a full-time student for the period between two academic years. The issue was whether the chief executive could have regard to parental financial circumstances when considering whether to grant an application. In holding that she could, the Court noted:

> the clear statutory link between student allowances and benefits including the community wage. When enacting Part 2 Parliament also enacted the Employment Services

and Income Support (Integrated Administration) Act 1998 and made related changes to the Education Act, all to come into force on 1 October 1998. In particular it provided for the use of student allowance information for the purposes of the Social Security Act and for the making of regulations for taking parental income into account. And the Student Allowances Regulation 1998 did so.

That is part of the tapestry in which s 90(2) operates. It reflects the general consideration that full-time students under 25 should ordinarily seek parental support before turning to the state, both during the academic year and during the summer vacation.

The Court was therefore able to use not only provisions elsewhere in the Social Security Act, but also in other Acts, to assist in interpreting s 90(2) and in identifying the underlying intention of the legislature.

"INDICATIONS"

Section 5(1) Interpretation Act omits a reference to what may be called the "external" context of an enactment (material outside the enactment being considered). Sections 5(2) and 5(3) ensure that the "internal" context (material elsewhere in the same Act or regulations) can be used to ascertain the meaning of an enactment:

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

"Indication" is not defined in the Interpretation Act, but the non-exhaustive list of indications in s 5(3) is instructive. The Courts have long looked at the Act as a whole when interpreting a particular enactment. They frequently consider the format and organisation into Parts and sections, as part of the "scheme of the Act". However, the 1924 Act limited the material in an enactment to which the Courts could have regard. Thus, s 5(f) of the 1924 Act stated that headings of "parts, titles, divisions, or subdivisions" of an Act did not affect the interpretation of the Act.

Meanwhile, s 5(g) stated that "marginal notes" (which since 1956 have taken the form of shoulder notes, and are now generally referred to as "section headings") were not deemed to be part of an Act. (Despite this the Court of Appeal in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 142 per Cooke J suggested that "while it may be necessary to be on guard against allowing a marginal note to control the interpretation of a section, it may be taken as some indication of the main subject with which the section deals".) In contrast to marginal notes, preambles were deemed to be part of the Act and "intended to assist in explaining the purport and object of the Act": s 5(e).

Section 5(2) and (3) Interpretation Act remove these distinctions between material which is and is not of interpretative value. The Court of Appeal has recognised the sense in this approach in *Tyler*:

> The new s 5(3) goes the further sensible step of expressly recognising section headings and the other matters mentioned as indications which may be considered in ascertaining the meaning of an enactment. Also specifically mentioned in s 5(3) are the organisation and format of the statute which have always been relevant in reviewing the scheme of a statute and are of particular relevance in this case.

The new approach to indications should cause little concern in respect of future legislation, except that parliamentary counsel may now have to adopt greater care than in the past in drafting section and Part headings. A greater problem lies with using as an aid to interpretation section and Part headings in enactments predating the Interpretation Act. These headings were never drafted with a view to being used in the interpretation of the enactment, and therefore may have been prepared (albeit subconsciously) with less care than the text of the body of particular sections or subsections. Every reader of legislation would also have experienced on occasion a striking contrast between the simplicity of a section heading, often a single word, and the complexity of the following text, raising the question of whether the section heading, while now clearly able to be used in the interpretation exercise, is really any help.

The problem with headings in enactments passed or made before 1 November 1999 arises because under s 4(1), all provisions in the Interpretation Act (including s 5) apply to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of the Interpretation Act unless the context provides otherwise, or requires a different interpretation.

The combined effect of ss 4(1), 5(2) and 5(3) allowing section headings of an Act passed, say, in 1955 to be used in interpreting that Act, is one example of the Interpretation Act itself having retrospective effect, notwithstanding the enactment in s 7 of the presumption that an enactment does not have retrospective effect. The problem could have been avoided by including a subsection similar to s 11H(2) Interpretation Act 1967 (ACT), which states that a heading to a section or subsection is part of an Act if the Act is enacted or the heading is amended or inserted after 1 January 2000. This, however, requires readers of enactments to consider the date on which a particular Act or heading was drafted, while amended Acts might contain some headings which could be used and others which could not.

It remains to be seen whether the Courts will use the exception referred to in s 4(1)(b) – that the "context of the enactment requires a different interpretation" – to downplay the weight given to a section heading drafted before the Interpretation Act came into force. The existing warning in *Daganayasi* may already be enough.

CONCLUSION

The purposive approach to interpretation which was the main point of s 5(j) is carried over into s 5(1), but is now complemented by a direction to consider the text of an enactment as required under the literal approach. That common law rule of interpretation now finds its rightful place in New Zealand's interpretation statute.

Sections 5(2) and 5(3), allowing the use of indications to ascertain the meaning of an enactment, remove anomalies which existed under the Acts Interpretation Act regarding the type of material in an enactment which was of interpretative value. Judicial practice had already been moving in this direction. Finally, the recent decisions of the Court of Appeal in *Parris* and *Tyler* suggest that the omission of reference in s 5(1) to the context of an enactment is unlikely to deter the Courts from considering external contextual matters such as the common law and other statutes, despite the concerns expressed by the Select Committee. ❑

EXTRINSIC GUIDES TO STATUTORY INTERPRETATION

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asks whether anything has changed

On 1 September 1999 the Interpretation Act 1999 came into effect and repealed the Acts Interpretation Act 1924. It may be fair to say that both Bench and Bar have overlooked the new Act, on occasions, in the first months of its life. However, s 5 of the Act contains, it is submitted, a provision that could be interpreted as having radical effects on the use the Courts make of extrinsic material as guides to interpretation. Section 5 reads:

> **Ascertaining meaning of legislation –**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

The question that section raises, and which it is the purpose of this paper to consider, is whether that section now precludes reference to extrinsic material as a guide to statutory interpretation.

USE OF EXTRINSIC MATERIAL

From the mid 1980s, at least, the Courts have been prepared to look to extrinsic material, particularly parliamentary matter, to assist them when faced with ambiguous legislation. In *Marac Life Insurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 Cooke J, as he then was, had referred to *Hansard* to assist him. He said, at 701:

> A governmental statement in the House could not be allowed to alter the meaning of an Act of Parliament in plain conflict with it; but in my view it would be unduly technical to ignore such an aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act.

Increasing use has been made of *Hansard*, the explanatory notes to Bills and Committee or Law Commission reports. The Court of Appeal has also been prepared, on occasions, to consider historical works and other material to ascertain the context in which particular enactments may exist. A notable example is the case of *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Other material, which is also "extrinsic", includes dictionaries, other statutes – be they current or earlier ones, as well as academic writing and case law. It is also a principle of international law that a signatory to a treaty should not willingly legislate internally in a fashion inconsistent with international obligations. For that reason the meaning of a statute that is related to an international obligation must be derived in light of that latter obligation. Nor can inconsistencies be overlooked. The doctrine of implied repeal will apply where meanings cannot be found that are consistent between two statutes that touch on the same subject matter. See J F Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992). It is not necessary to explore any further the extent to which extrinsic material is relevant to statutory interpretation, but it can be taken as given that it, in all its forms, is very relevant.

SECTION 5

Section 5 of the Interpretation Act 1999 is intended to confirm the preference for the purposive approach to interpretation and replaces s 5(j) of the 1924 Act. However, if the new section is interpreted literally it could be taken to read that no reference to extrinsic material is now permissible. An enactment's meaning must be derived from its text. Arguably this precludes the use of other material in the interpretive task. However there are perhaps a number of contrary arguments. The first can be found in the fact that the section does indicate that "meaning" and "purpose" are in fact different concepts, which one supposes is obvious. "Purpose", it can be argued, is not within the restriction in the section, if there is one, and can be found by reference to extrinsic material. It may be, therefore, that extrinsic material can still be looked to, to adopt Cooke J's words above, to find the mischief at which an Act is aimed, but possibly not in the resolution of ambiguities. Further, purpose provisions are now incorporated in modern statutes and it may be that these should ultimately be the source from which purpose is established.

However, this still creates a significant restriction whereby it appears that other statutes, for example, cannot be looked to for assistance in establishing meaning, but there is room to argue that ambiguities can be resolved by reference to extrinsic material. Section 5(2) states that the "indications" provided in the enactment can be considered. However, it is said they are only matters that may be included in the search for meaning, yet others that are not "indications" in the statute may, arguably, still be looked to. This does seem inconsistent with s 5(1) and there may be an

ambiguity within the section. Depending on which interpretation can prevail may have significant consequences, for if "purpose" only can be considered in light of extrinsic material, s 5 can at the least, be regarded as precluding reference to other legislation as aids to interpretation. It seems absurd that this is the intent of the legislature.

The purpose of s 5 cannot be derived from the title to the Act, which simply provides that the Act relates "to the interpretation, application, and effect of legislation". There are no indications in the Act itself that help. In a recent Court of Appeal decision the Court referred to *Hansard* and Select Committee reports to emphasise the purpose behind certain legislation (see *R v Palmer* (CA 344/99, 16 December 1999). However, the Court did not expressly refer to s 5 of the Interpretation Act and its use of extrinsic material to purpose, the legislation itself being relatively unambiguous.

For the avoidance of doubt, it seems permissible at this stage to refer to some extrinsic material. The new Act is largely based on the Law Commission's 17th report *A New Interpretation Act: To avoid "prolixity and tautology"* (Wellington, 1990). It is interesting to note that the report was subject to some criticism. Mr D F Dugdale in "Fooling around with words" [1991] NZLJ 76 at 77 thought it "best thought of as an achievement of the Alexander Portney school of law reformers".

Section 5 originated in cl 9 of the Commission's report. It provided:

> **9 General principle –**
>
> (1) The meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context.
>
> (2) An enactment applies to the circumstances as they arise so far as its text, purpose and context permit.
>
> (3) Among the matters that may be considered in ascertaining the meaning of an enactment are all the indications provided in the enactment as printed or published under the authority of the New Zealand Government.

As can be seen, that original clause is similar to the final version. What is seminal in the current context is that the Commission expressly supported the retention of the Courts' power to refer to extrinsic material (see ch III). It went so far as to say that a provision in the Act restricting such reference would be futile for –

> We have it on good authority that Judges are infinitely curious ... After all, they will often be aware from their own professional and other experience of the background to particular pieces of legislation. (at para 120.)

On this point the Commission concluded, at para 126:

> Accordingly, we do not propose the enactment of legislation regulating the use of parliamentary material. That was also the strong view of most of those who expressed views to us on this issue. We conclude with two cautionary remarks. We repeat that the user of the statute book should in general be able to place heavy reliance on it ... The second caution is that experience shows that in many cases relevant parliamentary material does not exist, and we certainly do not wish to be seen as encouraging the presentation to the Courts of unhelpful information.

In earlier parts of ch III the Commission openly acknowledged that the Courts did, and should, refer to other extrinsic material, such as dictionaries and other texts when necessary. It is therefore submitted that the body that created the draft Interpretation Act, the Law Commission, had no intention to suggest to Parliament that a provision in its draft should be interpreted as restricting, or in any way altering the way in which the Courts resort to extrinsic material.

Approximately seven years later the Interpretation Bill 1997 was introduced to the House of Representatives on 25 November 1997. Clause 5 of the Bill became s 5 of the Act and the two are in almost identical terms. The explanation given cl 5 says that the new provision is designed to confirm the purposive approach to interpretation now used by the Courts. No indication was given that it was intended that the new provision should be in any way more restrictive than rules applying under the 1924 Act.

The Bill was read a second time on 2 December 1997. There was no reference at all in that debate to the new provision being intended to restrict the Courts' "traditional" means of statutory interpretation. It is interesting to note, however, that two opposition MPs urged that express provision be made regarding the propriety of reference to *Hansard*. History shows the House ultimately preferred the Law Commission's opinion that to do so was unnecessary. The Bill was then referred to Select Committee. A number of changes were made to the Bill, but none of any substance were inflicted upon cl 5.

In the third reading of the Bill, on 29 July 1999, those members who contributed to the debate stressed the fact that the new provision is designed to ensure that the meaning of a statute is in fact derived from its text and is therefore in accord with Parliament's intention. At Select Committee stage there were weighty submissions made to the effect that s 5(1) should also include the reference to "context" that appeared in the Law Commission's draft. This was rejected. One member who served on the Committee said, at (1999) 579 NZPD 18689, that to include such a reference might require analysis of matters other than the words of the statute itself. This could be considered to imply that reference to extrinsic material would be inappropriate. However, this was never expressly proposed and to so interpret the member's comments would be inconsistent with the Law Commission's report. Ultimately, it is submitted, Parliament did not turn its attention to the use of extrinsic material.

CONCLUSION

It is submitted that reference may still be made to extrinsic material, such as *Hansard*. In its search for simplicity, Parliament has unwittingly replaced s 5(j) of the old Act with a provision that is far from clear as to the use that may be made of extrinsic material from 1 November 1999. However, there are two significant arguments supporting the view that, in fact, nothing has changed in this regard. The first is the deliberate decisions by both the Law Commission and Parliament to avoid the issue. The second reason is a more practical one. The reality is that Parliament will always create some legislation that cannot be interpreted solely from its text, even in light of its purpose. To resolve such ambiguities, or to derive purpose where none is evident, both Bench and Bar will surely resort to whatever means possible to find assistance. As the Law Commission acknowledged, it would be somewhat futile and perhaps naïve to think reference to extrinsic material will stop because of s 5 of the Interpretation Act. Further, given the relationship that all legislation must have with, what Burrows (above) refers to as its "external context", it would seem anomalous for Parliament to suggest that any statute exists in a vacuum. ❑

UPDATES TO YOUR MATERIALS

STUDENT COMPANION

edited by
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LAND LAW

Julia Pedley

Read v Read (1999) 4 NZ ConvC 193,077

Where certain requirements are met, equity will recognise an easement and enforce the same by directing the execution of a registrable memorandum of transfer under the Land Transfer Act 1952, thereby creating a legal easement. The circumstances in which an equitable easement will arise were considered by the Court in *Read v Read* (1999) 4 NZ ConvC 193,077. A dispute over a grant for legal access arose between two brothers, Peter Read (plaintiff), and James Read (defendant). Both had acquired adjoining properties from a family trust; Peter in 1979 and James in 1984. A track across James's land provided de facto access to Peter's land. In 1994 Peter sought a grant of legal access from the defendants in respect of the track. His request was declined and the relationship between the brothers deteriorated to the extent that the defendants closed off the access and issued Peter with a trespass notice. Later that year Peter agreed to sell his land, conditional upon his obtaining legal access to the same. Negotiations for access with other adjoining landowners, however, were unsuccessful and further negotiations with the defendants also failed. Subsequently the agreement for sale and purchase was cancelled. In 1998 Peter entered into another contract to sell but at a lower price than under the 1994 contract. Proceedings were commenced by the plaintiffs claiming the existence of an equitable easement over the defendants' land, together with a claim for damages for the loss in value on sale of part of the plaintiff's land, costs associated with the earlier aborted sale and subsequent costs associated with the creation of a new access way.

Issues arising included whether there was an equitable easement and if so, whether the damages claimed by the plaintiffs were attributable to the actions of the defendants in closing off the track and refusing to grant a legal easement of right-of-way. If an equitable easement did exist, then a further issue for consideration was whether the Court should exercise its equitable jurisdiction to grant relief.

Potter J first summarised the legal requirements necessary for the existence of an equitable easement and also made the point that where there is an enforceable contract, in order to distinguish the arrangement from a mere contractual licence, the Court must be satisfied that there was an intention by the parties to create an easement. The plaintiffs relied on a 1979 agreement with the Trust that Peter should pay $200 for use of the track on the defendants' land. The defendants had no recollection of any such agreement. In evidence it was adduced that one payment had been made in 1980 but none thereafter, although Peter had contributed to the maintenance of the track in terms of his expending time and effort.

Applying the law to the facts, Potter J found that the right of way claimed did have the essential characteristics of an easement. Her Honour, however, was unwilling to accept that the consideration provided by the plaintiff was for a legal easement of right-of-way, noting that there was no evidence to show that the issue of a legal easement was ever discussed between the parties until 1994 when the issue was then raised by the plaintiff with the defendants. As a consequence, the facts raised considerable doubt that the consideration given was referable to any intention to create a legal easement. Rather, the Court held that the payment had been made merely for "use of track" and that subsequent maintenance work on the track had been undertaken by the plaintiff due to an immediate and continuing need to use it for access. On the absence of a memorandum in writing, (which was not disputed), there was on the part of the plaintiff a sufficient act of part performance referable to a specific agreement. Potter J found no suggestion that there was any such agreement to which acts of part performance could have been relevant.

The plaintiffs also sought to rely on the doctrine of estoppel by acquiescence submitting that it would be unjust and unconscionable to allow the defendants to set up their rights against the plaintiffs' claim for a legal easement of right-of-way when, both prior to James's acquisition of his land in 1984 and since that time until 1994, he had been aware of Peter's use of the track but had taken no objection. Reviewing the relevant authorities, the Court distinguished both *Crabb v Arun District Council* [1976] 1 Ch 179 (CA) and *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 from the present facts, unconvinced that the plaintiffs were mistaken as to their legal rights. Finding that the plaintiffs had clear knowledge of the exact situation regarding the access, Potter J was able to dispose of the plaintiffs' claim based on estoppel by acquiescence. Potter J concluded that the evidence only supported the plaintiffs having a licence to use the track for access to the land and that no more than this was ever intended.

Weatherhead v Deka NZ Ltd [2000] 1 NZLR 23 (CA)

This Court of Appeal decision is significant in terms of the analysis of "repair" as opposed to "renewal" distinction in the context of a lessee's obligation to repair.

The case concerned a "restaurant building" which formed part of other premises to which it was adjoined and which together were the subject of a lease to Deka. The restaurant building had been constructed in 1914, since when serious deterioration in its structure had occurred. Accordingly, notice was served on the lessors by the local district council requiring either demolition of the restaurant building, or works to be undertaken to ensure its interim security and ultimate strengthening. The cost of carrying out such repairs approached the cost of replacing it with a new building. Consequently, a dispute arose between the lessors and Deka as lessee, over who was liable to carry out the necessary repairs. At arbitration it was

found that the primary defects in the building constituted inherent defects with deterioration commencing some 66 years before the commencement of the lease term. The essence of the dispute centred upon the lessee's obligation to repair which stated:

> The Lessee doth hereby further covenant with the Lessor as follows:
>
> a. That it will during the said term well and sufficiently repair maintain amend cleanse and keep the demised premises with the appurtenances and all fixtures and things thereto belonging (including the glass windows thereof) or which at any time during the term shall be erected and made by the Lessor in good and substantial repair and condition when where and so often as need shall be having regard to the condition thereof at the commencement of the term reasonable wear and tear only excepted.

Adopting a "question of degree" approach, the arbitrators concluded that given the substantial nature and extent of the required works and the costs of the same, the works required did not fall within the ambit of the lessee's repairing obligation in the lease and that were such works to be carried out by the lessee, this would substantially and permanently improve the building, giving a "windfall" to the lessor.

The lessor commenced proceedings in the High Court to set aside the arbitrators' decision (*Weatherhead v Deka* (No 2) [1999] 1 NZLR 453; (1998) 3 NZ ConvC 192,850. Before the Court the lessor submitted that the entire building, (of which the restaurant building was only a part), should be taken into account so that the extent of the repairs, when set against the entirety of the demised premises, would not result in a renewal or replacement of substantially the whole subject matter of the lease. This argument was rejected by Baragwanath J on the ground that the lessor had not demonstrated that the arbitrators had erred in treating the restaurant as a distinct entity. As a consequence, in terms of the obligation to repair, Baragwanath J found that the required works amounted to renewal and not repair and held that the lessee was not responsible for the necessary works.

The lessors appealed to the Court of Appeal where again the essence of the lessors' submissions focused on the nature of the lessee's repairing obligation under cl 2(c). It was argued that the clause had been construed too narrowly by the arbitrators and Baragwanath J. It was argued that the clause should have been construed by breaking the obligation down into six separate obligations; to repair, to maintain, to amend, to cleanse, to keep in good and substantial repair, and to keep in good and substantial condition. The Court rejected this "fractured approach" to the construction of the covenant and determined that the sense of the covenant can be better discerned when it is read as a whole. The Court stated that regard must be had to the condition of the premises at the commencement of the lease, with the lessee's obligation being subject to that "benchmark". On the issue of whether the obligation arising from the words used in the covenant were appropriate to describe the work required to be undertaken, this was a question which, in the Court's view, could not be divorced from that benchmark.

Addressing the substantive issue of whether the work required of the lessee was to be classified as renewal or repair, the Court referred to *Brew Brothers Ltd v Snax (Ross) Ltd* [1970] 1 QB 612 where Sachs LJ at pp 639-640 considered in some detail the various phrases used throughout the case law in order to draw a distinction between the end-product of work which constitutes repair, as opposed to that of work which constitutes renewal. Sachs LJ considered that the correct approach to be taken in such a case is not to look at the covenant "in vacuo", but to look at the particular building, its condition at the date of the lease, and at the precise terms of the lease so as to conclude on a fair interpretation of those terms in relation to that particular state, whether the works required can fairly be termed "repair". Thus the approach to be taken should not become an exercise in semantics between the various phrases.

The Court noted the approach of Hoffmann J in *Post Office v Aquarius Properties Ltd* [1985] 2 EGLR 105, 107: "In the end, however, the question is whether the ordinary speaker of English would consider that the word 'repair' as used in the covenant was appropriate to describe the work which has to be done". This was pertinent to a further issue raised by the appellants, that the obligation to repair could include an obligation to renew a part of the premises or to put a part of the premises which were in disrepair back into a state of good repair. The Court was unwilling to accept such an extended meaning. Giving judgment for the Court, Thomas J adopted the dictum of Sachs LJ.

The arbitrators had determined that this was a question of degree on the facts and that the extensive structural works required to be undertaken, (the cost of which approached the cost of demolition and replacement with a new building) were not proportionate to the lessee's obligation under the repair covenant.

In the Court's view this was the correct approach and the arbitrators did not err in law or in principle in their approach. Dismissing the appeal, the Court held that the findings of fact pointed strongly to the conclusion that the words giving rise to the lessee's obligation were not appropriate to describe the work required. Indeed the Court concurred with the view that the lessors would have been given a "windfall".

Of particular significance was the Court's finding on the issue of whether the restaurant building should be treated as a separate part of the demised premises (which the appellant had submitted was wrong). Notwithstanding the importance Baragwanath J had attached to this issue, the Court stated that it was of no assistance in determining whether the words used in the covenant were appropriate in terms of describing the required works. Whether the restaurant building should have been viewed as physically distinct or integrated with the whole of the demised premises had no relevance.

TORTS

Rosemary Tobin

Gregory v Portsmouth City Council (HL, 27 January 2000, Lords Browne-Wilkinson, Nicholls, Steyn, Hobhouse and Millett)

Malicious prosecution is most commonly alleged where the plaintiff alleges malicious prosecution of criminal proceedings. The broad purpose is to discourage the abuse of the coercive powers of the state. Malicious prosecution has succeeded in limited cases of civil proceedings such as the malicious presentation of a winding up order or petition in bankruptcy.

In *Jones v Foreman* [1917] NZLR 798 the Full Court of the Supreme Court held that the bringing of civil proceedings (other than insolvency proceedings) would not support an action analogous to an action for malicious prosecution. However in *NZ Social Credit League v O'Brien* [1984] 1 NZLR 84 Cooke J indicated that when an appropriate case came before the Court of Appeal the decision should be reviewed. In Todd *The Law of Torts in New Zealand* (2nd ed 1997 at 997 – 998) the author could see no compelling reason why a person who maliciously institutes civil proceedings without reasonable and probable cause should not be liable in the same way as the malicious prosecutor of criminal proceedings, and suggested that the rigid difference between the two is not easy to justify. Nonetheless when the issue came before the House of Lords in the above case the House was not in favour of extending the ambit of the tort. Although the specific question before the House of Lords was whether the tort of malicious prosecution was, in law,

capable of extending to the institution of domestic disciplinary proceedings by a local authority, the House considered the wider issue of whether there was a general tort of maliciously instituted civil proceedings.

The principal submission for the plaintiff was that, as disciplinary proceedings were in concept quasi-criminal and could involve severe penalties affecting the lives and livelihood of individuals, the extension of the tort was warranted. Unfortunately this did not take account of the great diversity of statutory and extra-statutory disciplinary proceedings ranging from the very formal, subject to appeal to the Courts to the informal. The purpose of disciplinary proceedings also varied greatly. Lord Steyn, delivering the opinion of the House, considered that leaving the matter to be decided case by case could plunge this area of the law into uncertainty.

Counsel for Gregory also argued that the distinction between civil and criminal proceedings lacked rationality, and that what a Court should do was consider the fact of malicious prosecution resulting in serious damage to an individual, rather than the type of proceeding. Counsel drew attention to the development of the tort in the United States, as described in *The American Law Institute, Restatement of the Law, Torts, 2d (1977)* where s 674 extends the tort to all types of civil proceedings and s 680 extends it to include proceedings before administrative boards. Lord Steyn acknowledged that the Restatements were prestigious and influential publications often referred to throughout the Commonwealth, but observed that the development in the US had to be seen in the light of differences between the two legal systems. It was significant that American Courts do not have a general power to award costs against a plaintiff, whereas in England the award of costs was a significant weapon in deterring groundless actions.

Lord Steyn then considered the availability of other remedies to the plaintiff. Torts which might which might provide the plaintiff with an appropriate remedy included defamation, malicious falsehood, conspiracy and misfeasance in public office. His Lordship noted that the main damage a plaintiff injured by groundless disciplinary proceedings will suffer is injury to reputation by the publicity given to the proceedings. Lord Steyn believed that defamation is a relevant alternative remedy, as it allows recovery for damage to reputation, and the defence of qualified privilege is defeated by proof of malice. Although not all overlapping torts allow recovery for injury to feelings and reputation, Lord Steyn considered that if the existing protection afforded to a victim by the other torts was inadequate a better solution might be the development of those torts, rather than the extension of malicious prosecution.

Lord Steyn accepted that there was a stronger case for extending the tort to civil proceedings. Even so, countervailing reasons persuaded him that the extension was not warranted, especially when the protection afforded by other related torts was considered.

CONTRACT

Maree Chetwin

Electronic Commerce 2, A Basic Legal Framework (NZLC R58, November 1999)

The Law Commission has been considering various aspects of the law affected by electronic commerce. In this, its latest report, the Law Commission recommends the enactment of an Electronic Transactions Act broadly similar to the Australian Electronics Transactions Bill and adopts many of the provisions of the UNCITRAL Model Law on Electronic Commerce. It is a basic legal framework to remove barriers to electronic commerce such as (para 24):

- statutory requirements that certain documents be "in writing";
- statutory requirements that the writing be "signed";
- the need to retain for various purposes "original" documents;
- statutory requirements in relation to notices and the service of documents (by post or in person);
- statutory requirements for physical presence or attendance of a person when things are done; and
- the negotiability of electronically generated documents.

Of particular interest to contract students will be the discussion on the established common law contract rules as they relate to electronic commerce on eg, the time when acceptance is deemed to have occurred and the postal acceptance rule. "A contract is complete upon acceptance, which is the time the acceptance is received by the offeror, unless the postal acceptance rule applies." (para 39) This rule and case interpretation were discussed in ECom 1 (paras 68-74). Also noted in ECom 1 (paras 72- 74) is the Vienna Sales Convention under which there is no scope for the postal acceptance rule, unless there is a usage or custom to that effect or the parties agree otherwise.

In ECom 2 (para 39) it is emphasised that it is uncertain whether the postal acceptance rule would apply to an acceptance sent electronically. Where the e-mail user has direct and immediate access to the person to whom the e-mail is sent the mode of communication could be classified as instantaneous. If e-mail is sent through an Internet service provider delays may occur and the communication could not be classified as instantaneous. The Commission recommends that the Act contain an equivalent to art 15 of the UNCITRAL Model Law (Time and Place of Dispatch and receipt of Data Messages). The article eliminates any confusion caused by the possible application of the postal acceptance rule. If the addressee has designated an information system, the time of receipt of a message is when it enters the designated system, or, if it is sent to a system that is not a designated system, when the message is retrieved by the addressee. If the addressee has not designated a system, receipt occurs when it enters an information system of the addressee.

The Commission would like to abolish the postal acceptance rule but concluded it was beyond the scope of a report confined to electronic commerce. A separate discussion paper is to be issued. Likewise, it was considered inappropriate in a report on electronic commerce to recommend repeal of the Contracts Enforcement Act 1956.

Other provisions recommended include equivalents to arts 4 (Party Autonomy), 5 (Non-discrimination) 5 bis (Incorporation by Reference) 6 (Writing), 7 (Electronic signatures) and 10 (Retention of electronically generated documents).

Also included is a provision specifying that Internet Service Providers (ISPs) have no liability unless:

- they have actual knowledge of the existence of information on the website ... which would be actionable at civil law or constitute a criminal offence; and
- the ISP fails to remove promptly any offending information of which it has knowledge; and
- that ISPs will not be liable for reposting of information, by a third party, that has been previously removed unless it obtains actual knowledge of such a reposting and fails to remove it promptly.

The Commission recommends that New Zealand continues to be represented at the UNCITRAL Working Group on Electronic Commerce and the Hague Conference on Private International Law. The outcomes will be considered in its third report.

Other recommendations include that the Evidence Code be enacted contemporaneously with the proposed Electronic Transactions Act. The recommendations are summarised at para 340 including that the four offences recommended in the *Computer Misuse* report be enacted. A fifth computer misuse offence is recommended; namely, intentionally and without authority gaining access to data stored in a computer.

STUDENT COMPANION

ADMINISTRATIVE LAW

Hamish Hancock

Moonen v Film and Literature Board of Review (Court of Appeal, CA 42/99, 17 December 1999, Elias CJ, Richardson P, Keith, Blanchard and Tipping JJ)

The Board determined a book, *The Seventh Acolyte Reader*, containing stories describing sexual activity between men and boys and various photographs, objectionable in terms of s 3 Films, Videos and Publications Classification Act 1993. Moonen appealed to the High Court under s 58 (restricted to questions of law). The High Court found that the Board had made no error of law in coming to its decision. Moonen appealed to the Court of Appeal under s 70 (again restricted to questions of law).

The Court of Appeal held that the censorship provisions of the Act must be interpreted so as to adopt such tenable construction as constituted the least possible limitation of freedom of expression. The Board's decision contained no discussion and no reasons why it saw the book as "promoting" the exploitation of children or young persons for sexual purposes. Reasons were required under s 55(1) of the Act. It was inevitable in a censorship context that some limit would be placed on freedom of expression but the combined effect of ss 5 and 6 New Zealand Bill of Rights Act 1990 resulted in a need to put on the words "promotes or supports" such available meaning as impinged as little as possible on freedom of expression. Furthermore, s 5 Bill of Rights Act required that, in applying the concepts of promotion and support to the publications in question, such application should favour freedom of expression over objectionability, if the case was marginal. It was not clear how the Board approached the construction and application of the concepts of promotion and support in the present case but it was likely by reason of the Board's reference to, and its being bound by the decision of the Full Court in *News Media Ltd v Film and Literature Board of Review* (1997) 4 HRNZ 410, that the Board erroneously regarded Bill of Rights considerations as having no part to play.

The Court of Appeal directed the Board to reconsider the classification of the publications in accordance with the law as explained in its judgment.

White v New Zealand Stock Exchange (HC Wellington, CP 273/97, 8 December 1999, Gendall J)

This was a judicial review in which there was a late application by the plaintiff for adjournment and for leave to amend the statement of claim to add a further cause of action of bias against the second defendants. The question was whether the plaintiff should be granted the indulgence of the Court to argue the new cause of action. Counsel for the defendants referred to the delay on the part of solicitors for the plaintiff in not acting in any way upon the discovered documents provided almost six months earlier.

The High Court noted such a decision involves a discretion and reluctantly acceded to the plaintiff's request on conditions because the plaintiff was not responsible for the default of his solicitors and neither defendant would be prejudiced. Although the bias action appeared "at best to be thin", it was not something Gendall J was prepared to prejudge. It is important for litigants, especially individuals who come to the Court to argue "unfairness" on judicial review, that they are not left with the impression that all possible arguments in their favour have not been put forward. Costs of $1000 awarded to the NZSE.

Singh v Attorney-General (Court of Appeal, CA252/99, 16 November 1999, Richardson P, Gault and Tipping JJ)

The appellant was denied refugee status by the NZ Immigration Service. He sought an interim order that an appeal hearing before the Refugee Status Appeal Authority not proceed until the substantive determination of his application for review alleging denial of natural justice in relation to the NZIS decision. The High Court refused to make an order because, despite the appellant having a clearly arguable case, there would be a full hearing before the Authority.

In dismissing the appeal the Court of Appeal held the appellant's essential contention, that it was not open to deny the opportunity for review by the Courts of a process even where the process would be repeated by an expert and independent tribunal, was contrary to both authority and common sense. An appeal on the merits by way of a de novo hearing may be able to provide all that procedural fairness requires. It will not only redress the initial unfairness more effectively and quickly than judicial review can but also provide a fresh decision on the merits. This is a strong reason for appeal rather than judicial review.

CIR v NZ Wool Board (Court of Appeal, CA 68/99, 2 November 1999, Richardson P, Gault, Keith, Blanchard and Tipping JJ)

The Board invested $100m in redeemable preference shares and thereafter treated the dividends as exempt income under s 63 Income Tax Act 1976. Two days before the time bar expired for reassessing the Board for relevant income year, the CIR made an amended assessment, including the dividends received during that year amounting to $11.75m, as assessable income of the Board, on the basis that the redeemable preference share investment was part of a wider arrangement attracting the anti-avoidance provisions of s 99. The Board successfully instituted judicial review proceedings.

In the High Court Durie J upheld the judicial review challenge against the CIR on three grounds and made a declaration that the assessment was invalid. The three grounds were: (1) failure to make an honest judgment in the administrative law sense when reassessing the Board; (2) breach of legitimate expectation and abuse of power; and (3) improper purpose of countering criticism of the Inland Revenue Department in Parliament and at the Winebox Inquiry.

The Court of Appeal, in allowing the appeal, held that the objection proceedings will provide the opportunity for testing all factual material relevant to the s 99 issues. It was not established in the judicial review proceeding that the CIR had not exercised an honest judgment. Legitimate expectation cannot frustrate an honest appraisal of the income tax liability of the taxpayer nor restrain the discharge of the statutory duty by the CIR before the time bar would apply. The spotlight of the Winebox Inquiry may have encouraged the CIR to give particular attention at the time to the Board's transactions but the CIR is not to be criticised for that. Even if at the outset the CIR is influenced by extraneous factors in considering the taxpayers' position the CIR may nevertheless end up by making a proper assessment. Appeal allowed and judicial review proceedings dismissed.

R v Department of Education and Employment, ex parte B (Court of Appeal, The Times, 14 September 1999, Peter Gibson, Laws, Sedley LJJ)

B, a pupil on the assisted places scheme at a private school, appealed against the refusal of an application for judicial review of a decision of the Secretary of State refusing to exercise his discretion under s 2(2)(b) Education (Schools) Act 1997 to allow B to remain on the scheme after age 11, in accordance with a pre-election promise made by his political party while in opposition.

The Court held, dismissing the appeal, that statements made by political parties during elections did not create a legitimate expectation capable of protection in a legal sense. To permit every child in B's situation to remain on the scheme until age 18 would exceed the discretion under s 2(2)(b). A political party was not bound by its pre-election promises. Failure to carry them through gave rise to political as opposed to legal implications. ❑

TAX ON GIFTS TO TRUSTS

Ross Holmes, Ross Holmes Lawyers, Auckland

warns that gifts to trusts with charities as beneficiaries must be got right

Section 22 Taxation (Accruals Rules and Other Remedial Matters) Act 1999 (the 1999 Act) inserted a new s EH5 Income Tax Act 1994 with effect from 20 May 1999 to clarify the law on the application of the accruals rules to gifts and testamentary dispositions made to trusts.

As a result the old manner of drafting trust deeds is dangerous from a taxation perspective.

Most properly prepared estate plans will require wills whereby:

- the settlor leaves his or her estate to the trust which they have established;
- those who would otherwise have left assets to the settlor in their wills leave such assets to the trust established by the settlor.

In order to avoid income tax on gifts to trusts, and on amounts bequeathed to trusts on death by wills, all trust deeds must clearly show that the trust was established primarily to benefit either a natural person for whom the creditor has natural love and affection, or an organisation or a trust whose income is exempt under s CB4(1)(c) or (e). If the trust deed does not do so then under s EH4, any principal or interest owing to the creditor that is "remitted" is assessable income to the trust as the debtor when that amount is "remitted".

Historically it has been usual to name charities as one of the classes of discretionary beneficiary in New Zealand discretionary trusts.

IRD BINDING RULINGS

Prior to 20 May 1999 the Inland Revenue Department had issued a number of binding rulings dealing, amongst other issues, with the question of whether the Income Tax Act accruals rules imposed an income tax liability in the case of trusts which included charitable beneficiaries both when on death a will made bequests to such trust and when a creditor made gifts to such trust.

Binding rulings are made under s 94D Taxation Administration Act 1994 (TAA). Section 91DB TAA deals with the effect of binding rulings. It provides:

(1) Notwithstanding anything in any other Act, if –

(a) A public ruling on a taxation law applies to a person in relation to an arrangement; and

(b) The person applies the taxation law in the way stated in the ruling, – the Commissioner must apply the taxation law in relation to the person and the arrangement in accordance with the ruling.

(2) If two or more public rulings apply to a person in relation to an arrangement, the person may apply, and require the Commissioner to apply, any one of those rulings.

No binding ruling has been issued on the effect of s EH5. Accordingly the earlier binding rulings are only a useful guide to the manner in which the IRD is likely to interpret s EH5 in relation to gifts and bequests made after 20 May 1999.

In (1996) 7 TIB No 10 pp 13 to 18 the IRD published binding ruling BR Pub 96/4 which applied to amounts of debts forgiven by a natural person in consideration of natural love and affection in the 1996, 1997, and 1998 income years. This Ruling deals fairly comprehensively with the relevant issues but does not include any guidelines on the distinction between primary and minor beneficiaries.

In (1996) 8 TIB No 10 pp 39 to 44 the IRD published binding ruling BR Pub 96/4A which applied to amounts of debts forgiven by a natural person in consideration of natural love and affection in the 1996, 1997, and 1998 income years. Public ruling BR Pub 96/4A replaced public ruling BR Pub 96/4 with effect from the 1997-98 income year. As a result for the 1996 year those affected could apply, and require the Commissioner to apply, any one of both BR Pub 94/4 and BR Pub 96/4A. The relevant portions of BR Pub 96/4A were however identical to BR Pub 96/4.

In September 1998 the IRD issued a draft Binding Ruling for comment 0009: *Debt forgiveness in consideration of natural love and affection.*

This in turn was followed by Public Ruling – BR Pub 99/7 which was published in (1999) 11 TIB No 9 on *Debt Forgiveness In Consideration Of Natural Love And Affection.* BR Pub 99/7 does not replace BR Pub 96/4A, which applies from the 1997-98 year to 19 May 1999. The Ruling applied for the period 1 April 1997 to 19 May 1999. Under s 91DB(2) TAA, this permitted taxpayers to rely upon either ruling during the period that both applied. The expiry date for both rulings was 19 May 1999 being the last day prior to the 1999 Act having application. No binding ruling has been issued in respect this topic for the period after 20 May 1999.

The major problem is the interpretation of s EH4, one of a number of the provisions of the Income Tax Act drafted with such complexity that it is bound from time to time to be interpreted in a manner not previously considered possible. The section provides: In summary the effect of s EH4 is:

- Base price adjustment calculations for financial arrangements are contained in s EH4. As the IRD accepts, the base price adjustment is effectively a "wash up" calculation of all income or expenditure under a financial arrangement upon the maturity, transfer, or remission of that arrangement;
- Generally, under s EH4, any principal, interest, or other amount payable on a financial arrangement that is "remitted" is assessable income to the issuer. Where the debt is remitted, the issuer is the debtor. (1996) 7 TIB No 10, 13-18;

- Section EH4(6) allows issuers relief from the assessability of remissions for certain intra-family and private debts. If the requirements of s EH4(6) are satisfied, the amount of the debt forgiven is deemed paid. This includes any amount accrued and unpaid on the debt. This consequence is deemed for all purposes within the qualified accruals rules;
- The main provisions when this deemed payment is relevant are ss EH4 (base price adjustment) and EH5 (bad debts). Broadly, the effect for the issuer or debtor is that no assessable remission arises on a base price adjustment. For the holder or creditor, no bad debt deduction is available under s EH5 because the amount forgiven is deemed paid. Also, any interest or accruals income forgiven is assessable to the holder, for the same reason.

the only safe course is to follow the guidance in Public Ruling BR Pub 99/7

THE 1999 ACT

Section 22 of the 1999 Act inserted a new s EH5 with effect from 20 May 1999. The effect of this is that after 20 May 1999 in order for a bequest or a gift to a trust to be exempt from income tax on gifts and bequests under the Income Tax Act accruals rules the trust must have been "established" primarily to benefit a natural person for whom the creditor has natural love and affection, and/or an organisation or a trust whose income is exempt under s CB4(1)(c) or (e).

If this criterion is not satisfied then the exemption from income tax given by s EH5 does not apply.

Section EH5 contains no guidance as to how it is to be established that the trust was established primarily for such purposes.

In my opinion the only safe course is to follow the guidance given in Public Ruling – BR Pub 99/7 namely:

- Section EH5 will apply in all instances if the creditor has made a bequest to or forgiven a debt owing by a trust where all the primary beneficiaries (apart from default beneficiaries) are persons for whom the creditor has natural love and affection or organisations or trusts whose income is exempt under s CB4(1)(c) or (e), ie qualifying or primary beneficiaries;
- The trust deed must accordingly provide that the Primary Beneficiaries (ie the only objects or persons who can benefit while they are alive) are named organisations or trusts whose income is exempt under s CB4(1)(c) or (e) or named natural persons for whom all persons making bequests or gifts to that trust have natural love and affection for. It is implicit in the words of the section that the debt must be forgiven in consideration of natural love and affection towards all the Primary Beneficiaries. This is because the forgiveness, in a discretionary trust, could benefit any of the objects of the trust if the trust deed is not worded in the manner suggested. If the trustee has power to allocate benefits to Primary Beneficiaries who are not an organisation or a trust whose income is exempt under s CB4(1)(c) or (e) or a natural person for whom a creditor could not have natural love and affection, it cannot be said that the trust was established primarily to benefit such bodies or persons;
- The IRD accepts that a person making a bequest or a creditor making a gift to a trust can have natural love and affection for a relative (for example a father or child, brother or sister, husband or wife (or non-spousal domestic partner), grandchild, niece or nephew, and other descendants or antecedents of the creditor, whether by blood, marriage, non-spousal domestic relationship, or adoption, and whether or not born during the creditor's lifetime), or a close friend of the creditor or person making the bequest;
- In the case of charities the trust deed can include them as Primary or Secondary Beneficiaries. Only if they are to be included as Primary Beneficiaries then the charity must not be carried on for the private pecuniary profit of any individual, and the purposes of the charity must be limited to New Zealand. In the case of Primary Beneficiaries if the purposes of the charity are not limited to New Zealand the Commissioner may apportion the amount in such manner as the Commissioner deems just and reasonable between those purposes within New Zealand and the like purposes out of New Zealand;
- In a family discretionary trust situation at the time the debt is forgiven all of the Primary Beneficiaries of the trust, other than default beneficiaries, must be an organisation or a trust whose income is exempt under s CB4(1)(c) or (e) or persons for whom the creditor has or would have had natural love and affection, ie qualifying beneficiaries;
- The fact that the terms of the trust may include a power to add as Primary Beneficiaries objects or beneficiaries for whom a creditor could not have natural love and affection will not preclude the section from applying to a forgiveness of debt if that discretion has not been exercised. If, however, there is an intention (at the time of the debt forgiveness) to add a non-qualifying beneficiary as a Primary Beneficiary, the Commissioner will consider the potential for invoking the anti-avoidance provisions of the Act if the circumstances support this. For that reason if there is a power of addition of beneficiaries (as is normal and desirable) it should in my opinion be limited (in the case of Primary Beneficiaries only) to adding as Primary Beneficiaries organisations or trusts whose income is exempt under s CB4(1)(c) or (e) or natural persons for whom all persons making bequests or gifts to that trust have natural love and affection for;
- The naming of default beneficiaries to receive trust property if the intended Primary Beneficiaries are not alive or in existence when the distribution takes place is accepted by the Commissioner as not precluding the application of s EH4(6), notwithstanding that such default beneficiaries may be persons for whom the creditor does not necessarily have natural love and affection. Therefore, non-qualifying beneficiaries can be default beneficiaries and the section will still apply in a situation of debt forgiveness.

CONCLUSION

The relief from taxation liability under the Income Tax Act accruals rules on bequests or gifts to trusts will only apply when either all, or all of the primary, trust objects or potential beneficiaries are persons for whom the creditor has or would have had natural love and affection, and New Zealand charities.

The old ways of drafting trust deeds are now dangerous if bequests or gifts will be made to the trust. ❑

A STATUTORY CHARITABLE TRUST

Charles Rickett, The University of Auckland and
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examine a peculiar example of a charitable trust established by statute

An interesting manifestation of a charitable trust has emerged as a by-product of the privatisation of the national railways.

On 1 July 1999 the New Zealand Railways Staff Welfare Dissolution Act finally came into force after a six-year gestation period. As indicated by its title, the Act served to dissolve the New Zealand Railways Staff Welfare Society ("the Society"), which had been established in 1958 during the administration of the welfarist Nash government to provide financial relief, assistance and benefits for its members and their dependants (s 105(1) New Zealand Railways Corporation Act 1981; see also NZPD: Vol 570, 6 August 1998 at 1117). The 1999 Act provided for the transfer of the dissolved Society's assets and liabilities to a charitable trust, which would continue the Society's operations.

The reason for the change in the legal status of the Society to that of a charitable trust is inextricably linked to the political and economic developments of the past two decades. After a century of state control, the railways were targeted in the first wave of economic deregulation in the early 1980s. The New Zealand Railways Corporation replaced the Railways Department in 1982, and was incorporated as the limited liability company, New Zealand Rail Ltd, in 1990. Three years later, the National Government sold New Zealand Rail Ltd to the Tranz Rail Holdings consortium, and Tranz Rail Ltd listed as a public company on the New Zealand Stock Exchange in 1996.

Caught up in the movement from public to private ownership during the early 1990s were the members of the Society. They concluded that it was time for the Society's swan-song, since once the railways came totally under private control, it would be anachronistic to have an organisation controlled by legislation (Part VIII of the New Zealand Railways Corporation Act 1981) and therefore under the direct control of Parliament. Accordingly, a decision was made to replace the Society with a charitable trust, and in 1993 the New Zealand Railways Staff Welfare Charitable Trust ("the Trust") was duly incorporated under the Charitable Trusts Act 1957. (In view of the comments to be made below, it is not clear quite how the Trust managed to gain acceptance by the Registrar of Incorporated Societies as exclusively or principally charitable, as required under Part II of that Act.) All that remained to complete the process was for the legislature to dissolve the Society and transfer all its assets and liabilities to the Trust, but it was not until 6 August 1998 that Parliament finally referred the Dissolution Bill for consideration by a select committee.

The Commerce Select Committee heard submissions from the Society itself, the Rail and Maritime Transport Union, Tranz Rail Ltd and the New Zealand Railways Superannuitants' Association, and advice was given by the Treasury. All submissions favoured the move to a charitable trust and the Committee took just 33 minutes to consider the Bill. It concluded that it was "inappropriate" for the Society to continue to operate under the 1981 Act following the sale of New Zealand Rail Ltd into private ownership:

> [T]here appears to be little reason for the government to continue having a direct influence on the Society's operations and its future when there is an alternative which can provide full protection of the rights of the Society's membership. As a Trust the Society will be in a position to adopt changes of benefit to the members without requiring Parliament to consider amending legislation. (Recommendation of the Commerce Committee: Bill: 1998 No 177-2.)

The Committee concurred with the view of the Minister for State-Owned Enterprises, the Hon Tony Ryall, who had previously argued in Parliament that a charitable trust would both "allow more efficient and independent operation and protection of [the Society's] assets for its members" and preserve the Society's non-taxpaying status (NZPD: Vol 570, 6 August 1998 at 1117). Finally, in December 1998, it was decided that the Dissolution Bill would proceed.

Interestingly, although the Bill inspired much rhetoric from Members of Parliament about the merits and/or vices of privatised railways, an issue of some legal significance was not adverted to in the House. This is whether a charitable trust was in fact the appropriate mechanism with which to replace the Society. The issue arises because the New Zealand Railways Staff Welfare Charitable Trust, although incorporated as a charitable trust board in 1993, does not meet all of the established legal criteria of a charitable trust.

The principal conceptual difference between a charitable trust and a private trust is that the former is a trust for purposes whereas the latter is a trust for persons. The charitable trust is furthermore understood to be an exception to the general rule invalidating trusts for purposes, and as such has several advantages. It will not fail for uncertainty of object so long as a general charitable intent is manifest; it may be perpetual; and it is the recipient of substantial relief against taxation (*New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157 per Somers J).

On account of the special privileges enjoyed by trusts and other mechanisms used for pursuing charitable purposes, "charity" is ascribed a technical legal meaning to limit the privileged class of purposes (*Oppenheim v Tobacco*

Securities Trust Co Ltd [1951] AC 297, 306 (HL) per Lord Simonds). In essence, barring specific statutory glosses, for a trust to be deemed "charitable" at law, three things must be demonstrated. First, the purpose of the trust must be "charitable". What this means is discussed herein. Second, that charitable purpose must be of a public character in the sense that it is for the benefit of the community or a significant section of the community. Third, that purpose must be exclusively charitable.

It is instructive to assess whether the Railways Staff Welfare Charitable Trust passes muster under the general requirements of charitability. First, then, is the Trust pursuing a charitable purpose? The activities of the Society (and now the Trust) include the reimbursement of 80 per cent of medical expenses, payment of grants on the death of some of its members, holiday accommodation at reduced rental rates, and financial assistance where there is evidence of hardship or misfortune. Leaving to one side the issue that all these benefits are for members only, are those benefits or purposes charitable? There is an easy answer in this case. It is simply not necessary to entertain the usual *process* to be followed in determining whether any particular purpose, once itself clearly articulated, is charitable at law. In particular, it is not necessary to apply Lord Macnaghten's famous fourfold descriptive classification of charitable purposes laid down in *Commissioners for the Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 583. The Society Dissolution Act simply stipulates, by s 9, "all the purposes of the charitable trust are deemed to be charitable purposes" for the purposes of any other enactment or rule of law.

Secondly, however, it is not enough that the purpose of the trust be "charitable"; a trust will only attain charitable status in the technical legal sense if it is directed to the "public benefit" (*Pemsel*, per Lord Macnaghten at 580). In *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] SCR 10, this was confirmed as one of the key principles of charity law. There must be an objectively measurable and socially useful benefit conferred, and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit. It is difficult to satisfy the separate public benefit criterion when a trust has a defined membership, since the implication is that the benefit, no matter how "beneficial", will accrue to entitled individuals in their private capacity, rather than to individuals as part of the community or as part of a section thereof. This is reflected in the traditional test of public benefit as stated by Lord Wrenbury in *Verge v Somerville* [1924] AC 496, 499:

> The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.

A clear and oft-applied test to determine whether beneficiaries of a trust constitute the "public" was articulated by Lord Simonds in the leading *Oppenheim* case (at 306):

> A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

The public benefit criterion as thus articulated has been questioned by some, most notably by Lord MacMillan in his powerful dissent in *Oppenheim*, and obiter by Lord Cross in *Dingle v Turner* [1972] AC 601. In *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 155, Somers J stated:

> [I]t is not possible, at least in the present state of the authorities, to state with any confidence how the line is drawn between [private and public benefit] or to say that it is drawn in the same way as between different types of charitable trust.

And most recently, the Inland Revenue Department has released an Issues Paper No 4, *The Public Benefit Test*, for comment and discussion, in which the suggestion is made that there is movement away from a strict adherence to the principles expressed in *Oppenheim* to a more flexible approach whereby the nature of the beneficiaries is no longer determinative of whether a trust is charitable (para 5.1). The Issues Paper is undergirded by a detailed examination of relevant cases, and appears to suggest the collapsing of the present public benefit requirement into merely operating as a factor in assessing the charitable nature of the *purpose*. That is certainly the thrust of the reasoning of both Lords MacMillan and Cross, so heavily relied upon in the Paper.

Much of the difficulty in respect of the public benefit test (which of course does not apply in relief of poverty cases) is its link with the majority of cases whereby purposes gain charitable status, as being "purposes beneficial to the community" (Lord Macnaghten's fourth head). How can a purpose be "beneficial to the community" but not "for the public benefit"?

It appears that in New Zealand, following the majority decision in *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA), a more flexible approach will be applied to cases allegedly within the fourth head. The majority therein appeared to apply the approach favoured by Russell LJ in *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 (CA), but hitherto not followed in New Zealand. By defining the relevant purpose more widely ("for the protection and benefit of the public"; "for the protection and promotion of the health of New Zealanders") than the minority did ("to regulate qualification for, and conduct in, the practice of medicine in New Zealand"), and establishing thereby that it was prima facie beneficial to the community, the purpose was held charitable within the fourth head, barring compelling policy grounds to declare the purpose non-charitable. Care must be taken in confusing the process of assessing the beneficial nature of the *purpose* with the equally important but conceptually different question of defining the potential beneficiaries of the actual pursuit of that purpose. Or, if there is to be a slide towards the Russell LJ test, as seems to be happening, there must be transparency about the impact that will have on the "public" nature of charitable trusts. In Canada, Gonthier J, in *Vancouver Society of Immigrant and Visible Minority Women*, referring to Russell LJ's analysis, appreciated that this approach would possibly collapse the separate "public benefit in application" requirement into the "purpose which benefits the public" criterion. His Lordship said this was contrary to established authority.

The marginalisation of a public benefit requirement was evident in the case of the Trust under examination. While s 9 of the Dissolution Act is expressly directed at declaring charitable the purposes of the Trust, it does not deal with "public benefit". One is left to assume that if there is a deficiency in that connection, s 9 will require stretching to deal with it. We will assume that s 9 can be so read. If it cannot, then, as will be seen, the Trust is simply not

charitable. The membership of the New Zealand Railways Staff Welfare Society comprised three groups, all of whom automatically became "beneficiaries" of the (charitable) Trust under the 1999 Act:

1. Group A: employees of Tranz Rail Ltd and other employees of other specified employers who comprise approximately 4400 members and enjoy the full rights and privileges of the Trust. Of this contingent, around 4300 work within the rail system, and the remainder 100 work for various companies that had a direct relationship with New Zealand Rail before the restructuring of the 1980s;
2. Group B: former employees of the rail industry who have retired or been made redundant. The 3000 members of this group are entitled only to access to the holiday homes owned by the Trust;
3. Group C: employees of specified employers who are associated with the rail industry and who belong to the Rail and Maritime Transport Union.

Clearly, the members (or "beneficiaries") of the New Zealand Railways Staff Welfare Trust are linked by their relationship to certain employers, particularly Tranz Rail and those associated with it presently, or with New Zealand Rail Ltd before its sale into private ownership. As such, the Trust beneficiaries are linked by their personal relationship to certain propositi and therefore would fail to qualify as a section of the public under the test established by Lord Simonds in the *Oppenheim* case. In fact, Lord Simonds cited in *Oppenheim* (at 306) the earlier case of *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194 (CA) as "direct authority" for the proposition that where the common quality among the beneficiaries is employment by particular employers, those beneficiaries will not constitute a section of the public for charitable purposes.

Furthermore, it is significant that the Welfare Board that controlled and administered the New Zealand Railways Staff Welfare Society was afforded wide discretionary powers (s 106, New Zealand Railways Corporation Act 1981). Those powers are now vested in the trustees of the Trust, and include the ability to prescribe terms and conditions subject to which employees may become beneficiaries of the Trust. That power to formulate the rules according to which beneficiary status is determined would preclude the qualification of the beneficiaries as a section of the public under the well known test laid out by Lowe J in *Re Income Tax Acts* [1930] VLR 211, 222-223:

> [The membership] of an association which takes power to itself to admit or exclude members of the public according to some arbitrary test which it sets up in its rules or otherwise [cannot] properly be called a section of the public.

There is further semantic evidence that the New Zealand Railways Staff Welfare Trust is inherently non-public (within the public benefit criterion), and a fortiori non-charitable. When in Bill form, the Dissolution Act referred to those entitled to the rights and privileges of the charitable trust as "members", rather than "beneficiaries". The Commerce Committee noted the anomaly ("[I]t is somewhat unusual for beneficiaries of a trust to be referred to as members": see Recommendation of the Commerce Committee: Bill: 1998 No 177-2) and recommended that the language be amended accordingly before the Bill was passed.

As the public benefit requirement for a charitable status is clearly not satisfied by the Trust – and would probably not be satisfied even under the Russell LJ flexible purpose test – why did Parliament nevertheless award the Trust charitable status? A major consideration was the tax privileges that the institution would enjoy as a charity that would not be available if it were to operate as an ordinary private trust. Indeed, this consideration is explicit in the explanatory note that prefaced the Bill:

> In light of the privatisation of the New Zealand Railways Corporation, the Society believes that it is best able to provide for its members through the mechanism of a charitable trust. As a charitable trust the society would preserve its non-taxpaying status.

A more liberal construction of "charity" was supported for this reason in Australia in a report of the Industry Commission (*Charitable Organisations in Australia*: Report No 45, 16 October 1995) which recommended, inter alia, that taxation relief should be extended to all "Community Social Welfare Organisations" (Recommendations 11, 13, 14). Accordingly, putting the matter in its most positive light, the concession made to the Railways Staff Welfare Trust might reflect Parliament's dissatisfaction with the narrow conception of "charity" that has evolved from the preamble to a 1601 English statute and ensuing case law. In an era when state welfare initiatives have been reduced, and trade unions rendered less powerful by the Employment Contracts Act 1991, perhaps it is appropriate that there be a commensurate increase in the incentives for private groups in the community to assume responsibility for the welfare of members. In fact, the devolution of responsibility for the Society from politicians and Parliament to the workers and employers under a charitable trust was cited in the House as a positive effect of the transition (see, for example, NZPD, 8 December 1998, p 14388 Hon Richard Prebble MP; p 14392 Pansy Wong MP).

On the other hand, the fact that the Trust was awarded charitable status, despite clearly not satisfying the traditional public benefit criterion, can perhaps be interpreted as a politically-motivated sweetener to counter the bitter controversy that followed the privatisation of New Zealand Rail and the 17,000 consequent redundancies. In its haste to abdicate responsibility for the Society, the government may have been prepared to throw in what was in effect an incentive package to obtain the support of Parliament in passing the legislation. Certainly, it is extremely unlikely that a similar organisation for the employees of a run-of-the-mill private sector company would be allowed to operate as a charitable institution and enjoy tax concessions and other special advantages. Instead, any such institution would likely have to operate as an express private trust for its beneficiary-employees. Therefore, one might legitimately conclude that a special concession was made for the New Zealand Railways Staff Welfare Trust, its origins being in Railways as a government department and then a state-owned enterprise, even though its beneficiaries are now (in the main) the employees of a private sector company. On this analysis, the decision to afford the Trust charitable status could be described as one characterised by political pragmatism rather than any principled application of the law of charitable trusts. If a more generous judgment of this whole episode is called for, such as that postulated in the prior paragraph, why is there no sign of any executive or legislative activity in the reform of charity law? Are there not other social welfare entities just as deserving of tax breaks as the railways staff? ❑

CHALLENGING TIMES FOR VOLUNTARY WELFARE

David Nelson, CEO and Fr Des Britten, City Missioner, The Wellington City Mission

describe the view from the Wellington City Mission

The Wellington City Mission was established in 1929, by Act of Parliament and is a Charitable Trust. Although affiliated to the Anglican Church it operates under the direction of an independent Board of Trustees. It is a separate legal entity, which publishes its own annual report and financial statements.

The Mission offers its services to anyone, regardless of religious or ethnic background, in three key areas:

- Community services
- Residential care services
- Catering services

The Mission has been running four community service programmes:

- Programme for Youth
- Programme for Families
- Programme for Older People
- Programme for Disadvantaged Adults.

In 2000 the Mission will add a fifth community service programme, ie:

- Programme for Long-term Unemployed

Residential care services are provided by the Mission's subsidiary Mission Residential Care Ltd, operating as Kemp Home & Hospital. Catering services are provided by the Mission's subsidiary Mission Foods Ltd. This company produces food for institutions as well as prepared meals for home consumption (Ezee Meals).

The stresses and strains of a modern, rapidly changing society are creating a greater need for the Mission's services. As the percentage of elderly in the population increases, as families fragment or find it difficult to manage on limited incomes, as some younger folk find it hard to cope with the problems of growing up in an increasingly pressured society, well resourced service programmes are required to provide the help that is needed.

BACKGROUND TO THE CHALLENGE

Over recent years there has been much devolution from central and local government to private sector, especially in provision of health and welfare services. As part of the private sector, charitable and commercial organisations have been picking up work no longer done in the public sector. This is clearly evident in health, with many services now being contracted out. In the field of unemployment WINZ is contracting out programmes designed to prepare unemployed people for entry to, or a return to employment.

However, many of the services provided by voluntary welfare groups are not funded through central or local government. The Mission's community services are funded mainly from public donation, grants from charitable trusts, a "sprinkling" of corporate giving, and income from invested legacies. Less than eight per cent of all expenditure on our community service programmes has come from government agencies!

City Mission programmes, such as our education/life skills programme for secondary school pupils who can no longer cope in mainstream education, or who are no longer welcome to return (having been expelled), receive regular referrals from CYFS, Police Youth Aid, and from secondary schools. Clearly, these agencies see the need for and value of our programme – it is a place of last resort for most of these teenagers – but to date there has been no funding available from CYFS, the Police or Justice Department, or from the Education Ministry. Last year, total government agency funding for our work with at-risk youth was $69,000 (from Lotteries Grants Board and Community Funding Agency). However, these programmes, which require seven full-time staff plus volunteers, cost about $500,000 a year to run.

Another programme for at-risk young families (mainly solo parents with pre-schoolers and no extended family support, who need in-home mentoring to help with child rearing, diet, home management and budgeting) receives referrals from CYFS and others, but no money.

In-home support of elderly people with health or disability problems is now preferred by many (including government agencies) over residential care in rest homes or geriatric hospitals. Some basic help is funded by subsidies, if the clients cannot afford to pay for their own care, but often the care provided is barely adequate to maintain basic safety and security, and does nothing to address social needs. The Mission's programme of home visiting and support of elderly people, many of whom are socially isolated by their personal circumstances, received only $4000 of support from government agencies last year, but costs about $250,000 pa to run.

In 2000 we will develop a new programme for long-term unemployed, aimed at addressing the key personal issues creating a "barrier" to paid employment, and enabling a record of successful accomplishment to be built up, which can be seen by potential employers. WINZ have given us a grant to fund a manager for the programme, but soon we will have to find another $350,000-$450,000 pa, if we are to be able to tackle this serious societal problem in a meaningful and successful way.

Demand for all of the Mission's community services is increasing, but because of funding constraints we have to limit the numbers we can help. With current resources, we have had to decline a number of referrals to our budget advice/money management service, and our at-risk young families programme. We have not been able to develop a work skills centre in a building we already have available, and we have not been able to develop a health component to our in-home elder support programme. We could do all this, and so much more, to meet needs we see every day in our work, but we don't have the funds.

The present economic climate is great for some, but for many at "the bottom end" life is truly a daily struggle to survive with a very basic quality of life. There is no doubt the gap between the wealthy and the poor is escalating. This is happening at a time of major change in the demographic make-up of the country. In the next 20 years we will see a major increase in the percentage of the population over the age of 70 (a time of life when there is an increased need for health and welfare services), and proportionately fewer people will be in employment and paying the tax governments will need to run essential and basic services.

In the recent past, the paucity of government contribution to the Mission's community programmes has almost been matched by a paucity of corporate giving. Of course some businesses do give financial donations, or used office furniture or equipment, or food, or voluntary time for specific projects, and we are very appreciative of this help. But only a small percentages of businesses in the Wellington region have supported us in this way. Those that do give are mainly larger companies, but if they are operating on a nation-wide basis they often prefer to support nation-wide charities. Wellington City Mission can miss out. Sometimes we look with envy at the corporate support enjoyed by other charitable organisations and some sports. It is unfortunate that there are hundreds of businesses in the Wellington region who have never supported our work.

The challenge to business

New Zealand society cannot continue to afford the present level of dependency and individual and family dysfunction. It is time for a change. We believe that business should see programmes such as ours (which are designed to reduce or overcome benefit dependency, get people back to work, or into tertiary education, and to reduce anti-social behaviours) as being of benefit to business, as well as society at large.

Businesses may think their support of voluntary welfare should be encouraged by way of tax breaks, but it seems unlikely further tax rebates can be afforded at present. Every dollar that government can direct to education and economic development, rather than dealing with antisocial behaviour and on income support, is a dollar invested for the country's future. As the economy grows, and people obtain more spending power, business opportunities and jobs are created.

We call on all businesses to adopt a policy and practice of financial support for voluntary welfare work. They should not expect any short-term payback for this investment, but they should choose their charities very wisely. A professionally run voluntary welfare organisation will be able to demonstrate that it is "making a difference". Businesses also need to be sure that a high percentage of their cash donations actually get spent on service delivery, rather than administration. Larger sums contributed to one or two professionally led organisations will have a greater impact than the "scatter gun approach", ie small amounts spread around a host of well meaning groups. Many charities are more than willing to acknowledge corporate support in their publications, and, in some cases, will grant naming rights, or allow a business's name (with a "proud to support" message) to be displayed on buildings or vehicles. However, the prime motivation should be a recognition that some

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Population Projection

Source: *Statistics New Zealand – 1996 base*

Wellington region incorporating Kapiti District, Porirua, Upper Hutt, Hutt, and Wellington Cities

Year	Total population	Population 70 years and over	Percentage
1996	385,600	27,330	7.09%
2021	403,500	43,560	10.80%
Increase	**17,900** (4.64%)	**16,230** (59.39%)	

Containing expenditure on the "big three" – health, welfare and education – has clearly started, and will probably have to be maintained in the face of the demographic realities. Governments and spending priorities may change, but any government is going to be faced with increased demands when fewer people will be able to provide taxation revenue. We are all going to have to adjust our thinking on funding of all but the really basic and essential government services.

THE CHALLENGE

If the above scenario is correct, pressure is really going to come on voluntary welfare organisations to take on service provision that governments will be unable to contemplate. In reality this pressure is there now, and we are responding, but we see the situation escalating. How will we raise the necessary funds to provide services for those who struggle to maintain a very basic standard of living, or to cope with some of the pressures of modern society – drugs, alcohol, unemployment, family violence, disabilities, and so on?

In recent times fund-raising has become extremely competitive between the major charities – the number of appeals coming through the letterbox and seen on TV, and the increasingly sophisticated "asks" are testament to that. The Wellington City Mission has had to actively develop a higher profile and embark on a wider range of fund-raising ventures just to maintain its "share" of the donation dollar. This year we will need to find close to two million dollars to run our community service programmes.

CHARGING CLAUSES

David Brown, Victoria University of Wellington

asks whether charity begins with the trustees?

Until recently it has been regarded as sacrosanct that trusteeship, whether for charities or non-charities, is voluntary. While a trustee may be reimbursed out of trust property for expenses properly incurred (s 38(2) Trustee Act 1956), remuneration is different. In the absence of either express authorisation, consent of all adult "sui juris" beneficiaries, or statutory provision, trustees are not allowed to be paid, irrespective of whether services they provide are ones for which they charge in their business.

The basis of this "voluntary principle" is that trustees should not place themselves in a position where their duty and interest conflict. However, many have questioned the validity of this principle in the light of the sophistication and complexity of modern trusts and the nature of investments which trustees of larger funds must consider. Many trusts today are the vehicle for large businesses or collective investment, such as pension funds. To attract trustees of sufficient experience and reputation, it is often beneficial to be able to pay something more than mere expenses.

The major exception is express authority provided in the trust document. This may take the form of a professional charging clause, allowing reasonable remuneration to a trustee engaged in a business who is providing a service to the trust. In addition, trust corporations are statutorily permitted to charge reasonable remuneration: s 18 Trustee Companies Act 1967; see also s 49(5) Trustee Act 1956 as to advisory trustees, s 50(4) as to custodian trustees; and s 23 Public Trust Office Act 1957.

However, even charging clauses will be construed against the trustee in cases of doubt. For example, if the trustee wishes to charge for matters which could have been undertaken by a non-professional trustee, that has to be specified. There are also many cases where attempted remuneration will be regarded as a gift or legacy to the trustee, which may affect priority in relation to other expenses of the trust or estate: *Re Thorley* [1891] 2 Ch 613; *Re White* [1898] 2 Ch 217; cf *Dale v IRC* [1954]AC 11.

In addition, the Court has statutory power to order payment of "commission" and a detailed list of factors which the Court must take into account are listed in s 72 of the Trustee Act 1956.

EXISTING POSITION OF CHARITIES

While the general provisions of trust law and the Trustee Act apply; the overriding requirement that a charitable trust exist for exclusively charitable purposes is relevant. In theory, the Court's power to order commission applies to charities. Under s 72 Trustee Act, in deciding what is a "just and reasonable" sum, the Court must have regard to a number of factors, including payments already received, difficulty of the services, liabilities to which the trustee has been or may be exposed, value of the property, time and services reasonably required, and any other circumstances the Court considers relevant.

A settlor may expressly provide for charity trustees to receive some form of payment. In *Re Coxen* [1948] Ch 747, there was provision for an annual dinner for the trustees. The Court held that the annual gathering assisted in the efficient administration of the charity since charity business was discussed between courses. The benefit to the charity was reasonably clear there, but express authorisation of payment may affect the exclusively charitable status. Payment to trustees is not a charitable purpose in itself; it can only be so if it assists in, or is incidental to, the charitable purpose. As the Charity Commission of England and Wales explained, the danger is that the trustee would in effect become a beneficiary of the trust and it would not be exclusively charitable, *Consultation Document on Trustees' Remuneration*, 1999, Annex D.

ENGLISH REFORMS

In May 1999 the English and Scottish Law Commissions produced a joint report on *Trustees' Powers and Duties*. (Law Com 260, Scot Law Com No 172 (1999). The report is available on the Internet at http://www.open.gov.uk/lawcomm/) The discussion of remuneration of professional trustees is linked to the acknowledgment that new forms of sophistication in the stock market, particularly the move towards paperless dealing and the use of discretionary fund managers, have necessitated wider powers for trustees in the UK to invest and delegate (trustees' statutory powers in England are not as wide as under the Trustee Act 1956).

The Law Commissions stated that there was nothing inherently wrong with a trustee receiving a benefit, provided that it was authorised and not secret. Otherwise, professionals may have to be engaged as agents which may be more expensive than reasonable remuneration for trustees. If there was a choice between paying a trustee and employing an agent, that decision could be made by the trustees collectively, whereas at present, there is no such choice.

Therefore they recommended that trustees should have statutory power to authorise any one or more of the trustees to charge for services. Where the testator or settlor provides some other benefit for the trustee in question, that would be a factor for the trustees to consider in their discretion.

The Commissions' proposals are limited to "professional" trustees. There may be some uncertainty in the application of this term. They made it clear that there should be a "nexus" between the profession and the service

provided. They pointed out that this is quite frequent in charging clauses and does not give rise to problems of interpretation. However, the statutory clause will be wider than many express clauses in that professionals will be able to charge for all their services, even matters which a non-professional trustee could have undertaken: para 7.15, *Re Chalinder & Herrington* [1907] 1 Ch 58. They recommended, at 7.18, that express charging clauses be statutorily extended in order to remove inconsistency.

The Commissions' draft Bill has gone before Parliament as the Trustee Bill 2000.

CHARITABLE TRUSTS

The Law Commissions found opinion divided during consultation. On the one hand, the arguments as to the sophistication of modern trusts, and the need to secure the best-qualified trustees, applied equally to charitable trusts. On the other hand, the "voluntary principle" was even more pertinent for charities, which are based on altruism and public benefit. While in the case of non-charitable trusts the recommendations reflected standard practice in the form of express charging clauses, the same could not be said for charities. Lastly, some felt that a standard clause would undermine public confidence in administration of charities.

In the light of the "strong reservations", the Law Commissions put forward a provision, now in the Bill as cl 30, that the Secretary of State could make regulations extending the remuneration provisions of the Bill to charities. Meanwhile, there should be further consultation.

Soon after the Law Commissions' report was published, the Charity Commission issued a Consultation Document on Trustee Remuneration. It noted that out of 100 new applications for registration as charities, 59 had charging clauses in their governing document. Even in cases where the Commissioners are asked to authorise remuneration, it is on the basis of full disclosure and accounting. The Commissioners act on the general presumption that trustees should not be remunerated. Reasonable remuneration will be allowed if the trustees demonstrate that it is necessary and in the best interests of the charity. The Commission lays emphasis on ascertaining whether any conflict of interest is properly managed, for example whether procedures for excluding the trustee are workable, whether there is objectivity in the judgment of his or her performance, and ensuring transparency to counteract any accusations of "sleaze". The Commission points out that even where there is express provision, trustees must think carefully before authorising payment, since they might have to justify it later. In England most charities are obliged to file annual returns, and would be obliged to report remuneration under accounting regulations. In addition, the Commissioners' power to investigate, "misconduct or mismanagement" is specifically provided by s 18(3) Charities Act to: "extend to employment for the remuneration or reward of persons acting in the affairs of the charity ... of sums which are excessive in relation to the property which is ... applicable for the purposes of the charity". (For a recent discussion, see *Weth v A-G*, unreported, 29 April 1999, Ch Div.)

The Commission distinguishes three situations in which payment might arise. The most common, and easiest to justify, is payment for services provided to a charity. This may cover not just remuneration for obvious professional services, such as legal or financial ones. It may cover goods or services, for example IT or personnel skills, or more manual skills. Indeed, they point out that "a charity is likely to require a greater range of specialist skills to carry out its charitable purposes than will be required to administer a 'family trust' where the skills may primarily be 'professional'". However, even where there is a charging clause, it should not be assumed that the specified professional is automatically be the best person for the task. The trustees still have a responsibility to make a considered decision.

The second category is paying a trustee for acting as trustee, rather than for other services. It is harder to assess value for money, since it is harder to value the office of trustee. Among the factors trustees should consider here are the difficulties of finding trustees, the size and complexity of the charity's activities and the higher degree of skill and care which the law expects from paid trustees.

Lastly, payment of employee trustees. The conflicts of interest which will arise in this situation mean that it will rarely be appropriate unless there is no other suitable trustee.

The Commission found strong support for the voluntary principle. Thus, the Deakin Report did not believe there was sufficient evidence that it was difficult to recruit trustees because of the voluntary nature of the office. (Commission on the Future of the Voluntary Sector, July 1996; support was also given to the principle by The Committee of Standards in Public Life (Nolan Committee, May 1996) report on Boards of Local Public Spending Bodies, and the Rowntree Foundation (May 1995, review of Housing Associations)). A MORI public opinion poll in February 1999 found that 14 per cent favoured payment of remuneration, 66 per cent favoured payment of expenses but not remuneration, and 12 per cent favoured no payment whatsoever. The Commission concludes that there is a "strong continuing belief in the value of the voluntary principle, both in the charitable sector and the public. The public expectation is that charities will be run on essentially voluntary lines. Payments to trustees seem to be acceptable ... when made transparently, at reasonable levels for the service provided, clearly demonstrated as being in the charity's interests, and [does] not smack of self-interest".

The situation in New Zealand is slightly different. First, there is already a statutory power for the Court to order commission or a percentage to trustees out of trust property. (Section 72 Trustee Act 1956, see also s 237 Administration of Estates Act 1969.) In England the decision of the Court of Appeal in *Re Duke of Norfolk's Settlement* [1982] Ch 61 has confirmed that the Court has an inherent jurisdiction. The inherent jurisdiction of the New Zealand Courts may have survived s 72, see *Re Spedding* [1966] NZLR 447. In considering whether a statutory right to remuneration should be included in New Zealand legislation for trusts generally, the arguments are broadly the same as in England. The suggestion has much merit, though how far it is necessary in private trusts in New Zealand is not known.

Secondly, in the context of charitable trusts, the New Zealand situation is different because of the absence of a Charity Commission. The UK body has specific powers to advise charity trustees, register new charitable trusts or amend existing trusts. While the Attorney-General has a role to play in supervising New Zealand charities, it is clear that the Attorney-General does not pursue a proactive role, through no fault of her own. The Charity Commission has wide statutory powers of investigation in the Charities Act 1993. The Commission accepts of the need for a charging clause on a "necessity" basis, but only subject to its consent.

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CHARITABLE TRUSTS AND EDUCATION

Ross Knight and Michael Hodge, Knight & Associates, Auckland

discuss the role for charity in the state education sector

Since 1989, schools have become increasingly innovative in the quest to deliver quality educational services. This is partly because the Education Act 1989 ("the Act") provided a framework for those schools wishing to excel. But also, since 1995, schools have been required to institute and maintain sound performance management strategies. As a result, the education market place is far more competitive today than ever before.

SETTING THE SCENE

The Act marked off a new era in education. Dubbed *Tomorrow's Schools*, it was promoted by its creator David Lange (then Minister of Education) as "radical" and "exciting law". School governance and management would be based upon a business model, the principal as chief executive (responsible for day to day management), reporting to and working with the board of trustees elected by its school community (responsible for governance in the form of policy and direction). The focus on providing quality education across the board has led to schools being harshly criticised by the Education Review Office when they have failed to perform, and worse, the closure of schools where school communities have voted with their feet by electing to place their children in a better learning environment.

One of the most salient features of *Tomorrow's Schools* was the emphasis on partnership between school and community. However, funding the reforms has always been a burning issue in an environment considered by some to be the last bastion of true unionism in New Zealand.

Management of staff through re-deployment, competency and or discipline has been a fruitful source for personal grievance claims over the past ten years. While some Boards have been forced to let good staff go because of falling rolls, other Boards have managed and or forced the exit of staff who have failed to perform.

Employment terms for teachers have traditionally been contained in collective wage agreements negotiated on their behalf by the NZEI (New Zealand Education Institute) and PPTA (Post-Primary Teachers Association) respectively.

In 1996, schools were given the opportunity to choose how their teacher's salaries would be funded. The options were Centrally Resourced Funding ("CRF") or Direct Resource Funding ("DRS").

DRS (colloquially known as "bulk funding") has been strenuously opposed by the teacher unions since it was introduced in 1996. They argue that bulk funded schools have more flexibility to remove expensive and experienced staff by replacing them with cheaper and less experienced staff. The new Labour Government has pledged to make wholesale changes to the bulk funding provisions of the Act, details of which have yet to emerge.

Schools within the state system receive all their funding (operational and salary) from government, but invariably that funding alone is never enough to meet every child's educational needs, much less their parents' expectations. As a result, school communities rely heavily on locally raised funds to meet the extras required. In the state sector, the process of raising funds is relatively unsophisticated. Typically, this is done through hard-working PTA's, sponsorship, school donations etc. This is in stark contrast to the private sector where the majority of schools are driven by well managed and active charitable trusts or foundations established for educational purposes.

LEGISLATIVE FRAMEWORK

With the exception of foreign fee paying students (that is persons who are not domestic students), primary and secondary education is free (s 3 of the Act).

All schools within the state system ask for a donation – usually set at the beginning of each school year. However, because it is a donation rather than a fee, parents can not be required to pay as a pre-condition for entry of their child(ren) into school.

Since 1989, numerous individuals and groups within the education community have examined school financing and suggested that the actual level of operations grant funding provided by the state is inadequate and does not enable schools to meet the obligations imposed upon them by National Education Guidelines: see, eg Economic and Social Research Association Ltd – report to New Zealand School Trustees Association, August 1997 – *The Adequacy of Operations Grant Funding for New Zealand Schools: Further Evidence and Analysis*.

Generally, locally raised funds are an integral part of a school's budget. Recent studies have suggested that while fundraising for capital expenditure does occur, locally raised funds are more likely to be spent on current operating activity rather than capital projects.

Moreover, there is anecdotal evidence to support the theory that because operation grants have not increased significantly since 1989, schools have less purchasing power today and are forced to rely more and more on locally raised funds.

In the search for local funds, school boards need to proceed with caution so as not to contravene the free

education provisions of the Act, or those provisions which regulate the receipt of gifts for scholarships or bursaries etc.

Section 68 of the Act provides:

> **Boards may receive property for scholarships –**
>
> (1) A Board may receive from any person gifts for funding scholarships or bursaries, or for other educational purposes in connection with a school;
> (2) A Board shall hold every such gift for the specific purpose declared by the giver;
> (3) Unless the giver has created a special trust, scholarships and bursaries from a gift shall be open to every student at the school;
> (4) If the school for which a gift was given closes, the minister shall direct that the gift should apply to some other school.

CHARITABLE TRUSTS IN THE STATE SYSTEM

Many schools now plan for their funding requirements in 5-10 year blocks. For example, Sacred Heart College has assessed its future needs in terms of its physical and spatial requirements for the years 1999-2003, at $5 million. In a plea to its community, the Board says:

> In short, we are asking you to help those students who are enjoying the fruits of previous families and friends' generosity, forethought and visions. We can also encourage you to give generously knowing that you will enjoy a tremendous tax advantage from doing so because of the charitable nature of the schools Development Foundation Trust.

So how easy is it for a school to go about setting up a charitable trust? Are there, indeed, the tremendous tax advantages as suggested by the Sacred Heart College School Board of Trustees?

Schools already enjoy all the privileges of the Crown in respect of exemptions from taxation in the payment of fees or charges. (s 187)

While a trust registered under the Charitable Trusts Act 1957 receives the legal benefits of incorporation, it will not automatically receive an exemption from income tax. Separate approval must be obtained from the Inland Revenue Department before an organisation can become an approved charity for tax purposes. Charitable purposes is defined in the Income Tax Act 1994, as including:

> every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

Correspondingly, the Charitable Trusts Act 1957 defines "charitable purpose" as:

> every purpose which in accordance with the law of New Zealand is charitable; and for the purpose of Parts I and II of this Act, includes every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand.

The classic definition of what is charitable can be found in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, where Lord Macnaghten outlined four categories of charitable activities, being:

(i) relief of poverty;
(ii) advancement of education;
(iii) advancement of religion; and
(iv) other purposes beneficial to the community (or a substantial body of the community) not falling under any of the proceeding heads.

But even if an organisation's activities fall under one of the above heads, it will not be considered charitable unless there is an element of public benefit: *Molloy v Commissioner of Inland Revenue* (1981) 5 NZTC 61,070. This means, therefore, that the activity must benefit the community as a whole or a significant section of it.

The notion of public benefit is not a numerical consideration, but rather has acquired a technical meaning in relation to the law of charitable trusts. To this end, if the group or class of beneficiaries under the proposed trust is linked by "blood, contract, family, associated membership or employment", it has been held that they do not constitute the public or an appreciably significant section of the public to fulfil the requirement of public benefit: *Oppenheim v Tobacco Securities Trust* [1951] AC 297.

In the advancing of education for charitable purposes, two key objectives, the establishment of schools; and the support of existing schools have been held to be charitable: *Case of Rugby School* (1626) Duke 80; *Brighton College v Marriott* [1926] AC 204; *The Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] Ch 728.

Subject to opinions following, it is open to the Boards of state schools to use charitable trusts as a separate funding entity for the advancement of education within the school.

In setting up a charitable trust, Boards need to give careful consideration to the appointment of suitable trustees. Likely candidates may include parents, teachers, principals or other suitable and interested members of the community. However, the appointment of teachers can be problematic. It is a trite principle of trust law that a trustee must not have a personal interest in the [charitable] trust, nor be placed in a situation where his/her duty as a trustee conflicts with his/her personal interest. Arguably, a teacher might have a conflict of interest since decisions concerning the distribution of trust funds within a school may impact or indirectly on the trustee's employment. The same could be said of parents of pupils within the school.

The power to appoint and remove trustees needs to be vested in an individual (or body) that has stability and continuity within the framework of the school management structure. School boards might determine that it is essential that they retain ultimate control and that the deed of trust is appropriately drafted to give the power of appointment and removal of trustees to the Board, as a collective. But even then, there is obvious potential for conflict. Moreover, trustee elections take place every three years and in between times trustees may come and go. There is much to be said for a charitable trust to be set up with an independent appointment process, and for trustees in each case to be outside the management framework of the school.

There are at least three major areas of benefit to a school in setting up a charitable trust. These are:

Taxation savings

Gifts made to a charitable trust are not subject to gift duty and individual taxpayers who make a monetary donation of $5 or more [to a charitable trust] are entitled to a rebate of one third of the donation up to a maximum of $500 per year: s 73 Estate and Gift Duties Act 1968.

Under the same section, corporate taxpayers who make monetary donations to a charitable trust are entitled to a tax

deduction for the amount of the donation – up to a maximum of $1000 or five per cent of the company's assessable income each year, whichever is greater.

Efficiency

Forming a charitable trust for specific fund raising activities is an efficient way of streamlining the organisational structures of a school. Handing over the administration of a particular fundraising project to a charitable trust (with independent officers) relieves the Board and allows it to focus on matters of governance.

Marketing

A charitable trust is likely better to promote fundraising for a school than the board of trustees otherwise could. Many donors will want to donate funds for a specific purpose, for example, the building of an auditorium. A charitable trust set up for a specific purpose will be far better placed to market itself as a desirable recipient of donations than will the board of trustees.

In summary, the establishment of a charitable trust enables a Board to ring fence funding for specific purposes from funding for general purposes. This inevitably leads to more focus and efficiency. Sometimes Boards get caught out by agreeing to "tag" moneys raised for specific purposes in such a way that they fall foul of the law. An example might be the receipt of moneys from a particular cultural group for the educational advancement of children within that group. Receipt of moneys for that purpose may well breach the human rights of all other children at the school: s 57(1) Human Rights Act 1992.

IN CONCLUSION

Schools are under considerable pressure to perform with limited resources. Invariably they are forced to seek additional funding in order to meet the educational needs of pupils and the expectations of their parents.

In the state sector, the quest for locally raised funds has, up until now, been relatively unsophisticated. The benefits of a charitable trust as a vehicle for obtaining and managing locally raised funds is apparent. As the public demand for quality educational services builds, we can expect to see Boards becoming more entrepreneurial in their approach to funding initiatives. ❑

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people in our society need support from business (as well as from the general public) and that, whilst this support cannot necessarily be justified or quantified using the usual return on investment basis, there will eventually be benefit to the business, albeit indirectly. This does not have to be seen as a "social conscience" thing for business – it is more a question of business being seen as part of society, and being concerned for the future health of that society.

Some company executives feel their only role is to maximise returns to shareholders and believe there is no room for charitable giving. But this is a short-term focus which ignores the reality of a business being part of a society which needs to be healthy if business is to maximise its opportunities over time. Others feel that it is always government's responsibility to provide for those "at the bottom end". But this ignores the fact that governments simply cannot address every need in society (and in our view government agencies are not necessarily the best organisations to provide the sensitive care and assistance often needed).

For companies which are not "closely held", a tax rebate is available on company cash donations to qualifying charities. This is limited to the greater of $1000 or five per cent of the company's net income (net income is total income less all allowable deductions, except the cash gifts). Single gifts cannot exceed one per cent of net income or $4000 (*Master Tax Guide* 11-055, p 493). But of course companies can exceed these amounts if they accept no rebate will apply over the prescribed limits. Unfortunately most small businesses (those which are "closely held", being controlled by five or fewer persons/shareholders) do not qualify for these rebates.

It would be wonderful if most businesses, regardless of size, were to accept the challenge to do something tangible to help those organisations who are working professionally and achieving results with the less fortunate people in our community. We would love to see law firms take a lead in this, and to encourage their clients to do the same. ❑

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In New Zealand, the lack of the latter restraint militates against extending any statutory charging clause to charities. In the UK, there is clear public and charity sector support for the "voluntary" principle and there is no reason to think a different result would prevail here.

It has been pointed out that in practice, the only time the Attorney-General's functions under the Charitable Trusts Act 1957 are exercised is when the public complains, or when there is an application by trustees to the Court for a scheme. Unlike in the UK, there is no obligation, even on large charities, to file annual returns. Incorporated charities and societies are subject to some reporting obligations, but these may be inadequate to detect remuneration or excessive remuneration: see Ireland [1998] NZLJ 49. For a case in which allegations were made in relation to remuneration of charity trustees for unspecified services, see *Re Wellington Regional Housing Trustees* [1980] 2 NZLR 14, though no impropriety was found.

It is suggested that in New Zealand, due to the lack of a Charity Commission, and the lack of any specific accountability of charitable trustees as such, it would be inappropriate to erode the voluntary principle. Section 72 Trustee Act provides for Court authorisation in appropriate cases where difficulty in finding suitable voluntary trustees or other factors are proved, and it is suggested that a general default clause allowing remuneration would be open to abuse, and perceptions of abuse. While there are sound arguments for amending the Trustee Act to provide for an implied clause for non-charitable trusts, the very nature of their activity and philosophy dictates the opposite conclusion for charitable trusts. There is already controversy surrounding charitable status without the risk of undermining public faith in the voluntary sector by permitting unaccountable trustees, even transparently, to vote themselves awards out of charitable funds. Lastly, one might speculate that there is a wider spectrum of sizes of charitable bodies in England than in New Zealand, and so the need for a statutory default clause is greater there. ❑

CHARITABLE TRUSTS AND SPORT

James Willis, Bell Gully, Wellington

asks whether "mere sport" is eligible for charitable status

New Zealanders love sport. Sport arouses strong emotions, has passionate followers and committed participants. At one end of the scale it supports big business with considerable amounts of money at stake and with some of our leading sports stars paid handsomely. As sport has become increasingly professional, the taxation implications for the clubs and organisations that are responsible for our principal sporting events and sports stars has become an omnipresent concern. It is little wonder that whether or not sports bodies are entitled to or deserve charitable status (and the income tax exemption that is the reward for such status) is an increasingly important issue.

The conventional wisdom, ever since *Re Nottage, Jones v Palmer* [1895] 2 Ch 649, has been that "mere sport" cannot be charitable. However, as this article will explain, that position is now not as simple and needs to be reconsidered in light of a series of recent cases which have culminated in the decision of the Court of Appeal in *CIR v Medical Council of New Zealand* [1997] 2 NZLR 297.

This article explores the law of charitable trusts in relation to sport, and notes how shifting trends in the definition of what is, and what is not "charitable", lead to the conclusion that, in the right circumstances, sporting objects could be charitable.

INCOME TAX ACT AND CHARITABLE PURPOSES

Sections CB 4(1)(c) and (e) of the Income Tax Act 1994 exempts from income tax:

> (c) Any amount derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, except where the amount so derived is an amount to which para (e) applies.

and

> (e) Any amount derived directly or indirectly from any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes within New Zealand, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes and not carried on for the private pecuniary profit of any individual.

Section OB 1 of the Act defines "charitable purpose" as follows:

> "Charitable purpose" includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

The above definition is effectively a restatement of the preamble to the Statute of Elizabeth I 1601 and the four categories of charity set out by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531. The preamble sets out a variety of purposes which were recognised as charitable.

Lord Macnaghten in *Pemsel* defined four broad categories of charity:

- trusts for the relief of poverty;
- trusts for the advancement of education;
- trusts for the advancement of religion;
- trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Sporting organisations are not for the relief of poverty or the advancement of religion (despite the almost religious fervour of some sports fans). In order to be charitable sporting organisations must fall under the head of the advancement of education or the so-called fourth head of community benefit.

Many and varied are the kinds of purposes that have been held to be charitable under the fourth head including funds or trusts for:

- the repair of bridges;
- the provision of life boats;
- promoting the finding of original Shakespearean manuscripts;
- reclaiming fallen women.

The range and diversity of purposes that have been considered under the fourth head has defied any easy or comprehensive categorisation.

It used to be considered that in order to be charitable under the fourth head there needed to be some analogy with some of the other three heads of charity. The first clear statement indicating that this was not so was in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corpn* [1968] AC 138.

In that case Lord Reid said:

> But the appellants must also show that the public benefit is of a kind within the spirit and intendment of the Statute of Elizabeth I. The preamble specifies a number of objects which were then recognised as charitable. But in more recent times a wide variety of other objects have come to be recognised as also being charitable. The Courts appear to have proceeded first by seeking some analogy between an object mentioned in the preamble and the object with regard to which they had to reach a

> decision. And then they appear to have gone further and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable. And this gradual extension has proceeded so far that there are few modern reported cases where a bequest or donation was made or an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not of individuals, and yet the object was held not to be within the spirit and intendment of the Statute of Elizabeth I. Counsel in the present case were invited to search for any case having even the remotest resemblance to this case in which an object was held to be for the public benefit but yet not to be within that spirit and intendment. But no such case could be found.

That general approach was endorsed in *CIR v Medical Council of New Zealand*. The *Medical Council* case concerned whether or not the council was charitable. It was not an organisation that fell under the first three heads and, if it was to be considered charitable, had to be so under the fourth head. In finding that the Medical Council was a charity, the Court of Appeal made a number of statements clearly articulating how the fourth head is to be treated.

McKay J said that the "correct approach" was that stated in 5(2) *Halsbury's Laws of England* (4 ed) para 37:

> Not all such purposes are charitable: to be so, the purposes must fall within the "spirit and intendment" of the preamble to the ancient Statute of Elizabeth I. Historically, in order to find whether a particular purpose came within that spirit and intendment, the Courts sought to find an analogy with purposes mentioned in the preamble itself, or with purposes previously held to be within its spirit and intendment. It now appears that, even in the absence of such analogy, objects beneficial to the public, or of public utility, are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.

McKay J supported this approach by extensive reference to New Zealand and English authorities. One of those authorities was *Morgan v Wellington City Corpn* [1975] 1 NZLR 416. That decision of the Court of Appeal concerned whether the grant of land for the purposes of public recreation and enjoyment for the benefit of a city's citizens established a charitable trust. McCarthy P cited *Halsbury* with approval, when finding that such a purpose fell within the fourth category identified in *Pemsel*.

In his judgment in *Medical Council*, Thomas J also relied on the above passage from *Halsbury*. Thomas J stated:

> "Charitable Purpose" includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community. The protection and promotion of the health of the community is in my view a matter which is undoubtedly beneficial to the community. Such a view accords with modern case law where, as Lord Reid said in *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corpn*, a wide variety of other objects have come to be recognised as also being charitable. *Halsbury's Laws of England*, vol 5(2) (4th ed) para 37, p 39 makes it clear that, even if the objective is not analogous with purposes falling "within the spirit and intendment of the preamble" to the Statute of Elizabeth I, objects beneficial to the public, or of public utility, are prima facie within that spirit and intendment and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law.
>
> It could, of course, be argued that, in a sense, the protection and promotion of public health is analogous to the purposes in the preamble; health tends to be valued ahead of wealth; health is as important, if not more important, to the community than education; and, it could be said, while religion may advance the health of one's soul, medicine and surgery advance the health of one's body. But even if the objective of safeguarding the health of the community is not analogous to the purposes mentioned in the preamble it manifestly falls within the phrase "matter beneficial to the community". Numerous cases have established that a purpose does not have to be of a eleemosynary nature to be considered charitable.

The above passage from Thomas J's judgment illustrates that he decided the *Medical Council* case on the basis of the fourth category identified in *Pemsel*. In this regard, the last two sentences in the passage cited above are of particular importance. The passages from McKay and Thomas JJ's judgments cited above demonstrate that the case was decided under the "purposes beneficial to the community" category of *Pemsel*, and in particular, in reliance on the statement from *Halsbury*. Keith J, the third majority Judge in *Medical Council*, expressly agreed with the reasons given by McKay and Thomas JJ.

In *Brisbane City Council v Attorney-General* [1979] AC 411, the Privy Council left the question open as to whether an analogy with the decided cases was necessary. The same cannot now be said for the law in New Zealand. The majority of the Court of Appeal in *Medical Council* and the unanimous Court of Appeal decision in *Morgan* have both endorsed the approach adopted in *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 and *Scottish Burial*. The High Court also approved of this approach in *Auckland Medical Aid Trust v CIR* [1979] 1 NZLR 382 at 386.

The approach adopted by the majority of the Court of Appeal in *Medical Council* therefore represents the law in New Zealand in settling how the fourth head in *Pemsel* is to be interpreted and applied to the objects of particular bodies, statutory or otherwise.

Therefore, the fourth head identified in *Pemsel* applies where the object or objects of an organisation are within the spirit and intendment of the statute, either directly or by analogy with the previously decided cases, or are prima facie beneficial to the public and there is no good ground for holding them outside the spirit and intendment of the preamble to the Statute of Elizabeth.

The crucial question, therefore, is whether a particular sporting object is within the "spirit and intendment" of the preamble to the Statute of Elizabeth I. In this regard, the comments of McKay J in *Medical Council* should be noted:

> The purposes which have been held within the spirit or intendment of the preamble to the Statute of Elizabeth I are many and varied, and are illustrated by the numerous examples given in 5(2) *Halsbury's Laws of England* (4th ed) paras 40-45. They range from increasing the efficiency of the armed forces to the protection or benefit of animals. I cannot see that the protection of the public in respect of the quality of medical and surgical services could possibly be held to fall outside this broad category.

SPORTS AND CHARITIES

Attempts to have various kinds of sporting organisations declared charitable have been before the Courts on a number of occasions.

The early leading authority is the English Court of Appeal decision in *Re Nottage, Jones v Palmer* [1895] 2 Ch 649 where the Court held that a gift to the Yacht Racing Association of Great Britain for a cup to encourage the sport of yacht racing was not charitable. Rigby LJ held that the gift was not charitable as the requirement of benefit to the community was not met. Lopes LJ noted that the beneficiaries of the gift were "individuals as distinguished from the community at large". The third Judge, Lindley LJ found the gift not charitable specifically because it was for the encouragement of "mere sport".

However, in *Re Mariette* [1945] 2 Ch 284, the English High Court held that gifts to build squash courts and to provide an athletics prize at an English private school were charitable. The reason stated by the Court was that sport was an essential part of the education of the pupils of the school.

This general approach was endorsed in *IRC v McMullen* [1980] 2 WLR 416 (HL). This case concerned a trust whose object was the organisation and provision of facilities to encourage students at schools and universities to play Association Football. It was held to be charitable under the second category, the advancement of education. Lord Hailsham, however, noted in relation to trusts for the encouragement of sport that had no educational aspect:

> I do not in the least wish to cast doubt on *Re Nottage*, which was referred to in both Courts below and largely relied on by the Crown here. Strictly speaking *Re Nottage* was not a case about education at all. The issue there was whether the bequest came into the fourth class of charity categorised in Lord Macnaghen's classification of 1891. The mere playing of games or enjoyment of amusement or competition is not per se charitable, nor necessarily educational, though they may (or may not) have an educational or beneficial effect if diligently practised.

This line of cases has been approved in New Zealand in *Laing v Commissioner of Stamp Duties* [1948] NZLR 154. That case concerned bequests to a rowing association, a swimming association and an athletics association. The bequests were found not to be charitable, one of the reasons being that each association had a range of objects which included, as a substantial object, the regulation of their sport. However, in relation to an object purely for the encouragement of sport Kennedy J held:

> It was conceded that the decision in *Re Nottage* stood in the way ... the testator stating his object in giving the cup to be to encourage the sport of yacht-racing. It was held that the gift, being for the encouragement of mere sport, though it might be beneficial to the public, could not be upheld as charitable. The importance of the case lies in the observations made, which show that, while the indirect benefits were regarded, the gift was not within the analogy of the statute.

A conclusion that can be drawn from these cases is than an organisation that has as its object education advancement through sport can be considered charitable. Thus a fund or trust to provide academic scholarships to outstanding athletes, to promote sports science or to foster the development of better coaching techniques could all be considered charitable under the guise of educational advancement.

However, for the promotion of sport per se, obtaining charitable status is more elusive. A significant hurdle is identifying or quantifying the nature of any public benefit that can be derived from sporting objects.

It is not that the public benefit necessarily must be quantified but that it can be accurately described.

New Zealand Society of Accountants v CIR [1986] 1 NZLR 417 demonstrates that the "public benefit" element cannot be too speculative or remote.

This case concerned whether or not the fidelity funds operated by the Society of Accountants and Law Society could be considered charitable. Richardson J stated that:

> the only persons who actually benefit from the fund are those whose moneys are misapplied by the solicitor, chartered accountant and who, having exhausted the remedies against that solicitor or accountant, claim reimbursement from the fund. But counsel for the two Societies advanced a broader argument. They submitted that the community as a whole benefits from the existence of the fidelity fund in that as present or potential clients all have the benefit of knowing that the fund is there is a safeguard and protection of their interest. For reasons which I can state quite shortly I am satisfied that this generalised concept of benefit does not satisfy the public character requirement.
>
> There will no doubt be many cases where expenditures may improve the lot of a class of persons for the public benefit. Thus, in *Re Good* [1905] 2 Ch 60, 67 Farwell J in upholding a gift on trust for the maintenance of a library and the purchase of plate for an officers' mess said:
>
> > It is the public not the officers, that are benefited by better means being put at the disposal of the officers to enable them to make themselves efficient servants of the King for the defence of their country.
>
> There is nothing of that flavour here. Some members of the community who have not actually suffered loss from the deprivations of professional advisers may perhaps gain some peace of mind from an awareness that if at sometime their money is stolen by a lawyer or accountant they will have ultimate recourse against the fidelity fund. That peace of mind seems to me far too nebulous and remote to be regarded as public benefit. Nor is it suggested that the existence of the fund tends to promote honesty and integrity on the part of those engaged in the public practice of law or accountancy, or that the purpose of the trust is the moral improvement of the community. The element of public benefit must arise if at all, from the application of the fund for the purposes of the fund and I can not see any basis for enlarging the community benefited beyond those persons entitled to claim from the fund.

Richardson J approvingly referred to the case of *Hadaway v Hadaway* [1955] 1WLR16. In that case the testator bequeathed the residue of his personal estate on trust to establish a bank, the primary object of which was to assist the planters and agriculturists of St Vincent with loans of low interest. It was held that the trust was not a charitable trust. Viscount Simon said (pp 19-20):

> In the present case Their Lordships entertain no doubt that the ambit of the trust is wide enough to include loans which could not fairly be described as being for the

> promotion of agriculture or as being ancillary to that purpose, and that it is only by inserting restrictive words that loans could be so confined. For it is clear that it would be competent for the directors of the bank, which is to be established under the will, to make loans to planters in any financial emergency, whether due to crop failure or other farming disaster or to some personal distress. But such loans which might or might not be used for agricultural purposes cannot be properly described as made for the general promotion of agriculture however much individual planters may benefit. The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative and remote to justify the attribution to it of a charitable purpose. It would be equally easy and equally wrong to regard as charitable a trust for the granting of loans on generous terms to any member of any other class which performs a useful function in the social or economic life of the country.

The decision in *Re Verrall* [1960] 1 Ch 100 held that the purpose of "promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest ..." was charitable. When considering whether this was a purpose beneficial to the community within the fourth category in *Pemsel*, the Court commented:

> In the present case the trustees are strictly limited to the specific objects and purposes referred to in the Act, which are plainly public purposes, expressly stated to be for the benefit of the nation, and have no choice of applying them to any other purposes ....

Another case (with intriguing sporting overtones) that demonstrates that the public benefit element does not necessarily have to be quantifiable is the unreported judgment of Greig J in *Re Chapman* (High Court, Napier Registry, CP 89/87 17 October 1989). This case concerned whether a trust for the purpose of "providing more permanent seating accommodation, in the form of a further grandstand, for mainly Rugby Football representative matches in Napier" was a valid charitable trust. Greig J was in "no doubt" that a purpose of "public recreation" is charitable. His Honour said:

> The provision of a public amenity like a grandstand or an extension to a grandstand, though it be for the comfort of spectators, assists in the encouragement of the public recreation and the general use of a park as a public facility.

Greig J supported his decision by extensive reference to New Zealand authorities. In particular, Greig J referred to the leading Court of Appeal decision in *Morgan*. In *Morgan*, the Court of Appeal commented that:

> We think it clear that a grant of land upon trust for purposes of public recreation and enjoyment to a city corporation for the benefit of the citizens of that city establishes a charitable trust according to the law of charities as long established.

The important point that should be taken from *Chapman*, *Morgan* and *Verrall* is that the "public benefit" element does not necessarily need to be quantifiable for the object of an organisation to be held to be charitable. Where there is some real, as opposed to illusory, public benefit flowing from the objects of an organisation those objects are "prima facie beneficial to the community".

It is also prudent to note that the question of whether public benefits should be considered as objective or subjective requirements, could be raised to suggest that only objective benefits should be regarded as charitable. This argument should be rejected, because, just as many benefits are not quantifiable, they are also often relative to the individual, and therefore, subjective. The comments in *Re Verrall* relating to buildings being of "beauty or historic interest" are a good example of the subjective nature of many public benefits.

CONCLUSION

This analysis leads to the proposition that an organisation that is established with the sporting objectives could be accorded charitable status without necessarily being in the guise of an educational trust.

The proposition is simply put. There is an obvious impact on national morale as the result of sporting triumphs or disappointments. The winning of the Americas Cup in 1995 and the ecstatic crowds that flocked to ticker tape parades up and down the nation in the aftermath of that victory are arguable sufficient to establish that sporting success has real benefits for the public even if those benefits are hard to quantify or somewhat ephemeral. An organisation that is formed to exclusively provide funds to outstanding sports men and women for the purposes of nation-building, development of pride in the nation, role modelling or other such objects could, if correctly framed attract charitable status. Given the often subjective nature of the public benefit assessment, whether or not such an organisation is properly to be considered charitable could well come down to the personal preferences or idiosyncrasies of a particular Judge.

Other than assessing whether there is a public benefit, remaining key issues will be:

- When was the organisation established? An existing organisation will not be able to change its objects to include charitable purposes – the organisation must have been established with the charitable purposes.
- What are the purposes of the organisation? Richardson J in *CIR v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 made it clear that it is not essential that the relevant organisations have as their object a charitable purpose but rather that charitable purposes must be the predominant object. Tipping J in *Institution of Professional Engineers Inc v CIR* [1992] 1 NZLR 570 made it plain that in an inquiry of that type an examination of what the organisation actually does is appropriate:

  > If the founding documents are crystal clear [in that respect] then there may be no call to resort to an examination of what the body is actually doing but if, as will nearly always arise in a disputed case, there is difficulty in determining the matter from the founding documents alone, the activities of the body in question must be regarded as relevant in that they will help to explain how the body itself has construed its own constitution.

  Having charitable purposes but pursuing other activities will prevent the relevant organisation being declared charitable.

It remains to be seen if a well-framed constitution can test this proposition. ❑

FAMILY PROTECTION CLAIMS – THE ROLE OF MEDIATION

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

What happens to the family member who has been excluded from the will? New Zealand legislation provides that a person owes a duty to provide for certain family members after that person's death, even if that family member is able to provide for him or herself.

The Family Protection Act often presents a difficulty for charitable trusts, where there has been clear provision in a will for that charity and one of the relatives of the deceased, who has been excluded from the will, makes a claim under the Act. Often the cost of defending such a claim is greater than the bequest itself, which leaves the trust without the alternative of defending the claim in Court.

Mediation is another alternative. It is a forum that does more than simply horse trade to reach a compromise payment, which may not meet the needs of either party. The mediation process gives the claimant and the charity an opportunity to discuss the claim and the surrounding needs and interests of each of them.

What is mediation?

Mediation is a voluntary and confidential process, which is not binding on any party unless and until agreement is reached. Mediation is a consensus-based process whereby parties work with an independent third party to endeavour to resolve their differences. It is a cooperative problem-solving process designed to help the parties to dispute find constructive solutions to problems. Those solutions may or may not involve enforcement of the legal rights of the parties. From a commercial perspective, mediation is an extension of the usual commercial process of negotiating an agreement

During mediation an independent third party, chosen by the disputing parties, facilitates the negotiation by the parties of their own solution to the dispute. The role of the mediator is to assist the parties to isolate the issues in dispute by following a clear process.

The mediator manages that process and provides the opportunity for the parties to discuss their own needs and to reach their own outcome. As part of the independent role of the mediator there are certain things that fall outside the mediator's role, these include giving legal (even when the mediator is legally qualified) or directing the parties' decisions. The mediator is not a Judge or an arbitrator and will not impose a solution on the parties.

The mediation process enables the parties to develop and explore options for the resolution of the issues in dispute. The parties are able to play an active role in the decision-making process and to exercise control over the terms of settlement. This results in a consensual agreement that accommodates their needs and interests.

Range of possible outcomes

The range of remedies available in mediation is virtually unlimited. By enabling the parties to discuss their individual needs and interests, the mediation process enables a number of options to be generated, which could meet some of those needs and interests. The parties can then work to find a solution, which best meets all of those needs and can incorporate a number of the options raised or even extend and enhance those options. For example the possibility of life interests, a different distribution of family heirlooms or shared distribution of the assets are some of the potential options that could be raised in disputes involving a deceased estate.

An agreement reached is with the consent of all parties to the dispute. As such the agreement is likely to provide satisfaction, at least to some degree, on each of the substantive, procedural and psychological levels. This means that there is a greater likelihood that the agreement will be comfortably adhered to than if it had been imposed by a Judge or an arbitrator. Agreements reached are usually final and binding contractual agreements.

Costs compared with Court proceedings

Most mediations result in the parties being able to reach an outcome within one day. The relative cost of attending mediation compared with the cost of participating in Court proceedings is significantly lower. Mediation can therefore be attempted with a relatively low risk of wasted cost and, if successful, will significantly reduce the expenditure making it a viable option, even when the bequest is relatively small.

From the prospective of a trust defending a claim under the Family Protection Act, mediation provides a real possibility of reaching an outcome which meets the needs of the family member who has made a claim, while adhering to the intention of the deceased to leave part of the estate to that trust.

LEADR

LEADR's training programme for the year includes four four-day workshops in Auckland 22-25 March and 11-14 October, Wellington 21-24 June and Queenstown 6-10 September. In addition LEADR with AMINZ and the VUW Institute of Dispute Resolution will hold workshops in Wellington and Auckland during May, with American transformative mediation experts Joe Folger and Dorothy Della Nocce.

CONFLICT WITHIN ORGANISATIONS

by Sandra Watling

Conflict resolution is an issue that many organisations are facing with the growing awareness of personal rights within businesses. There are many different strategies for handling conflict such as litigation, arbitration and mediation. Mediation is widely used within family disputes, between union and employers, land disputes and other issues. This article discusses the role of mediation within business.

What is mediation?

"Mediation currently serves as the most common dispute resolution mechanism in alternative dispute resolution programs" (Kressel and Puitt 1989, cited in Folger and Jones 1994), or "a voluntary confidential process that allows two or more disputing parties to resolve their conflict in a mutually agreeable way with the help of a neutral third party, the mediator". (Smith and Hyland "A Practitioner's Guide to Mediation", *Accountancy Ireland*, February 1999.)

Christopher Moore, defines mediation as "... the intervention of an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute" (*The Mediation Process*, Jossey-Bass 1986).

Mediation is a process that involves a third person entering into a negotiation with sparring parties to ensure that a workable and agreeable solution is found. The mediation process helps the parties to communicate their feelings to a separate person without the negative backlash that often coincides with conflict. A number of writers on the subject suggest that the traditional way of dealing with conflict has been a "winner takes all" approach using litigation, arbitration and disciplinary procedures. These techniques according to the writers often leave the parties involved dissatisfied.

The key aspects of mediation are:

- the presence of a neutral third party with no decision-making powers;
- it is a voluntary process; and
- it is confidential.

People in conflict are often reluctant to ask for a third party's assistance. Parties are afraid that their request for intervention will weaken their negotiating position and damage the possibility of a satisfactory outcome (Moore, p 45).

It is important to understand why mediation is a voluntary process. If mediation was compulsory or participants were forced to be there, it could create barriers between the parties and the mediator. A workable atmosphere could be difficult to achieve, as parties may not be focused on obtaining a solution which could result in their inability to communicate their views effectively. Resentment and a feeling of entrapment could result which "may promote unease about the mediator or accusations of bad faith" (Charlton and Dewdney, *The Mediator's Handbook* p 186, LBC 1995).

Therefore mediation has become primarily a voluntary process. "A request for mediation may also signal a desire to cooperate for mutual benefit, a willingness to make concessions or a belief that total victory is not possible" (Moore, p 45). The parties involved have to want to resolve the conflict and not be forced into an outcome. Reynolds says "because of this emphasis on resolution, mediation is often more appropriate". Further "mediation, which empowers players to communicate and generate their own solutions, may be more effective than the authoritarian approach" (Carl Reynolds, "Beyond Dispute", *People Management* November 1997).

As organisations consist of many different individuals who have preconceptions, perspectives, competencies and expectations, conflict often occurs when the individual's ideals and values have been challenged. With good management, effective communication and the mediation approach, many types of conflict are resolved immediately and without any long-term damaging effects. Communication plays an important part in conflict and mediation. "Much conflict is based on poor communication, and poor communication can obstruct conflict resolution" (Boulle, Jones and Goldblatt, *Mediation Principles, Process, Practice*, Butterworths 1998).

Communication is the key that enables the mediator to help resolve the conflict. Only through skilled communication strategies can a mediator get the two parties to impart their grievances towards each other and come to an acceptable solution. "Mediators require skills and techniques in many facets of communication, both as communicators themselves and as facilitators of the parties' communications" (H Brown and A Marriott cited in Boulle, Jones and Goldblatt, p 160).

THE ROLE OF THE MEDIATOR

When agreements between two parties fail to resolve a conflict many businesses are turning to a third party to help achieve a workable solution, in comes the mediator. The role of a mediator is to facilitate this process of agreement (Reynolds, above). The mediator works to reconcile the competing interests of the two parties, to assist the parties with their examination of each participant's needs and to negotiate the exchange of promises that will be mutually beneficial to both.

"The mediator will stress to both sides the importance of accepting the need for compromise in order that a successful agreement can be engineered" (Alan Guyatt, "Call in ... the Mediator", *Credit Management*, January 1999). The mediator's role is to focus the two parties on the conflict solution and keep side issues from becoming part of the conflict. However, Folger and Bush suggest that "parties' discussion of past events often focuses on questions of interpretation – how one party's perspective of an event could be different from the others" and that the mediator helps with "sidestepping consideration and discussion of these past events in a way to keep the process 'future orientated' – moving away from relational issues and toward the identification of tangible problems and their solutions". The mediator's role is to develop trust and confidence from the conflicting parties, analyse, clarify and define the issues in dispute and promote constructive communication. As part of this process "the mediator will separate the parties and meet with each in turn to explore the 'ways and means' whereby an agreement can be reached" (Guyatt).

The mediator also "tackles the issue of how people communicate after a dispute is resolved" (Reynolds). This is a necessary point as often the parties can return to conflict through poor communication, "this means teaching

and portraying a good style of communication" (Moore, p 16).

"If one of the parties is a poor communicator, especially when making offers, the mediator can provide the necessary support by clarifying what is being offered" (Charlton and Dewdney, p 113).

A GOOD CHOICE IN BUSINESS ORGANISATIONS?

The mediator has to be carefully selected so that the best possible outcome is procured for both the parties involved. A number of writers on mediation imply that the mediator's training is an important factor in the effectiveness of the mediator. "The special training for the team mediators must be adequate to ensure they will properly administer the mediation process" (Eric Galton, "Mediation Programmes for Collegiate Sports Teams", *Dispute Resolution Journal* 1998).

As most organisations are in the business of making money, mediation offers a cheaper alternative. According to Smith and Hyland, in 1990 the settlement rate was a constant 85 per cent through mediation.

Mediation can allow employees to air grievances without having to make a permanent complaint. "Mediation is used to handle both interpersonal and institutional disputes" (Moore, p 23). It provides an informal conflict resolution process that can allow members of an organisation a more personal and less rigid way of dealing with internal conflict. "Mediation allows the parties to re-negotiate the whole agreement, irrespective of how the dispute over the breach is resolved, or even of whether it is resolved. Arbitration and litigation, by contrast are retrospective exercises and cannot prescribe and enforce future cooperative action between the parties" (Boulle et al, p 40).

Reynolds states that a "successful mediator has to be impartial about the outcome of the session", which is why he believes "that mediation is a means for generating positive change within organisations". If the resolution is not dealt with by correct negotiations within an organisation, "communication is lost, emotion takes over and inevitably the matter will end up in Court. Mediation offers an alternative" (Smith and Hyland). Mediation focuses on the future, gives control back to the parties, heals the relationship and creates satisfaction by giving the parties ownership of the settlement.

CONCLUSION

A mediator needs to possess communication and listening skills, the ability to examine the issues from an impartial view and to work towards getting the best result for each disputing party. A mediation session could provide parties in dispute with a better understanding of each individual position. It is often a breakdown in communication that results in conflict. Therefore a communicator who can rationalise and analyse conflict should be the first choice. Mediation is an informal method that would not alienate the individuals and can create a supportive atmosphere for the complainants.

Mediation is a concept whose time has come. It is time that people within organisations started to work towards creating an environment where power is monitored in a healthy way.

MEDIATOR PROFILE CAROLE DURBIN

Carole Durbin first became interested in mediation as a result of practising in the field of construction disputes where ADR has always been popular. After representing clients in many mediations she became convinced of its superiority as a dispute resolution style and decided to learn more about why it worked.

Carole has been a partner of Simpson Grierson since 1984. She spent the first six years of practice as a solicitor in litigation (with an emphasis on civil litigation) and then got involved in her first construction arbitration in 1982. From then on she concentrated on construction and energy law. She is not only involved in dispute resolution but also gives advice on the "front end" of projects – that is project structuring, documentation, bonding and so on. As part of this she developed an interest in partnering and alliancing style contracts. Over the last ten years she has also been a director of a number of organisations including Deputy Chair of Transpower, Deputy Chair of Mighty River Power, Board member of Simpson Grierson, Member of a LATE

establishment unit for the Manukau City Council and a Board member of Synergy International. She is a Fellow of the Institute of Directors. This work in the corporate governance area has helped her gain a broader perspective on the commercial world which she has found valuable not only for legal practice but also particularly in mediation.

Carole's formal mediation training began with the LEADR workshop in 1994. Since then she has done a number of advanced short courses including a three day course with Bond University. In addition to being a LEADR panel member, she is a Fellow and Panel Member of the Arbitrators' and Mediators' Institute of NZ and an Associate of the Chartered Institute of Arbitrators.

Carole is very experienced, both as counsel in many mediations and acting as a mediator and as a facilitator. Interestingly, only about half of these were in the building and construction area with the others being of a more general commercial nature.

Carole believes that she has a very pragmatic approach and is flexible in responding to the demands of the particular situation. She does not feel comfortable in a strongly evaluative style of mediation. She believes that a mediator should firmly control process but should not attempt to direct the parties towards a solution that accords with the mediator's view of the proper outcome on the merits. "Firstly", she says "in any mediation it is quite impossible for the mediator to know enough about the issue to be confident that any view she may have as to the merits is well founded. Secondly I firmly believe that

one of the essential elements for a successful mediation is the empowerment of the parties to make their own decisions. Unless the parties are truly empowered any solution is not likely to be long lived or accepted".

"The parties are the ones with the problem, they know the most about it, and it is within them that the solution lies. The mediator is just there to help them find it".

Carole would prefer a mediation to be unsuccessful rather than have one or both of the parties feel disempowered by bullying or any other unacceptable pressure. In fact it worries Carole that mediators seem to put so much emphasis on "success rates" – meaning percentage of mediations at which a settlement was reached. To her, that is not the only measure of success.

While saying that she doesn't believe the mediator should take a view on the merits, she believes that the mediator should ensure the parties understand the practical realities of not settling such as legal costs etc and should reality test both parties. Carole sees a fine line between reality testing and evaluative mediation but prefers to try not to get involved in evaluation wherever possible. In particular, she will not accede to any request by the parties for an opinion as to the merits of the case at the conclusion of the mediation if settlement has not been reached. In Carole's view, what is called "med-arb" is not a suitable dispute resolution process.

Carole's style is probably best described as "strong" in process terms: she will try to move things along towards agreement rather than allowing drawn out sessions. For this reason, she prefers to start late morning rather than first thing. The imminence of a lunch or dinner break can often encourage progress towards resolution.

She believes that her style and experience suit commercial mediations. She does not feel qualified or able to do family or neighbourhood mediation. People who have been involved in mediations with Carole would say that she is clear in her communication, relaxed in style, strong in process organisation and that she uses humour to good effect.

ARBITRATION CASENOTES

Doug Hood Ltd v Gold and Resource Developments (NZ) Ltd

The Court of Appeal has indicated willingness to overrule the private agreements reached between parties where disputes have been referred to arbitration and one of the parties seeks to appeal the decision of the Arbitrator. This appears to mean:

- that parties who allow for the right of appeal risk the loss of the protection of any confidentiality provisions, if an appeal is lodged in a Court; and
- that the simple agreement that the arbitral award is "final and binding" does not of itself prohibit an application to the High Court for leave to appeal an arbitral award.

In the *Doug Hood* case, the Court of Appeal refused an appeal against the decision of the High Court to dismiss an application (by GRDL) for an order dismissing the proceeding. The proceeding was an application for an order granting leave to appeal to the High Court from an interim arbitral award.

The submission of the appellant, DHL, was that GRDL had not properly commenced the proceeding and that the Court had no power to make the order sought by GRDL because the arbitration agreement contained a clause that provided:

> The award in the arbitration shall be final and binding on the parties.

GRDL relied on the second schedule of the Arbitration Act 1996, which provides, inter alia, that a party may appeal any question of law to the High Court, with the leave of the High Court. GRDL argued that the second schedule did not apply where the parties had agreed otherwise, and the effect of the final and binding provision was to agree that the schedule would not apply.

Doogue J found that GRDL had confused the jurisdiction of the Court to grant relief with its jurisdiction to entertain and decide a claim for relief. The Judge took the view that the legislature had vested the Court with the jurisdiction to determine whether GRDL should be granted leave to appeal under the Arbitration Act 1996. There was therefore no basis for saying that the High Court had no jurisdiction to determine that question.

The Court of Appeal dismissed the procedural argument on the basis that the application fell within the "spirit of the definition of an 'interlocutory application' as it was for the purposes of the intended appeal". It did not matter whether the appeal was a "proceeding" or not.

TVNZ Ltd v Langley Productions Ltd and Hawkesby

In the *Hawkesby* case, an arbitral award was the subject of an appeal to the High Court. Representatives of the media made application to view the Court file. The parties to the arbitration sought to rely on a very clear confidentiality provision in the agreement to arbitrate. TVNZ then made application to the High Court seeking an order that the confidentiality provisions no longer applied.

In his decision, Robertson J commented on the fact that the attitude of the parties to making public the circumstances of the case had changed radically during the history of the Court's involvement. He also took the view that there was a serious and public interest in the nature of the contract which was entered into between the parties.

The Judge took the view that this was not a case where the Court, in having to exercise its discretion as to whether to order suppression of some material in a particular case, might have regard to the fact that the proceeding in the Court had its genesis in an arbitral process in which confidentiality was an essential ingredient. There was therefore no reason why the normal rules, which apply to proceedings in the Court, should not be adhered to. As a consequence the proceedings to dispose of outstanding matters would be held in public.

From a practical point of view, this illustrates the importance of considering the reasons for taking a dispute to arbitration, rather than to Court. If confidentiality and certainty of outcome, without recourse to appeal, are among those reasons, then the agreement to arbitrate must very clearly exclude the Second Schedule and any right to appeal. If the parties retain the right to appeal they do so with a clear risk that the protection of confidentiality afforded by the agreement to arbitrate may be lost. ❑

SETTLEMENT OF CLAIMS AGAINST CONCURRENT TORTFEASORS

TRANSACTIONS

with

Jane Anderson

It is not uncommon that a plaintiff settles its claim with only one of a number of defendants. This might occur prior to proceedings having been issued, before all potential defendants have been identified, or on the eve of a trial to which other possible defendants may or may not have been joined.

The House of Lords in *Jameson v Central Electricity Generating Board* [1999] 1 All ER 193 turned on its head what most of us had assumed to be settled law regarding settlements concerning concurrent tortfeasors.

A brief refresher: where two or more tortfeasors cause the same damage to the plaintiff they will either be "joint" or "concurrent" tortfeasors. Joint tortfeasors commit the same tort, such as a principal and its agent or participants in a conspiracy. Joint tortfeasors are jointly liable on the one obligation giving rise to the tort. Concurrent tortfeasors in contrast, commit different tortious acts that produce the same damage, such as a builder of a defective building and a local authority inspector who failed to discover the defects. Both types of tortfeasors are liable for the whole damage suffered. See generally *Todd, The Law of Torts in New Zealand*, (2nd ed) at 24.2 ff.

The issue in *Jameson* was whether settlement of a claim with one concurrent tortfeasor discharges another. The House of Lords majority held that on the case before it, the plaintiff's claim against A was indeed discharged by settlement with B. The plaintiff could not pursue A, who effectively obtained the benefit of the plaintiff's settlement with B even though he or she was not a party to it. To retain the claim against A, the House of Lords held that the plaintiff needed to specifically reserve the plaintiff's right to bring such an action. In the absence of anything specific, the presumption was that the claim against any other concurrent tortfeasor was discharged.

A number of practitioners may have felt distinctly hot under the collar at the potential consequences of this decision for settlements previously negotiated. However, those who were frantically taking stock of settlements where their clients may have signed away rights against other potential defendants, can breathe easily again. In *Allison v KPMG Peat Marwick* CA 146/98, 17 December 1999 the Court of Appeal delivered a judgment which trenchantly criticises *Jameson*, and we can now assume that that decision does not represent the law in New Zealand. It is useful to examine both cases.

Jameson's case

Mr Jameson had brought proceedings against his employer for personal injury, having contracted cancer due to asbestos exposure while working at power stations. He accepted £80,000 from his employer "*in full and final settlement and satisfaction of all the causes of action in respect of which [he claimed] in the Statement of Claim*". Before the money was paid over, Mr Jameson died and the money was inherited by his widow.

Mr Jameson's executors took proceedings on behalf of his widow under the UK Fatal Accidents Act 1976 for loss of dependency, agreed to be worth £142,000. The defendant joined the employer as a third party. The trial Judge assessed the value of Mr Jameson's claim (as opposed to the dependency claim) at £130,000. Both the trial Judge and the Court of Appeal considered that the executors were entitled to sue the defendant who in turn was entitled to maintain its contribution action against the employer. The House (Lord Lloyd dissenting) reversed this decision.

The two principal bases for the decision were:

(a) Satisfaction of the claim – Where the amount of a claim is liquidated by the Court, full satisfaction is achieved by the plaintiff when the sum so fixed is paid. An amount fixed by agreement between the parties also liquidates the claim and there will similarly be satisfaction when this amount is paid. Once payment has been made it discharges the tort and is a bar to further action on it (Lord Hope at 203h-204f). Whether the claim has in fact been satisfied depends on what the parties intended in the settlement agreement;

(b) The policy in favour of finality of claims and against circuity of action – If the plaintiff's claim against the other defendant remained, then this co-defendant could claim a right of contribution or indemnity against the very party who ostensibly purchased a release from that claim under the settlement. This would involve endless claims between co-defendants after a settlement by one with the plaintiff. If the settlement agreement is silent on the matter, policy therefore requires that the plaintiff be taken to have released all defendants (at 211e-j, per Lord Clyde);

Importantly, under the UK statute, the benefits obtained by the widow from the estate were required to be disregarded in assessing damages in the action. So, if the proceeding continued against the defendant Board in that case it could not then set off the £80,000 settlement from any damages

awarded. Moreover, the employer would become exposed to a contribution claim despite the settlement, and the claim against it would be calculated as if the settlement had not been entered into. The widow, having inherited the £80,000 sum from her husband's estate, stood to obtain a double recovery by the payment of a further full sum in the action against the defendant.

It seems that Their Lordships' reasoning was heavily influenced by this unjust result if the executors were entitled to pursue the claim (refer Lord Hope at 201h-j; Lord Clyde at 212a-b; and see inferences drawn in *Allison*'s case per Thomas J at 47; per Tipping J at 59). Herewith, a striking example at the highest level of the frailty of the common law. Needless to say, the facts in *Jameson* could not arise in New Zealand with our very different legislative setting.

The *Allison* case

The facts of *Allison* were complex but concerned a sale and purchase of a company by the appellants from Holman, the second respondent. The sale and purchase agreement contained a number of warranties as regard accounting-related matters. After various financial problems with the company arose, the appellants raised a number of grievances with Holman relating to breach of warranty and misrepresentation. Subsequently Holman and the appellants entered into an agreement settling the claims.

The appellants later sued KPMG for negligent preparation of an audit report upon which they had relied in entering into the agreement. KPMG were found negligent in the High Court, a finding upheld in the Court of Appeal. KPMG asserted, relying on *Jameson*, that its liability was discharged by the settlement.

All three members of the Court of Appeal were critical of *Jameson*. The principal judgments are those of Thomas and Tipping JJ. Thomas J sought to distinguish the present case from *Jameson* on the basis that in *Allison* the plaintiffs' intention was only to release Holman and not to discharge KPMG. However, he went on to deal substantively with the reasoning in *Jameson*.

In summary, the Court held:

(a) that on the facts there was nothing to suggest that the settlement between Holman and the appellants was intended to be a settlement of claims against KPMG, and indeed, in this country one would expect the requirements of the Contracts (Privity) Act 1977 to be met if a benefit was to enure to a third party to a contract in this way;

(b) the amount of a settlement between the plaintiff and a concurrent tortfeasor can only exceptionally be regarded as having the effect of satisfying the plaintiff's claim. A concurrent tort claim is "satisfied" only when the plaintiff has recovered the full amount of his loss, and then only satisfied in the sense that there is no loss left for the plaintiff to recover without offending double recovery rules. It is not satisfied by an agreement of compromise between the plaintiff and one defendant. It is only a joint tort liability that is satisfied in this way, because the joint obligation itself has been discharged by the payment of the settlement sum.

(c) there may be all manner of reasons that a plaintiff might decide to settle with a tortfeasor for less than the full sum and it should not be taken from the fact of settlement that the plaintiff is thereby intending to accept a lesser sum as against another concurrent defendant;

(d) in policy terms there is no good reason for placing on the plaintiff the burden of seeking in any settlement agreement to reserve its rights to sue third parties. Indeed, the burden is more appropriately placed on the defendant, who is obtaining a release from liability and who is likely to have drafted the document. This ability to obtain a release neutralised policy concerns as to finality of litigation and circuity of action.

Thomas J also referred to the enactment of s 17(1) Law Reform Act, which abrogates the common law rule that judgment against one concurrent tortfeasor is a discharge of another. He noted that this statute had endeavoured to do away with traps for the unwary in this area of the law and indicated that it would not sit happily with that enactment to extend to concurrent tortfeasors the rule in relation to joint tortfeasors that a discharge of one discharges the other.

Their Honours agreed with the dissenting speech of Lord Lloyd, who had stressed that the obtaining of judgment and a full and final settlement are two completely different things because a sum agreed in settlement is not an agreed figure for the plaintiff's loss. Rather, it is a figure reflecting the plaintiff's chances of success. The sum agreed is based in part on a reduction to reflect uncertainties and should not place a ceiling on the damages recoverable for separate causes of action against a different defendant which may (*Jameson*, 198a-d).

In my view the Court of Appeal was clearly correct in criticising *Jameson* and accepting Lord Lloyd's dissent.

The obligations of concurrent tortfeasors are wholly independent, linked only by the fact that the same loss is suffered as a result of breach of them. The torts themselves could be very different in character and different defences may be available to each tortfeasor. That was so in *Allison* where the claim against Holman had to address the existence of a limitation in the contract which limited the plaintiff's claim to where there had been fraud.

At the heart of the confusion in *Jameson* seems to be the indescriminate use of the concept of "satisfaction". The House of Lords, particularly Lord Hope, effectively conflates two uses of the word – "satisfaction" used in terms of extinguishing all the loss that has been suffered by the plaintiff; and "satisfaction" meaning a contractual agreement as to the amount of damages. Thomas J's judgment addressed the concept of "satisfaction" in some detail, along with other means of discharging a claim such as by accord and satisfaction, release, and judgment. One is left with a feeling that this is an area where the common law has managed to confuse even itself by overuse of concepts and terminology. A taste of this is Thomas J's summary of the position (at p 41): "*Satisfaction may be satisfaction for the purposes of accord and satisfaction; satisfaction may operate as a release, and an accord and satisfaction will operate as a release*".

In any event, it appears that the principle derived from *Jameson* has made a hasty retreat back to England, and good riddance. But practitioners drafting compromise agreements are issued a timely reminder. If acting for a defendant, it is important to obtain an indemnity from the plaintiff in regard to any contribution claim, or alternatively an undertaking from the plaintiff that he or she will not sue any other party in relation to the same loss.

Those acting for the plaintiff ought to ensure, that the agreement specifically states that the plaintiff is settling with that defendant only and does not give up rights to sue any third party in relation to the same loss.

ECONOMIC LOSS: THE LATEST WORD

Perre v Apand (1999) 164 ALR 606 (HCA)

The facts

Apand was a major supplier of seeds to potato growers throughout Australia. It supplied seeds to the Sparnons, potato growers in South Australia. The seeds were subsequently found to have bacterial wilt disease.

Western Australian regulations precluded the importation of potatoes which were grown on property situated within 20 kms of a known outbreak of the disease detected within the last five years. Without approval, importation was also precluded of potatoes that were processed with equipment or in premises in the same circumstances.

The plaintiffs were a group of partnerships and companies linked by membership of the Perre family. All were engaged in the business of growing potatoes for export to Western Australia from land within a 20 km radius of the Sparnons' property. They included growers and processors, owners of land or buildings used for growing and processing, and exporters.

The proceedings

The plaintiffs claimed their financial losses as a result of Apand supplying diseased seed to the Sparnons, and the consequent ban on export to Western Australia. It was accepted that the losses were reasonably foreseeable by Apand. Apand's own internal memoranda adverted to the need to be careful so as not to damage the interests of those involved in potato growing in land within the 20 km radius of a farm that might be infected with the disease.

The case was tried on liability only. Both the trial Judge and the Full Court of the Federal Court of Appeal refused the plaintiffs' claims, principally due to indeterminacy. The plaintiffs appealed.

The High Court

All seven members of the Court delivered judgments in a decision that spans over one hundred pages. This of itself demonstrates that vigorous intellectual debate as to the proper approach to recoverability of economic loss is alive and well. From the judgments there emerges significant differences in approach to the issue.

Despite that, the judgments traverse essentially the same policy factors in their analyses – knowledge or reasonable foreseeability by the plaintiff, concern as to indeterminacy, protection of pursuit by the defendant of legitimate self-interest, and the ability of the plaintiff to protect itself (vulnerability).

Moreover the Court was unanimous in finding that a duty of care was owed, while differing on whether the duty was owed to all or some only of the plaintiffs. Dissenting judgments on this latter issue stemmed not from the approach adopted, but the analysis of indeterminacy. The inference must be that the approach adopted will not produce a different result.

The general approach to economic loss in New Zealand is reasonably well settled (*South Pacific Manufacturing Co Ltd* [1992] 2 NZLR 282; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513). However, assessing whether a duty is owed in a novel situation will always be difficult. The High Court's rigorous analysis in *Perre* will assist in New Zealand cases faced with the issue. Accordingly, I propose to discuss two aspects of the Court's reasoning.

Vulnerability

The plaintiffs' inability to protect themselves by contract or otherwise from the risk that Apand placed them under, and Apand's knowledge of this, was a principal factor in the Court's conclusion. Indeed Gleeson and McHugh JJ (at 611, 637) identified vulnerability as the common theme in cases of economic loss. Notably, the ability to insure was not viewed as a relevant form of protection (McHugh J at 640).

Reliance and assumption of responsibility are often relied upon as indicating a duty of care. In *Perre* these were viewed as merely indicators of the broader concept of vulnerability. This approach has merit. The former concepts were of limited use in the context of the legatee cases (eg *White v Jones*) where the intended beneficiary can only be said to rely on a solicitor to fulfil a testator's instructions in a general sense of reliance on solicitors to do their jobs properly.

Gaudron J saw vulnerability as an aspect of the following general principle for recovery: (at 618)

> Where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed, or exercised by another, whether as an individual or as a member of a class, and that the latter person is in no position to protect his or her own interests, there is a relationship such that the law should impose a duty of care on the former to take reasonable steps to avoid a foreseeable risk of economic loss resulting from the loss or impairment of those rights.

It is submitted that a principle based on impairment of legal rights is flawed. Gaudron J derived the principle from decisions like *Hill v Van Erp* (1997) 188 CLR 159, a legatee case where the legal "right" was viewed as the right of a beneficiary to receive the testamentary gift. The notion of legal right can only be applied in this type of case if it is defined sloppily to encompass potential rights or expectations of the plaintiff (refer McHugh J at 627).

Broadening the notion of right to extend to a general right such as the right to sell a commodity (potatoes), deprives the concept of any utility as a filter for proper claims. Any loss of a plaintiff could readily be formulated as a loss of a legal right adopting that definition. A general factor of vulnerability stands on a stronger footing.

Indeterminacy

Gaudron J sought to meet concerns as to indeterminacy in the Courts below by stating that it does not matter to the operation of his principle of recovery that the plaintiff is a member of a class rather than an individual plaintiff, nor that members of the class could not be identified with accuracy (at 618).

McHugh and Hayne JJ both analysed indeterminacy. They rightly stressed that the law's concern about indeterminacy is not as to the size or number of claims per se, but as to whether these can realistically be calculated. The size and number of claims may be relevant to a policy of proportionality between the wrong and its consequences for the defendant, but not to indeterminacy.

McHugh J concluded that the defendant need not reasonably foresee that a specific individual may suffer loss (cf *The Willemstad* (1976) 136 CLR 529). The issue is whether the defendant knows or has the means of knowing that members of an ascertainable class will be affected by its conduct.

A duty was therefore owed by Apand to owners of land or growers of potatoes within the 20 km limit which could be readily ascertained. It was not owed to processors. "Processors" as a class would extend to those inside the 20 km radius as well as those outside who processed from within it. The latter were not readily ascertainable so the claim failed as it related to processing.

Hayne J also looked for members of an ascertainable class. The fact that Apand could itself choose who it would supply seed to (and hence what growers were within a 20 km radius) meant that it could also identify who was within the class likely to be affected by the supply of diseased seed (at 699).

Hayne J disagreed that processors were not owed a duty. It appears that he considered them to be sufficiently identifiable. However, a duty of care was owed only to those directly affected by the Western Australian legislation, which excluded owners of land leased for potato growing.

The "ascertainable class" concept was workable in *Perre* where a 20 km radius could limit persons in a class. Such an approach would be difficult to apply in other contexts, and have more than a measure of arbitrariness to it.

Nonetheless an analysis of the indeterminacy concept is welcome. The High Court's commitment to teasing out the relevant policy factors and analysing their content in *Perre* is a positive step towards a negligence jurisprudence in which the rationale behind imposing liability is transparent.

PROTECTING CONSTRUCTION CONTRACTS

by Roger Fenton

The Law Commission report *Protecting Construction Contractors* (NZLC SP 3). The report annexes a copy of the Building and Construction Industry Security of Payment Act 1999 (NSW), and concludes that while some "tightening up" may be needed, the NSW Statute provides a "useful model" for New Zealand. The Commission recommends the enactment of a Construction Contractors' Protection Act.

The problem as posed by the Commission (Commissioner, D F Dugdale) lies in the drying up of the cash flow passing from owner to head contractor to subcontractor and the resulting plight of the subcontractor. The cause may arise at any point in the chain leading back to the subcontractor, who frequently cannot ascertain quickly whether a problem exists further up and why payment has not been received. The solution which the Commission recommends, following overseas legislation, is a mechanism encompassing (1) the invalidation of "pay if paid" or "pay when paid" clauses (2) a strict regime within which the superior contractor must either admit or deny a progress claim and providing for the submission of disputes either to an adjudicator to be agreed upon by the parties or, in default of agreement, a person nominated by a nominating authority to be established by reg (3) the subcontractor to be entitled to summary judgment at various points during this process (ie in respect of claims admitted or found to be owing following adjudication) and at the same time to be entitled to suspend work.

The procedure proposed

The procedure is outlined by the Commission as follows:

- Within two weeks of the lodging of a progress claim the owner or superior contractor must particularise in writing ("the payment schedule") the details of any part or the claim that is not admitted, and reasons for the rejection. The owner or superior contractor must pay the amount admitted to be due (not particularised in the payment schedule) by the date specified in the contract;
- If the amount admitted is not paid within that time the claimant is to be entitled to summary judgment for the amount. If there is failure to give reasons within the two weeks for contesting all or part of a claim the claimant is entitled to summary judgment for the full claim;
- If within two weeks of lodging a claim reasons for contesting the claim in whole or in part are duly given, the claimant may, within five days, give notice requiring adjudication;
- The adjudication is to take place before a person agreed upon by the parties after the dispute has arisen, or, where agreement cannot be reached, a person nominated by a nominating authority to be established by regulation. The Commission expects the nominating authority and its list of adjudicators to be settled in consultation with the relevant trade organisations;
- The respondent must file and serve the response to the claim within five business days after receiving notice of the application;
- The adjudicator's function is not finally to determine contested issues but after a process conducted as the adjudicator thinks fit (but which the Commission would expect in practice to be extremely informal) to rule on the amount of and date for payment in respect of so much of any claim as is contested;
- If within two business days of the date fixed by the adjudicator for payment the respondent has failed to comply with an adjudicator's ruling the claimant is entitled to summary judgment;
- Whenever a claimant is entitled to seek summary judgment he or she is also entitled to suspend work.

The report itself describes the proposal as "the skeleton of a legislative scheme". Clearly all the organisations that have already made submissions will have further input into the procedure envisaged before it is finally enacted. One lingering doubt, however, remains – while there are many instances where the head contractor has negotiated security over the land on which the work is taking place (or indeed some other security), there are still times where the head contractor is not able to do this. This inability may arise for exactly the same reason as the Commission has invoked to justify the invalidation of "pay if paid" clauses, viz the realities of the tender process and economic imbalance within the industry. While no one would wish to return to the old days of Part II of the Wages Protection and Contractors' Liens Act 1939, including its requirement for retention moneys, the doubt remains as to whether the contractor should not have some additional remedy against the land itself. After all this would fit with the rationale underlying the traditional common law and equitable liens – the property in question has been improved or its value increased by the exertions or expenditure of the claimant. ❑

POST-DISSOLUTION PROFITS

P R H Webb, Emeritus Professor, The University of Auckland

discusses cases of post-partnership blues

Section 45(1) Partnership Act 1908 provides –

> Where any member of a firm dies or otherwise ceases to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representative, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets.

Section 42(1) Partnership Act 1890 (UK) is in identical terms. So, too, is s 46 Partnership Act 1958 (Vic), save that the rate of interest is seven per cent per annum. All these long-standing rates of interest are, of course, unattractive in years of high inflation and have accordingly met with judicial criticism in England (see *Sobell v Boston* [1975] 2 All ER 282) and in Victoria, *Fry v Oddy* [1999] 1 VR 557 (CA).

That case, a recent English case and a recent New Zealand case, each of which were respectively concerned with these provisions, now call for comment.

Each of the three provisions reproduces the remedies that were available in equity before the enactment of the partnership legislation. It was also the practice of Courts of equity before the enactment of the legislation to make a just allowance for the exertions of continuing partners. This well-settled jurisdiction is preserved by the partnership legislation: see s 3 of the 1908 Act, s 46 of the UK Act and s 4 of the Victorian legislation.

VICTORIA

Fry v Oddy involved O, a solicitor, who had retired from a nine-person law firm. He sued the continuing partners for an account of profits upon the dissolution and an account under s 46 of the Victorian legislation. The parties had, it appears, consented to an order appointing a special referee to give an opinion on the value of the firm and as to the share, if any, of the profits made by the firm since O's retirement which was attributable to the use of his share of the partnership assets. The referee reported on the value of the firm and O was – some 20 months after his retirement – tardily paid his one-ninth share of the firm's net tangible assets as at his retirement date. The referee further reported that no share of the firm's profits after O's retirement was attributable to his share of the assets. The Court of first instance ([1998] 1 VR 142) declined to accept this finding, though it otherwise accepted the report. When the issue came to be tried, it was held that the profits were entirely attributable to the use of the firm's assets save to the extent to which the continuing partners' skills and exertion had contributed to the profits. An allowance was, however, made for their contributions, this being based upon an annual amount calculated by O's chartered accountant, adopting the amount chosen by the special referee as a notional commercial salary of $30,000 for each continuing partner for his personal exertion and contribution to earning the profits. In the event, judgment was given in favour of O in the sum of $402,833, as being the share of the profits made between the dissolution and settlement of accounts which was attributable to the use of O's share of the assets, plus interest.

On appeal by the continuing partners it was put – for the first time – that, because the consent order had recited that both sides were agreed that O was entitled to be paid a specified portion of the firm's value as at the date of his retirement, he had forgone his s 46 right to a share of the profits and had agreed to accept a share of the assets in lieu.

The continuing partners' appeal was dismissed.

In the first place it was held that the contention that, under the consent order, O had contracted out of his s 46 rights raised a question of fact. This point had not been raised before. Consequently it was held that it would not be entertained on appeal. In any event, it was considered to be palpably at odds with the terms of the consent order, which reflected the parties' intention that the referee should make determinations which would presuppose the applicability of the s 46 rights.

Secondly, it was emphasised that, while every case depended upon its own facts, prima facie the profits of a partnership were attributable to the use of its assets. Brooking JA was at pains to demonstrate that, although the contribution of the partnership assets to the profits of a law firm may once upon a time have been small when contrasted with the contribution to profits attributable to the skills and personal exertions of the partners, solicitors' practices have been transformed nowadays so that the contribution to profits attributable to assets was of larger importance. It is worth setting out in full the following passage – it is worthy of a place in an anthology of English prose – in which he describes (at 567-568) the present day situation with especial reference to mega-firms:

> If the early cases show one thing, it is that each case depends on its own facts. Sometimes the skill, industry,

credit and reputation of the continuing partners will be of particular importance in the generation of profits and the assets employed in the business will be of less importance: *Vyse v Foster* (1872) LR 8 Ch. App 309 at 331, where James and Mellish LJJ instance the case of solicitors. But this was said in 1872. In the days when Mr Wickfield could carry on his practice with the aid of Uriah Heep, and Soames Forsyte and his father could rely for assistance on the venerable Gradman, the contribution of the partnership assets to a legal firm's profits may have been small. But the last half century has seen a transformation in the practice of solicitors. The megafirm will be courted as the prospective tenant of a block of floors in the latest skyscraper. The wasted space of the atrium – a form of conspicuous consumption – emphasises by way of advertisement the firm's standing and success. Sponsorships will be used. Less oblique forms of advertising are commonplace: in newspapers and journals; on television; by public relations exercises; even by the "shopper-docket" offering one free will. Discounts are in terms offered by some firms on a variety of products. Old Gradman wrote everything by hand. Now the pen has been replaced by the word processor, if not by voice recognition software. The new technology is used both for communication and for the management of information and activities. With technological change, no large firm could now prosper without its computer on every desk, its giant photocopiers (themselves a source of revenue), its computer notebooks, its fax machines and answering machines, its mobile telephones and pagers, its dictation equipment, its video conferencing facilities. Its library will be to a considerable extent in electronic format. Its drafting will be done with the aid of artificial intelligence. Its requirements in terms of human resources will range from caterers to librarians. Outsourcing may be used. The firm will need a managing partner or general manager or office manager to carry the cares of the practice. It may be so large that some partners hardly know one another. A service entity will provide services to the practice at a profit. It will have complicated financing arrangements with its banker and others. It will train its staff by means of continuing professional development courses or seminars. It will make provision for the supply of floral arrangements and potted palms. Its staff will be legion; many of them will have quotas to meet and will charge their time in small units. Charge rates per unit of time will be determined for the various categories of employee and the productivity of employees will be monitored. It has been said that legal partnerships use "leverage through people", and that the large Australian firms do this more than the smaller ones, having 5.5 fee earners to each principal: Stein and Stein, *Legal Practice in the 90s*, (1994), p 4. Competition will be a major consideration in relation to pricing. Partners and senior staff may be headhunted ruthlessly. Clients may be poached.

All this makes the practice of at least the bigger legal firms resemble a manufacturing business, producing and selling at a profit a range of legal and at times related services.

Thirdly, it was held that, for s 46 purposes, the extent to which a firm's profits were attributable to the use of its assets, and the extent to which profits were attributable to the use of a retiring partner's assets, were questions of fact and that the onus effectively rests on the parties who are seeking to deny the natural consequences of the use of partnership assets.

It appears that (see at 662-663) the Court below proceeded on the basis that, in cases of this kind, three steps are necessary, viz, to determine the plaintiff's share of the firm's assets at the date of dissolution; to ascertain the firm's profits between that date and the date of settlement of accounts, and lastly, to identify the profits attributable to the use of the plaintiff's share of the partnership share or the partnership assets during that period.

One of the matters which gave rise to much judicial deliberation was that of the allowance that should be made to the continuing partners for their skills and exertions in carrying on the business. It will be recalled that the sum of $130,000 per partner per annum was accepted at first instance. The continuing partners, who steadfastly maintained that O was not entitled to anything under s 46, did not advance any competing figure. Various views were expressed as to the basis on which such an allowance should be assessed: see at 564-571, per Brooking JA; 572-578, per Ormiston JA, and 580-582, per Callaway JA. One possible way of explaining the $130,000 figure is that it represented a notional commercial salary for each partner such as might be paid to someone who was not an equity partner. This evidently did not altogether commend itself to O's chartered accountant. At the end of the day, the making of a just allowance to the continuing partners is, as Brooking JA put it (at 570) "only a means of arriving at the true profit attributable to the use of assets". Putting it another way, it is "ordinarily of no real consequence whether it [sc the valuation of the continuing partners' personal services] is done by way of deduction or by seeing how much is fairly attributable to the former partner's share". (See at 575, per Ormiston JA.) Ormiston JA further put it thus: (at 578): "It is a question of estimation and in the end the real issue is what amount should be attributable to the former partner's share and what attributable to other established causes". Putting it yet another way, the allowance can be seen not as representing a share of profits but as a notional item of expense to be taken into account in calculating the profits to which s 45(1) applies: see at 580, per Callaway JA.

The continuing partners here were held not to have shown the lower Court to have made any relevant error of law or fact as to what was to be fairly attributed to the use of O's share of the firm's assets. It had, in particular, not been demonstrated that it was not open to the Court below to form the view that the annual allowance for each partner's personal exertion, as put forward by O's accountant, was intended by him as an estimate of the contribution to profits made by each partner.

One may conclude with Ormiston JA (at 572) that "what is to be fairly attributed as a retiring partner's appropriate share of subsequent profits is largely a matter of estimation and impression, assuming that the correct questions have been asked from the outset".

ENGLAND

The English Court of Appeal in *Popat v Shonchhatra* [1997] 3 All ER 800, heard a case reminiscent of *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239. P and S were in short-lived partnership as newsagents in London. S provided five times as much capital as P. They shared profits equally. Part of the partnership property

consisted of the leasehold premises in which they carried on their business. After the dissolution of the partnership, S carried on the business alone. He succeeded in purchasing the freehold of the premises. Two and a half years after the dissolution, the premises, the goodwill of the business and the fixtures and fittings were sold by S at a profit. P sought a declaration that S held the freehold or its proceeds on trust for the two of them in equal shares, It was held that s 24(1) of the 1890 Act, the equivalent of s 27(a) of the 1908 Act, applied both before and after dissolution. These provisions enact that, in the absence of any express or implied agreement between the partners, they are entitled to share equally in the capital and the profits of the business. It was emphasised that where partners contributed to the partnership capital by defraying the cost of acquiring partnership assets – as had happened here – these contributions did not determine the size of the partners' respective shares of the assets. Hence, since there was no contrary intention of any kind here, P and S were entitled to share equally in the partnership property. Accordingly the freehold must be regarded as held in trust for them both in equal shares and P was consequently entitled to the declaration he sought. In arriving at this decision it was accepted by the Court that capital profits made after dissolution were not "profits" for the purposes of s 42(1) of the 1890 Act by virtue of the decisions in *Barclays Bank Co Ltd v Bluff* [1982] Ch 172; [1981] 3 All ER 232 and *Chandroutie v Gajadhar* [1987] AC 147 (PC). One is thus bound to accept that s 45(1) of the 1908 Act and s 42(1) of the 1890 Act and s 46 of the Victoria Act apply only to post-dissolution revenue profits, while s 27(a) of the 1908 Act applies, like s 24(a) of the 1908 Act (and, for that matter, 28(1) of the 1958 Act), in the absence of contrary intention, to capital and revenue profits.

Nourse LJ (at 806-807) stated that:

> Like all the provisions of s 24, being entirely general in its terms, it [sc s 24(1)] applies equally both before and after dissolution. The true view is that s 42(1) provides for an exception to the general provision made by s 24(1) only in the "certain cases" (see the marginal note) in which its requirements are satisfied.

The marginal note to which his Lordship referred reads: "Right of outgoing partner in certain cases to share profits made after dissolution", the words "in certain cases" do not now appear in the marginal note to s 45(1) of the 1908 Act, which reads simply: "Right of outgoing partner to share profits made after dissolution".

The consequences of holding that the provisions of s 24 of the 1890 Act and s 27 of the 1908 Act continue to be applicable after dissolution give rise to some difficulty. It would seem that there apparently has to be a kind of prolongation of the partnership until the final settlement of the accounts. Suppose, for instance, that S, before purchasing the freehold, had taken in a new partner, T. Obviously all the provisions of s 24 of the 1890 Act would apply between S and T, but should S have obtained P's consent to the introduction of T as a new partner in accordance with s 24(7), the equivalent of s 27(g) of the 1908 Act? Or would a Court infer a contrary intention, perhaps? Similarly, suppose S, in breach of s 24(6), the equivalent of s 27(f) of the 1908 Act, without prior consultation paid himself remuneration for his work in the business, again after taking in T as a new partner and before he acquired the freehold. Doubtless T could complain of the breach, but could P complain also? Or would a Court perhaps infer a contrary intention? Suppose, further, that S decided to change the nature of the business before selling the premises by going in for, say, travel agency. This would amount to changing the nature of the partnership business and would, in the absence of contrary intention, require the consent of S's new partner, T, by virtue of s 24(8) of the 1890 Act, the equivalent of s 27(h) of the 1908 Act. As it is the only consent of "all existing partners" that is called for, it would prima facie appear that P is not entitled to any say in this extension of the business. Or is it the case that he must still be treated as an "existing partner"? And, finally, whether or not S takes in a new partner, how far can P rely on s 24(5) of the 1990 Act, the equivalent of s 27(e) of the 1908 Act, and insist that he be allowed to take part in the management of the partnership business until the final accounts are completed? Or, again, would the Court perhaps infer that there was a contrary intention?

NEW ZEALAND

The third case is *Draper v Souster* (HC, Auckland; Williams J, CP 162/97, 2 June 1999; [1999] BCL 729). It aptly illustrates that the facts of the case may entirely negative the application of s 45(1). S had been a sole practitioner as a chartered accountant in Papatoetoe for 27 years. In 1995 he was joined in partnership by D. Unhappily, the partnership never prospered and had to be dissolved. The termination gave rise to litigation on various points not relevant to the present discussion. In fact D and S had dissolved their partnership by agreement as at 31 January 1997. S purchased D's interest in the firm as at that date. He continued to practise in the same premises. S was accordingly not viewed by Williams J as a continuing partner because he had recommenced the practice he had been carrying on before entering into partnership with D. S was accordingly seen as not carrying on the business of the firm but as setting up as an accountant anew with his share of the partnership assets plus the share he was purchasing from D. D was viewed as having gone off to start his own accountancy practice with the assets, including the clients which it had been agreed he would take with him and the value of which had been deducted from his share. It thus followed, as Williams J said (at p 9):

> It therefore follows that s 45 has no application in the circumstances of the matter as [S] was not a continuing partner and the interest payable to [D] for his share of the partnership's capital at the date of termination is to be calculated in accordance with cl 4.6 of the Partnership Deed.

This clause, so far as relevant, provided that the purchase money was to be paid with interest at the base or indicator rate of the partnership bankers plus two per cent from the date of termination of the partnership.

It is finally to be observed that s 45(1) of the 1908 Act, like s 42(1) of the 1890 Act and s 46 of the Victorian Act, each refer to "surviving or continuing *partners*". It might, at first sight, be thought that these provisions apply only where there are two or more "surviving or continuing partners" and that they thus cannot apply where it is only one surviving/continuing partner who is carrying on the business. There is clear authority that this is not the case: see, for instance, *Pathirana v Pathirana* [1967] 1 AC 233 (PC). In any event, s 33 of the Interpretation Act 1999 enacts that words in the singular include the plural and words in the plural include the singular. ❑

RESTORATIVE JUSTICE AND VICTIMS' RIGHTS

Andrew Ashworth, Vinerian Professor of English Law, All Souls College, University of Oxford

asks ten questions about what seems to be conventional wisdom in an abridged version of a paper delivered at the 12th Commonwealth Law Conference, Kuala Lumpur, September 1999

Throughout Commonwealth criminal justice systems there has been increasing attention given to restorative justice and to the rights of victims of crime. So far as restorative justice is concerned, we have seen the spread of both formal and informal methods of dealing with criminal cases that bring together the offender and the victim with a view to achieving a resolution of the case. At this developmental stage there is a considerable variety of approaches to be found. Perhaps the best-known are the Family Group Conferences in New Zealand, instituted by the Children, Young Persons, and Their Families Act 1989, see eg A Morris, G Maxwell and J P Robertson, "Giving Victims a Voice: a New Zealand Experiment", (1993) 32 *Howard Jo of Crim J* 304; Ministry of Justice, *Restorative Justice* (Wellington 1995); Morris, essay in A Crawford and J S Goodey (eds), *Integrating a Victim Perspective in Criminal Justice* (forthcoming 2000).

Various conferencing approaches are also operated in different Australian states. For a thoughtful review, see K Daly and R Immarigeon, "The Past, Present and Future of Restorative Justice: Some Critical Reflections", (1998) 1 *Contemporary Justice Review*. A further development is restorative cautioning by police being developed by certain police forces in England and Wales (R Young and B Goold, "Restorative Police Cautioning in Aylesbury" [1999] Crim LR 126; for a recent English review, see T Marshall, *Restorative Justice: an Overview* (Home Office 1999).

These developments have various purposes and rationales. These include: a desire to involve victims in the resolution of cases with a view to enabling them to come to terms with the crime in a way not possible in "conventional" criminal justice systems; and the belief that restorative approaches are more positive for society as well as for victims: they place greater emphasis on the achievement of reconciliation or "social reintegration". It is sometimes claimed that a particular method, such as "reintegrative shaming", may be more effective in preventing re-offending. (On reintegrative shaming, the classic text is J Braithwaite, *Crime, Shame and Reintegration* (Cambridge U P, 1989); see also J Braithwaite and S Mugford, "Conditions of Successful Reintegration Ceremonies", (1994) 34 *Brit Jo of Crimlgy* 139; H Blagg "A Just Measure of Shame?" (1997) 37 *Brit Jo of Crimlgy* 481; J Braithwaite "Conferencing and Plurality: Reply to Blagg", (1997) 37 *Brit Jo of Crimlgy* 502. Whatever the rationales, those involved in the revival of restorativism are often strongly committed to their cause, and optimistic to the point of claiming that these approaches may come to displace large areas of more "conventional" criminal justice systems. The question to be considered below is whether this enthusiastic embrace of restorative approaches brings with it problems and pitfalls.

Another development, similar in some respects but different in others, is the increasing recognition of victims' rights. The starting point is similar: that victims have been unfairly marginalised, or even excluded, by conventional criminal justice systems. But the implications are often different, because those who campaign for victims' rights might do so within the structure of existing criminal justice systems, and without subscribing to restorative justice. They might argue that more emphasis should be placed on compensation from offenders to their victims, and might campaign for certain procedural rights to victims, but might not wish to see the kind of fundamental re-orientation of the criminal justice system for which many restorativists call. In practical terms the victim impact statement is the most widespread manifestation of this approach: some form of VIS may now be made in several Australian jurisdictions, (see, eg E Erez, L Roeger and F Morgan, *Victim Impact Statements in South Australia: an Evaluation* (Adelaide, 1994)) in New Zealand, (for a critical review, see G Hall, "Victim Impact Statements: Sentencing on Thin Ice?" (1992) 15 *NZ Law Rev* 143) and (in an experimental form) in parts of England and Wales see C Hoyle, E Cape, R Morgan and A Sanders, *Evaluation of the "One Stop Shop" and Victim Statements Pilot Projects* (Home Office 1999). Further down this road lie debates about whether the victim/complainant should be given legal representation, ought to have a voice in pre-trial decisions on prosecution and on plea arrangements, and should be allowed to make a statement about the preferred sentence.

It is important to draw a distinction between crime victims' rights to services, and procedural rights in the criminal process. The right to services for victims of crime should cover a right to call upon practical and emotional support in the period following the offence; to be treated with respect and sympathy by the investigating authorities; to be kept informed of the progress of the investigation and of the case; to be treated with respect and understanding

both before and during Court proceedings; and the right to compensation. For English approaches to these rights, compare *The Rights of Victims of Crime* (Victim Support, London, 1995), with *The Victim's Charter* (Home Office, 2nd ed, 1996). The important point is that one can be fully in favour of all these rights, and yet have doubts about the grant of procedural rights in the criminal process to victims of crime. This, in brief terms, is the stance taken by the British organisation Victim Support, and there are many arguments in its favour.

There is much to be said in favour of many of the initiatives in restorative justice and victims' rights, but the history of criminal justice is strewn with examples of "good ideas" that were taken too far and, in some cases, that led to excesses of one kind or another. This paper asks ten important questions. The initiatives are diverse, of course, and not all the points will apply to all the new approaches. But there should be sufficient here to give pause to policy-makers and to raise questions for enthusiasts.

What is the nature of the victim's interest in the response to the offence?

This seems easy. The victim of theft or assault has a direct interest in receiving proper compensation from the offender – that, above all, must be incontestable. But is it? One answer might be that this statement about compensation has no necessary connection with criminal justice; another might be that, if compensation is to be regarded as part of the criminal process, it should be subject to the general principles of sentencing and therefore that poor offenders should only be required to pay what little they can afford by way of compensation. Neither of these replies is conclusive, but both signal the complexity of the issues.

What is the nature of the victim's interest in the criminal justice response to the offence? Should we say that it is the victim's crime, and that he or she has a special interest in the formal or official response to the offender? This was assumed to be the right analysis for many centuries. Until relatively recently it was left to the victim to pursue the (suspected) offender and to have him brought to justice. In tenth century England offenders were often required to pay financial compensation for their crimes in the form of a "bot" to the victim and a "wite" to the victim's lord. In the twelfth and thirteenth centuries the King began to assert control over criminal justice, and payments to the victim (indeed the significance accorded to the victim in criminal procedure) declined. For the history, see eg S Schafer, *Restitution to Victims of Crime* (1960), and M Wright, *Justice for Victims and Offenders* (1996), ch 1. It is the subsequent processes of centralisation and professionalisation of criminal justice that the Norwegian criminologist Nils Christie described as the state "stealing the conflict" from the victim. N Christie, "Conflicts as Property", (1977) 17 *Brit Jo of Crimlgy* 1. The imagery is vivid, and a large part of Christie's argument is directed at lawyers and the way they (notably prosecutors) and their dealings displace rather than represent the interests of the victim. But we must pause before accepting Christie's strictures. In particular, his analysis seems to leave out of account the many crimes against the state or the collectivity, and so-called "victimless" crimes such as drug dealing, environment crimes, crimes of possession (eg a loaded firearm), and so forth. Moreover, Christie himself accepts that each crime is also an offence against the community, not just against the direct individual victim.

What is the nature of the public interest in the response to the crime?

What do we mean when we refer to the public interest in preventing or prosecuting crime? What is the significance of the phrase "a crime against society"? The idea seems to be that, when it is decided to make certain conduct a crime rather than simply a civil wrong, this implies that it should not be merely a matter for the victim whether some action is taken against the malefactor; and even that there is a public interest in ensuring that people who commit such wrongs are liable to punishment, not merely to civil suit. Entwined with these complex questions about the significance of making conduct a criminal rather than merely a civil wrong, there is the concept of the Queen's Peace. For a classic discussion, see C K Allen, *The Queen's Peace* (Stevens, London, 1953), ch 1.

This suggests that it is the responsibility of the state to ensure that there is order and law-abidance in society, and that citizens are not at the mercy of ruffians, thieves, terrorists, etc. Citizens agree to obey laws in return for protection of their vital interests, though keeping their right of self-defence for occasions of emergency when state protection is unavailable. In practical terms this is the justification for maintaining a police force, public prosecutions, the Courts, and other aspects of the criminal justice system. There are also fundamental values at stake: it is right that the state should take over the administration of criminal justice from victims and other individuals, to prevent vigilantism, and to ensure some measure of principle, consistency and efficiency in criminal justice. The theoretical foundations are examined by N MacCormick and D Garland, "Sovereign States and Vengeful Victims: the Problem of the Right to Punish", and by J Gardner, "Crime: in Proportion and in Perspective", both in Ashworth and M Wasik (eds), *Fundamentals of Sentencing Theory* (OUP, 1998). Those last values emphasise that offenders have rights too: the response to their offending should not be at the preference of the particular victim, but should be decided by reference to publicly debated and democratically determined policies that show respect for the human rights of victims and defendants.

How can the response that reflects the public interest be quantified?

The answer to this question is both simple and complicated. The simple answer is that it depends on the aims of sentencing adopted in the particular legal system. Thus, a deterrence-based approach to punishment will hold that deterrent sentences (either general or individual deterrents, depending on the favoured approach) reflect the public interest. A system based on proportionality will yield sentences that are judged to be proportionate. And so on. The complications are twofold. First, each approach to punishment is controversial on its own terms. There is a vast literature about the justifications for state punishment of law-breakers, examining the justifications for punishing and more particularly the proper criteria for punishment of certain types of offender and offence. For a recent collection, see von Hirsch and Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998). More relevant to this paper is the second complication. Let us suppose that one adopts a restorative approach to the proper response to lawbreaking, broadly following the writings of Christie and of J Braithwaite and P Pettit, *Not Just Deserts: a Republican Theory of Criminal Justice* (OUP, 1990). The official re-

sponse to lawbreaking should be to bring the victim and offender together (assuming that the victim is willing) and, by means of mediation or a family group conference or some other restorative forum, to reach agreement on an appropriately restorative response. One element in that will be some form of compensation, apology or other response from the offender to the victim. But another element should be some form of community restoration.

The problem is what this means. What exactly is one restoring? The essence seems to be some kind of symbolic restoration of damage to the community, or damage to stability. Some have argued that measures such as community service orders are fine examples of community restoration, eg Zedner, "Reparation and Retribution: are they reconcilable?" (1994) 57 MLR 228, Walgrave "Restorative Justice for Juveniles" (1995) 34 *Howard Jo of Crim J* 228 and that may well be the case. But we still need to ask what exactly is being restored and, in particular, when custodial sentences might be thought appropriate as measures of community restoration. Braithwaite and Pettit refer to "community reassurance" as an aim of criminal justice at this stage. (See also their re-statement of their theory, excerpted in von Hirsch and Ashworth pp 317-330, with criticism at pp 331-335.) This might be thought to have the same ring of ambiguity as one of the notions currently in fashion in criminal justice policy, "community safety". If restorative criminal justice is to take account of the wider community and to attempt some form of restoration in that sphere too, it is important to be clear about the exact purpose of this element of the agreement or Court order. Braithwaite and Pettit state that Courts should take account, among other things, of "how far the offender is capable of offending again" and of "how common the offence has become", suggesting incapacitative and deterrent purposes. These questions are especially important when the offence is a serious one, or when the offender is thought to present a continuing danger – or, for that matter, where a crime has no direct victim who can plausibly participate in any restorative processes. To speak simply of "restoration of the community" is to use symbolism and metaphor. There are plenty of metaphors elsewhere in sentencing, but those who argue for proportionate punishment based on desert have at least attempted to work out the details of their approach and to justify them. Probably the leading work is A von Hirsch, *Censure and Sanctions* (OUP, 1993). No such clarity is found when restorativists are tackled about the community element in their approach.

Should there be limits on the official response to crime?

This discussion of the community element in restorative justice processes leads directly into what I regard as a major problem. If restorativists are not clear about the details of the community or public interest element in their response, what is there to ensure that those community responses do not escalate? Words such as "community" are problematic in this context, because they do not tell us whether a positive or constructive measure is being proposed or a repressive or incapacitative measure: see Lacey and Zedner, "Discourses of Community in Criminal Justice" (1995) 22 *J of Law and Soc* 301. Thus Braithwaite and Pettit are unclear about the limits to measures that may be taken against offenders in the name of community reassurance. Of course, much of the discussion about restorative justice assumes that it is young offenders, or non-serious offences, that are being dealt with. But some proponents claim that restorative justice offers a model for dealing with all offenders; Braithwaite and Pettit certainly put forward such a scheme. It is then important to consider whether there ought to be limits beyond which it is not fair or proper to take measures against offenders in the name of community reassurance. It can be argued that, at the very least, any measures taken – and certainly, any deprivation of liberty – should not be out of proportion to the seriousness of the crime(s) proved against the offender. For an assertion of this principle in Europe, see the Council of Europe, *Consistency in Sentencing*, Recommendation R (92) 17 (Council of Europe, Strasbourg, 1993), s A. This principle of proportionality is a safeguard against excesses of state power, and it is important to re-assert this at a time when the tide of restorativism is sweeping forward. Of course, many of those promoting a restorative approach place far less reliance on traditional penal measures, particularly imprisonment, than some who take a more conventionally punitive approach. The danger is that, if no upper limits are in place, there is nothing to stand in the way of all manner of measures being imposed in the name of community reassurance and restoration.

Resolving conflicts between restoration and punishment, victim and community

Many of the questions raised so far have related to restorative justice, and not necessarily to victim-oriented measures within conventional sentencing systems. A number of difficult questions of priority may arise in both restorative and modified conventional systems. These questions can be solved, of course, and are solved explicitly in some jurisdictions. But they nevertheless deserve some consideration in point of principle.

In connection with restorative approaches two points may be mentioned. One concerns the impecunious offender. If civil proceedings were taken, judgment would be for the full amount, and the victim would be left to use civil methods to obtain execution of the judgment. But criminal proceedings tend to respect the principle that financial orders should be trimmed according to the offender's ability to pay, usually on the argument that to impose a financial penalty beyond an offender's means might well lead to further offending in order to pay off the Court order. The same response can be made to the idea of requiring the offender to pay instalments stretching over a lengthy period of time. This is one question of priority that needs to be resolved: should the offender's interests or the victim's interests be accorded greater weight? Secondly, there are possible conflicts between restoration of the victim and community restoration. Assuming that we can be sufficiently precise about what community restoration entails, the order might conflict with the order or agreement made in respect of restoration of the victim. The conflict may stem from shortage of financial resources, from the commitment of time (eg to making good the victim's property and performing community service), and of course from any decision that community reassurance requires a deprivation of liberty. If restorativists assert their preference for restoration of the victim, are they content that the element of community restoration or reassurance may come and go according to the situation of particular offenders?

Turning to victim-oriented aspects of conventional systems, there is the question of priority between a compensation order to the victim and a fine imposed on an offender, where the offender has insufficient means to pay both. The approach of the English system is pragmatic: the compensa-

tion order should have priority over a fine. However, when a Court sends an offender to prison it is effectively impossible for the Court to require the offender to pay compensation. The conflict may be avoided in cases where the offender has sufficient means to pay, or where certain property belonging to the offender (eg a car) can be ordered to be sold. Many proponents of victims' rights will argue that it is wrong to overlook the victim's claims in these cases, which are usually serious cases. My purpose is not to argue the point to a conclusion, but to note the strong conflicts that need to be resolved here.

What is the purpose of post-offence processes?

The reason for asking this unusual question is to examine people's expectations of what has come to be known as the sentencing stage of criminal procedure. It might be thought that the answer should flow from the aims of the criminal justice system, so that restorativists will offer an answer that is different from the perspective of more conventional forms of criminal justice. But it is evident that people with a range of different perspectives may now expect the sentencing part of the procedure to help with the "reintegration" of the victim. Thus some will argue that one reason in favour of allowing victims to participate in sentencing processes (eg through victim impact statements, or more strongly through a right of "allocution" which involves stating a view on the preferred approach to sentencing) is that it helps victims to come to terms with the offence. This is a major plank of Erez's argument in favour of victim impact statements: "providing victims with a voice has many therapeutic advantages"; Erez "Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice" [1999] Crim LR 545, 555. On the theme of therapeutic jurisprudence, see D Wexler and B Winick (eds), *Law in a Therapeutic Key* (Academic Press, 1996). Those who support mediation, family group conferences and other restorative processes take this as axiomatic, and indeed the purpose of achieving the reintegration of the victim may shape the procedure to be adopted.

Whatever the purpose of the criminal justice system, it is legitimate to ask whether the reintegration of the victim might be achieved more effectively by other methods – for example, by improved support for victims. The claim that involving the victim in post-offence processes is desirable or favourable to victims needs to be examined from the point of view of effectiveness (is it the most effective method of reintegration for the majority of victims?) as well as of appropriateness (does it distort any other purposes of those processes?). The answers to these questions remain to be debated, and they are connected with the questions raised below.

Should victims have procedural rights?

Of course the victim has an interest in the outcome of the criminal process. Some would say that, at a minimum, the victim's interest is in receiving proper compensation or restitution from the offender. There is widespread acceptance of what are often presented as pragmatic reasons for using criminal proceedings to order offenders to pay compensation to their victims – the criminal Court has heard the evidence, and it is an unfair burden to expect the victim to go off to another Court to start an action for damages against the offender. Since the making of a compensation order is of direct interest to the victim, there may be strong arguments for allowing the victim to submit a statement to the Court relating to the harm and damage resulting from the offence. See the carefully reasoned essay by Cavadino and Dignan, "Reparation, Retribution and Rights" (1997) 4 *Int Rev of Victimology* 233.

It is, however, an entirely different matter if it is argued that the victim ought to be able to make a submission to the Court which has a bearing on one of the "public interest" decisions that have to be taken in the criminal process. Once we leave the victim's direct interest in compensation and move into the sphere which may be described as "community restoration" or "sentencing in the public interest", the victim should have no special voice. This distinction is not taken by Erez. The victim is one member of the public, but the decision ought to be taken in the name of the community as a whole. The preferences of the individual victim should have no special weight at this stage, and it is wrong to refer to them at all. Other arguments point in the same direction. Thus it would be unfair if the sentences imposed on offenders, supposedly in the name of the community as a whole, differed according to whether or not the victims of their crimes wished to become involved at the sentencing stage or not. It would be grossly unfair if any sentence was affected by whether the particular victim was vengeful or forgiving, as the English Court of Appeal has emphasised in a number of recent decisions in cases where the victim or victim's family has pleaded for a reduction in the offender's sentence. The fullest discussion is that in *Nunn* [1996] 2 Cr App R (S) 136, and a recent example is *Roche* [1999] Crim LR 339. The European Commission on Human Rights reached the same conclusion in *McCourt v UK* (1993) 15 EHRR CD 110. Of course there are other points to be made – it is true that a victim can effectively prevent a prosecution, in some instances, by refusing to give evidence; and it is important to protect victims from reprisals, and even from fear and unexpected encounters, eg to measures that ought to be taken before the release of prisoners, to ensure that the victims of their crimes are properly warned and (where necessary) protected. But there is no acceptable justification for allowing a victim to make a submission to a Court in relation to sentence. To modify the point and argue that victims should have a right to be "consulted" at the sentencing stage is to offer palliatives, and pretence. If it is right that the victim should have no influence on sentence in the particular case, then "consultation" with the victim on sentence should not take place either. This is not to overlook the value of Courts giving a full explanation of the sentence, its effects and the reasons for imposing it, both to the victim and to the public.

Is victim participation in post-offence processes used as a "sweetener"?

This is not intended to be an outrageous suggestion: it is put forward as a recognition of practicalities. The criminal justice system depends on the cooperation of victims of crime, as witnesses especially. For that reason any processes that contribute to making victims feel "valued" by the system may encourage more victims to provide this help, or at least discourage fewer of them. The British section of the International Commission of Jurists is one of the bodies to recognise openly the importance of fostering the cooperation of victims. JUSTICE, *Victims in Criminal Justice* (London, 1998), p 4. It is difficult to deny the practical connection between victim cooperation and the smooth functioning of

the criminal justice system. But it does not necessarily follow that the only, or even the best, way of ensuring this cooperation is to grant to victims certain rights to participation in post-offence processes such as sentencing. Those rights should be determined by arguments of principle, as set out in (7) above. There are other relevant issues, such as the treatment of all witnesses (including victims) in Court, the proper limits of cross-examination and the judicial role in ensuring the fairness of the trial to all participants – raising questions about time-honoured practices of trial lawyers, a sensitive subject in many common law jurisdictions. An unusually radical English report, *Speaking up for Justice* (Home Office, 1998) has led to legislation in the Youth Justice and Criminal Evidence Act 1999.

Victims in the service of offenders?

This question, like the last one, is intended to be provocative but it points to an issue of some concern. Much has been said in recent years about the value of confronting offenders with the consequences of their crimes, as a means of bringing them to appreciate the enormity of what they have done and its effect on other people's lives. For too long the criminal process had the effect of insulating offenders from this, and (in many cases) the consequences of the crime were only set out, in rather disembodied form, in the prosecution's statement of facts on a guilty plea. Similarly it is sometimes said that one of the benefits of mediation, family group conferences and other restorative processes is that they bring home to offenders the human consequences of what they have done. From assertions of this kind it is a short step to the claim that greater victim involvement is for the benefit of offenders and of the wider community. Some have even gone so far as to assess the effectiveness of restorative justice initiatives by reference to reconviction rates.

The danger is clear: for some people there has been a slippage between the starting point, which was to support victim-oriented initiatives and restorative justice by reference to the interests of victims, and the idea of judging these initiatives on the basis of what they do for offenders. The danger is that victims are being used in the service of offenders. The British organisation Victim Support is well aware of this danger, and has been noticeably guarded in response to some of the allegedly pro-victim initiatives that have been mooted: they maintain, with some force, that it is wrong to place any onus on the victims of crime to become involved for the good of the system or for the good of others. If those beneficial consequences happen to flow from greater victim involvement, splendid. But to use those consequences as a yardstick of success is to cross a red line.

Victims in the service of severity?

The last of my three more provocative questions is whether the cause of victims is being used as a means of supporting the argument for greater severity in sentencing. This is not to suggest that the use of a victim impact statement in individual cases leads to greater severity in those cases: the evidence from Australia is equivocal: Erez and Rogers "The Effects of Victim Impact Statements on Criminal Justice Outcomes and Processes: the Perspectives of Legal Professionals" (1999) 39 *Brit Jo of Crimlgy* 216. The question of increased severity is posed at the level of policy. In the United Kingdom there has fortunately been little evidence of this, but it has become a major part of the agenda of some victims' organisations in some jurisdictions. Some politicians have been known to support the case for high or higher sentences by suggesting that this will be for the benefit of victims, or even that victims support it. It will not be possible to deal conclusively with all these arguments in the context of this paper: for example, some argue that higher sentences are more effective as deterrents and therefore benefit both present and future (potential) victims by making it likely that fewer offences will be committed, but the most careful studies show that the prospects of criminal justice strategies of this kind are frequently and significantly over-estimated. For a thorough review, see von Hirsch, Bottoms, Burney and Wikstrom, *Criminal Deterrence and Sentence Severity* (Hart Publishing, Oxford, 1999). Of greater relevance to the precise point here is that surveys of victims and of the wider public, in the UK and in many other jurisdictions, demonstrate the fallacies in some of the claims that are made. To put it briefly, victims tend to want compensation rather than punishment, and tend to favour reparative and constructive sentences (such as community service orders) ahead of prison. Members of the public and victims tend to have a false view of the sentencing practices of the Courts, and grossly under-estimate the severity of sentencing levels for crimes such as burglary and rape. When members of the public are asked whether sentence levels are too high, too low or about right, most of them reply that sentence levels are too low. But when they are given a factual scenario and asked to consider an appropriate sentence, their replies are preponderantly in line with what the Courts are doing. See Hough and Roberts, *Attitudes to Punishment: Findings from the British Crime Survey*, Home Office Research Study 179 (1998); for broader international material, see J V Roberts and L J Stalans, *Public Opinion, Crime and Criminal Justice* (Westview Press, 1997).

CONCLUSIONS

The purpose of this paper is to raise some questions about what might broadly be termed the victim movement, and its various manifestations either in restorative justice or in procedural rights for victims in otherwise "conventional" criminal justice systems. I fully accept that there was a neglect of the victim for much of the twentieth century, and wish to see something done to remedy that. But we must not move from past neglect of victims' rights to a form of evangelism based on exaggerated claims. Too often the history of criminal justice has seen changes motivated by benevolence turn into tragic failures, and has seen apparently promising programmes extended without proper evidence. I am not arguing against change: I am arguing for caution, for principle, and for evidence.

Some supporters of restorative justice or of procedural rights for victims will not recognise much of what I have written. They will protest that their schemes are homely, local arrangements dealing successfully with young and non-serious offenders and their victims. So be it. My point is that criminal justice inevitably involves the use of state power in some shape or form, and that its processes and outcomes must therefore be justified in those terms. Moreover, there are some who claim far more for restorative justice than its ability to deal with young and non-serious offenders. Once we begin to talk about serious offenders, some of the questions posed above become all the more pressing. Those who make criminal justice policy must ensure that they have satisfactory answers to the key questions. ❑