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A constitutional monarchy

New Zealand is a monarchy. This is a statement that is likely to be treated as legally and constitutionally irrelevant or a meaningless truism. Alternatively anyone who gives it a passing thought is likely to say that it is only partly true because New Zealand is a constitutional monarchy, meaning thereby that the monarch has only a symbolic and again therefore irrelevant position in the constitutional scheme of things. A closer analysis of the role of the monarchy in our constitutional system would suggest however that this is a simplistic view.

The present-day monarchy is not of course what it was as an institution of government in the days of the Tudors or the Stuarts. It is not even what it was in the days of Queen Victoria. The monarch in English law and tradition has never been thought of as being an absolute ruler. Back in 1259 Bracton in his treatise *de Legibus et Consuetudinibus Angliae* said that the King ruled "under God and the law". James I was a strong believer in the divine right of kings which Pope satirically described as "The right divine of kings to govern wrong". But even James I acknowledged the supremacy of the law, as when in his speech to Parliament in 1601 he said that

> a king governing in a settled kingdom leaves to be a king, and degenerates into a tyrant, as soon as he leaves to rule according to his laws.

When in 1885 A V Dicey first published his book on the Constitution, he began with a chapter on the nature of what he called Parliamentary sovereignty. The opening sentence of the book, and the statement for which it is most famous, read:

> The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions.

This statement of principle is now regarded as a commonplace and indeed Dicey claimed at the time that he was doing no more than describing an existing situation. He then went on to explain what he meant by the principle of Parliamentary sovereignty which, he wrote,

> . . . means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

This was a view that was to be taken by political scientists and other commentators, whether academic or journalistic, as meaning that the essence of democracy was what Harold Laski described as the "omnicompetance" of the House of Commons. This however is not what Dicey said. He referred in the quotation given above to "Parliament thus defined" and the definition he had given in the preceding sentence was that:

> Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the "King in Parliament", and constitute Parliament.

The obvious point of this is that the lawmaker in New Zealand as in the United Kingdom is not simply the elected representative of the people. The monarch is an integral part of the law-making process. In this respect the executive area of government has a double role. On the one hand the House of Representatives cannot even consider a "money Bill" unless it is introduced by a message from the Governor-General as the Queen's representative, and on the other the Governor-General in deciding whether to sign or not sign a Bill passed by Parliament is required by convention to act on the advice

of his (or perhaps someday her) Ministers.

In the United States it is the Constitution that matters. It has a certain mystic significance as in the Presidential oath of office when the President swears that he will uphold, defend and execute the Constitution. And this oath refers of course to the Constitution as interpreted by the Supreme Court even to the extent of some statutes being declared invalid and of no effect though they may have been proposed by the President, been passed by both the House of Representatives and the Senate and signed by the President. In the American system it is not election to office that is the final criterion of power and authority, but behaviour by those elected in accordance with the norms of the Constitution.

In our system it is the monarchy, the Crown, that has this same unifying role. The government of the day as a legal entity are the members of the Executive Council at which the Governor-General presides when he is present. The reason is that it is Her Majesty's Executive Council. Statutes do not become law until they have obtained the Vice-regal assent, again because the New Zealand legislature is the Queen in Parliament. Finally the authority of the Judiciary is that they are the Queen's Judges; and on taking up office they swear due allegiance to Her Majesty.

The basic point of the position of the monarchy in our constitutional system was made some years back, in his usual satirical, entertaining and anarchical manner by the novelist Evelyn Waugh. Like T S Eliot he considered himself a royalist. Despite the outrageously overstated opinion, there is an element of fundamental truth in what he said in the course of a symposium in October 1959 on the election then about to take place.

> I have never voted in a Parliamentary election. I shall not vote this year. I shall never vote unless a moral or religious issue is involved. . . . Great Britain is not a democracy. All authority emanates from the Crown. Judges, Anglican bishops, soldiers, sailors, ambassadors, the Poet Laureate, the postman and especially Ministers exist by royal will. In the last three hundred years, particularly in the last hundred, the Crown has adopted what seems to me a very hazardous process of choosing advisers: popular election. Many great evils have resulted but the expectation of a change of method in my lifetime is pure fantasy. . . . I do not aspire to advise my Sovereign in her choice of servants.

Most citizens of course are prepared to take part in the "hazardous process" and to cast votes in the electoral contest when given the opportunity. It is well to remember though that what New Zealand has inherited is a constitutional and political arrangement that in all its parts relates to the monarchy, to the Crown, and in its working can be said to be dependent on it.

It is because of the historical legal fact that the various elements of our constitutional system are expressions of royal authority in the executive, legislative and judicial spheres that they are independently on a standing of formal equality. The independence of the Judiciary is the most obvious case in point, and is the true reason why judicial decisions are binding and are carried into effect by the bureaucracy. There is also the legal principle that the executive cannot direct people not to obey a law that Parliament has passed. This is not to say that at any one time, and in particular circumstances, one branch of government may not be more important than the other.

All of this has some considerable significance regarding the office of Governor-General, who is the personal representative of Her Majesty the Queen, and not a representative of the New Zealand Government. The Governor-General is not just a civil servant. The office is not an empty formal piece of historical play-acting, as was made clear by Professor Brookfield in his article on the office at [1985] NZLJ 256. This was also a point made expressly by Sir David Beattie at the time of the expiration of his term of office. In an interview in *Council Brief*, the publication of the Wellington District Law Society, for November 1985, Sir David spoke about the reserve powers of the Governor-General. The report says that Sir David had had discussions with the present Governor-General of Australia, Sir Ninian Stephens, and with two former holders of the office Sir John Kerr and Sir Zelman Cowen. The report then went on to say that:

> Sir David is in no doubt that the Governor-General has extensive and undefined powers to act in times of constitutional crises and that he can act in his own right as the Queen's representative, informing her of his actions thereafter.
>
> "I draw freely on a paper by Sir Zelman Cowen that demonstrates this," he said. "Sir John Kerr in 1975 stressed that his actions were his own. The Governor-General of Fiji in 1977 appointed a prime minister followed by a grant of dissolution and Sir Paul Scoon in Grenada, late in 1983, allowed United States intervention without the prior knowledge of the British Government. The Queen was the Queen of Grenada but Scoon considered that to have warned Her Majesty, being also Queen of Great Britain, would have put her in an intolerable position." . . .
>
> As incoming Governor-General in 1980 Sir David prepared himself for what he considered the range of crises possibilities he might face during his term.
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> "In my capacity as Visitor of Universities I often availed myself of the advice of the Solicitor-General. I preferred to get away from people connected with the Government or Opposition and look for advice from a wider area, and one which is approved by New Zealanders as impartial."
>
> For his advisors Sir David would have selected two senior former politicans from opposite parties and two retired Appeal Court Judges who were also Privy Councillors.

It is because New Zealand is a monarchy that the three elements of government, the legislature, the Judiciary and the executive are formally interrelated and interdependent. It is one of the protections of liberty. Parliament, as defined by Dicey, may be the supreme law-maker, but there is only one sovereign, Her Majesty Queen Elizabeth the Second, by the Grace of God, Queen of New Zealand . . ., as she is styled in the Royal Titles Act 1974.

P J Downey

The standard form agreement for sale and purchase: modern conveyancing

By S Dukeson, a Barrister of Whangarei

This article suggests that practitioners should not rely simply on the standard form of an Agreement for Sale and Purchase without more in respect of particular transactions for individual purchasers. Each case needs to be looked at carefully and the implication of the form of contract discussed with the client.

The purpose of this article is essentially to raise two matters for the consideration of practitioners. The first is that it is possible that some solicitors do not pay sufficient attention to the standard form Agreement for Sale and Purchase when discussing the Agreement with a client. The second is that, particularly with the possibility of losing some of the conveyancing monopoly, it will be increasingly important to demonstrate to one's clients and the public in general that conveyancing requires the expertise of a solicitor and is not a task for amateurs.

At the outset, the writer wishes to emphasise that he does not set himself up as an expert and indeed, most practitioners will have had considerably more practical experience than the writer. Nevertheless, the writer has probably considered the provisions of the standard form Agreement for Sale and Purchase to a greater extent than most solicitors. Hopefully therefore, the writer's comments and suggestions will be accepted as an attempt to be helpful rather than being seen to be simply critical.

The writer suspects that many practitioners do not discuss the provisions of the standard form Agreement for Sale and Purchase in detail with their clients let alone point out any defects that may exist in the standard form Agreement. It may even be that some solicitors do not fully understand the law which relates to some of the provisions in the standard form Agreement for Sale and Purchase. The writer suggests that there are some defects in the standard form Agreement for Sale and Purchase and that in theory at least, it would be a dangerous practice for any solicitor to simply have his client sign the standard form without discussing the Agreement in detail. For instance, some of the following matters come to mind.

General queries

The writer wonders how many solicitors ask their clients to check the chattel list on the front of the standard form Agreement and, when acting for a vendor client, whether there are any tenants in the property. The writer also wonders how many solicitors take the opportunity, when acting for a vendor, to add encumbrances to the legal description so as to preclude a requisition by the purchaser's solicitors.

Clause 4 — insurance and risk

While cl 4 purports to deal with insurance and risk, it mainly concentrates on the question of insurance. Most practitioners would agree that the present provisions are an improvement on the provisions in the two standard form Agreements which preceded it. However, there are still some difficulties when acting for a purchaser.

For example, take the situation where prior to settlement, notwithstanding that the property is materially damaged by fire, the purchaser wishes to proceed with the transaction knowing that the vendor has insured the property. (The land might be of more value to the purchaser than the building on it or what is left of the building might still be of substantial value in the purchaser's eyes.) It may be that the vendor's Insurance Company will insist upon reinstating the property.

This would cause some difficulty to the purchaser particularly if the purchaser relies on mortgage finance. The Agreement for Sale and Purchase makes no provision for settlement to be delayed in these circumstances and yet, what mortgagee will advance moneys to enable the purchase to be completed if the property has been damaged?

Other difficulties can arise with respect to cl 4, although some of them may admittedly be more theoretical than practical. Nevertheless, it can be seen that when acting for a purchaser, the provisions of cl 4 might not necessarily fully protect the purchaser in all circumstances and for that reason, a solicitor acting for the purchaser might make a number of suggestions to a purchaser client. One might be to alter the provisions of cl 4. If the client accepts that suggestion, and cl 4 is amended accordingly, this might involve the purchaser's solicitor explaining the nature of the changes to the vendor's solicitor who may or may

not advise his client to accept those changes. A simple alternative would be to advise the purchaser to take out full replacement insurance cover immediately when the contract becomes unconditional. Generally, the writer's clients have adopted the latter alternative.

Clause 6 — vendor's warranties and undertakings

It may be that the intention in referring to "warranties and undertakings" in cl 6 was to make the promises contained in cl 6 innominate. If that was the case it is submitted that it would have been better to simply refer to the vendor's "promises". There seems to be a strange reluctance in New Zealand (and perhaps elsewhere in common law systems) to refer to contractual terms as promises. Yet, as we all know, promises are what the law of contracts is all about. It is respectfully submitted that the use of the word "undertakings" is not helpful.

When acting for a purchaser, and in theory at least, cl 6 is fraught with difficulty. First, in view of the bastardisation of the term "warranty" in contract law and the rather strange use of the word "undertakings", there may be no guarantee that if a vendor breaches one of the provisions of cl 6, a New Zealand Court will regard the breach as being anything other than inessential. Yet, the consequence of the vendor breaching one or more of the provisions of cl 6 could be extremely significant to a purchaser.

Although difficulties seldom arise, it is clear that difficulties can arise as is evidenced by one or two recent cases. The writer believes that, when acting for a purchaser, it is important to amend the provisions of cl 6 to make it clear that some of the promises contained in cl 6 should be considered to be "essential" that is, put the matter beyond doubt. For this reason, the writer customarily alters the provisions of cls 6.1(1), 6.1(4) and 6.1(8) to make those provisions "essential" promises.

The effect of so modifying cl 6.1(1) is to give the purchaser the right to elect whether or not to proceed with the Agreement if, prior to settlement, it is ascertained that the vendor has not disclosed any demands or requisitions which the vendor has received. It is suggested that an honest vendor could not reasonably object to this amendment. The issue would be important to a purchaser because if the cost of complying with a notice or demand is significant, it may be beyond the purchaser's planned budget. To date, the writer has not met any objection to this amendment.

A similar change to cl 6.1(4) is probably more of theroretical value than practical. First, problems seldom arise with respect to land tax. Secondly, if any problems do arise, it is likely that they would be discovered after the transaction has been completed, too late for the purchaser to cancel the Agreement. Nevertheless, the writer believes that the importance of cl 6.1(4) should be clearly stipulated in the Agreement. Again, the writer has not encountered any resistance to this type of amendment.

In the writer's view, when acting for a purchaser, the provisions of cl 6.8 should also be scrutinised. It is suggested that it is not satisfactory to give the vendor an election whether to comply with notices or demands or to require the purchaser to deal with them. The writer believes that either the vendor should be obliged to attend to these matters or the purchaser should. Obviously, when acting for the purchaser, the writer makes the appropriate amendment to the clause so as to provide that the vendor will attend to these matters. Again, the writer has not met any objection to this type of amendment.

Clause 6 is also of importance to vendors' solicitors. However, the writer wonders how many solicitors actually ask their vendor clients whether they have received any requisitions or demands, or whether they are liable to pay land tax (and so on).

Clause 7 — conditions

Often, one finds that the provisions of cl 7 and the space provided for stipulating finance details on the front page of the standard form are not properly utilised by agents. Despite the full provisions of cl 7, agents often ignore the "finance box" on the front page and write their own finance conditions. The writer has even noticed some solicitors doing this.

It would seem therefore that not everyone realises that the provisions of cl 7 are more or less all encompassing so far as conditions are concerned (and not just so far as finance conditions are concerned). Accordingly, having inserted any special condition into the Agreement, provided that the consequences spelt out in cl 7 are satisfactory to the solicitor, no reference need be made to the provisions of cl 7 — cl 7 provides that it will apply to all conditions in the Agreement unless otherwise stipulated.

It is to be noted that cl 7 provides that conditions will be conditions subsequent. It is respectfully submitted that it is unnecessary to label the conditions as being precedent or subsequent. These descriptive terms are only useful to explain what the consequences of the fulfilment or non-fulfilment of conditions will be where these consequences are not spelt out. As the consequences of the fulfilment or non-fulfilment of the conditions in the standard form Agreement are fully spelt out, the conditions need not be further described.

One problem frequently arises with respect to finance conditions and the wording of cl 7.1(1). This has been adverted to in the *Conveyancing Bulletin* (1983) 2 BCB 4. The situation can arise where, on the date stipulated for the arrangement of finance, the vendor's solicitor is advised by the purchaser's solicitor that he has received telephone confirmation that finance has been arranged but no written confirmation. Accordingly, the purchaser's solicitor is not prepared at that time to state that the contract can be regarded as being unconditional. Particularly if the vendor is also buying, and if the vendor's purchase is conditional upon the vendor's sale becoming unconditional by the stipulated date, the vendor will be faced with the problem of either having to obtain an extension of time with respect to his purchase or alternatively, having to elect whether to take the risk and make his purchase contract unconditional or of losing his purchase contract altogether because he is not prepared to take that risk.

The vendor's position in these circumstances, when the standard provisions of the Agreement for

Sale and Purchase are relied upon, is uncertain. It would seem the vendor could not insist that the purchaser's solicitor elect whether to make the Agreement unconditional or not because, if finance has been arranged, irrespective of whether the confirmation has been verbal or written, that fact alone will be sufficient to render the Agreement unconditional (even though it may take several days to ascertain whether the finance has been arranged).

When acting for a vendor, there is a way to make the vendor's position certain. That is to make the Agreement conditional, not on finance being arranged by a certain date, but on the vendor's solicitor being notified that finance has been arranged by a certain date. This at least gives the vendor the right to decide whether to proceed with or avoid the Agreement for Sale and Purchase. To date, the writer has not met any opposition to such an agreement.

Risk

There is a passage in Blanchard's *Agreement for Sale and Purchase* (para 613, p 70) which is extremely disturbing and which most solicitors appear to be unaware of. Blanchard cites one or two old authorities for the proposition that if, pending settlement, the vendor becomes liable to pay damages between the time that the Agreement becomes unconditional and the time that it is settled, the vendor becomes liable to pay damages to or compensate a third party (whether a neighbour or not) for, by way of example, nuisance, the vendor might be able to obtain an indemnity from the purchaser.

That this might be the position (at least, once the contract has become unconditional) should not be surprising. Solicitors will be aware of the fact that were it not for the provisions of the standard form Agreement for Sale and Purchase, the purchaser would have to bear the risk with respect to insurance during this time.

A number of comments can be made. One is that if the proposition propounded by Blanchard correctly represents the law, it is submitted that the law is out of keeping with the modern view of what risks the purchaser should be obliged to assume prior to settlement and the provisions of cl 4 of the standard form Agreement dealing with risk and insurance should be amended accordingly. Alternatively, a separate clause should be inserted into the Agreement to deal with the situation.

On the other hand, it has to be admitted that, while the consequences of the purchaser having to indemnify the vendor might be potentially disastrous for the purchaser, the likelihood of the risk materialising is slim. Further, some of the potential risks may be insured against by either the third party or the vendor (and depending upon what advice the purchaser has received from his solicitor, the purchaser).

What then, is the solicitor for the purchaser to do? Some solicitors might say that the risk which the purchaser assumes in entering into an Agreement for Sale and Purchase on this basis would be so small as to place no duty on a solicitor to even discuss the matter with the purchaser. With respect, the writer would disagree with this view. While the possibility of this kind of risk arising is extremely small, if the risk does arise, the consequences could be disastrous from a purchaser's point of view. The writer's practice is to explain to his clients what the legal position might be and to explain that a suitable clause can be inserted into the Agreement for Sale and Purchase to make it clear that the purchasers assume no risk in respect of these matters prior to completion of the transaction. In most cases, the writer's clients have decided that they will take the risk and require no amendment to be made to the Agreement. In those cases where the writer has been instructed to insert a suitable clause, the writer has received varying responses. Some solicitors have accepted the clause without question. Others have rejected it out of hand as being unusual.

One difficulty that arises when inserting such a clause into an Agreement is the fact that most solicitors are not aware of the legal position and therefore generally misinterpret the effect of the clause. Nevertheless, we are all deemed to know the present state of the law and the fact that the clause is unusual is, with respect, no reason for any vendor's solicitor to object to its insertion.

Contractual Remedies Act clause

When acting for a vendor, the writer always asks the vendor whether a "Contractual Remedies Act Clause" should be inserted to make it clear that the vendor assumes no liability for any statements made by the vendor or the vendor's agent. With only one or two exceptions, few solicitors acting for purchasers have opposed the insertion of such a clause and indeed, the writer sees no good reason for opposition to the insertion of such a clause. On the one hand, while it could protect a fraudulent vendor, it could also protect an honest vendor both in respect of unauthorised statements made by the vendor's agent on the one hand and against vexatious or unjustifiable claims of misrepresentation by the purchaser on the other hand. While not many solicitors use this type of clause, it is to be noted that more than just a few agents do (and it might be said, in view of the number of agents who have been sued for misrepresentation over the last year or two, that some of them have a vested interest in doing so).

When acting for a purchaser, and being faced with such a clause, it is suggested that it would normally be a simple matter of asking the purchaser to advise of any statements which the purchaser has relied upon when entering into the Agreement for Sale and Purchase. Any such statements should then be inserted into the Agreement for Sale and Purchase in the form of suitable promises by the vendor.

Summary

The writer wishes again to emphasise that he is not necessarily suggesting that other solicitors can learn from his practice with respect to Agreements for Sale and Purchase, still less that he is an expert. Nevertheless, the contents of this note will hopefully illustrate to some solicitors that the standard form Agreement for Sale and Purchase is not the sort of Agreement that should be dealt with lightly and that depending upon whether one is acting for a vendor or a purchaser, a number of issues must be discussed with one's client note has not discussed all of those issues and indeed, in terms of any solutions or suggestions proposed by the writer, there may be other solutions or suggestions which

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Capital appreciation — Mirage or miracle?

By W K S Christiansen, Associate Professor of Property Administration, University of Auckland

Capital growth, or appreciation, has entered into the everyday language of property investment as something of a catchphrase. This article seeks to identify it, take a look at the justification for expecting it to occur and generally pin it down by looking at a selection of property ownership situations.

One of the attractions of owning real estate is the virtual certainty that it will increase in value. There are many who acquire property very largely for this capital growth potential. In the economic climate we have become used to it has become ingrained that real estate increases in value with the passage of time.

It must be readily conceded that, in dollar terms, property does increase in value over time. What is not always quite so clear is what this means to property owners in practical terms. In fact it may mean different things to different owners and in respect of different types of property. In any event it does not always equate with available and disposable cash.

What we shall do is look at a variety of situations in an endeavour to see what capital appreciation is all about and what it means to a selection of owners: the homeowner, the industrialist, the individual investor, property companies, and managed funds. Before we look at specific cases it is worth looking at the nature of rising values.

In general terms, two factors generate an increase in property values. One is population growth and the other is currency inflation. The population factor is particularly noticeable in New Zealand which is especially prone to variations in the rate of migration into and out of the country. Scientifically respectable population projections can be easily upset by unpredictable emigration or immigration due to sudden economic factors.

A recent experience of this phenomenon occured during the six March years 1977 to 1982. They all showed net migration losses. The maximum was 26,906 people in the 1979 year. Despite this six-year drain the total population continued to increase each year during the period except for one year — also the March 1979 year. The pressure of outward migration was such that our total population actually decreased by some 1,200 people.

An example of demographic error occured in respect of the Wellington region. In the late 1960s the planners were looking forward to a regional population of 524,000 by the year 1986. By 1975 the planners were using a revised projection of 428,000 people for 1986 — an expectation reduction of nearly 100,000.

In fact, the Census statistics revealed a regional population drop of over 5,000 people between 1976 and 1981 while the estimated total for 1983 (the last figure available) was of the order of 367,000. This leaves only three years for the Wellington population to expand by some 60,000 people if the earlier estimate is to be substantiated. This is clearly an impossibility and it will be interesting to see what the 1986 Census reveals.

Population numbers is one piece of information, but this does not indicate the composition of that population. Family formation is the most important factor in housing demand. Others factors are the changing proportions of babies and the elderly, neither group likely habitual home buyers and renters on their own account; and the changing socio-ethno-economic composition of the population which dictates what people are able to afford to house themsleves. The proportion of the population which is of working age will affect economic activity.

Looked at another way, if our population numbers and composition were static, year after year, and if everyone was reasonably housed there would be no pressure on housing supply. Apart from replacement of worn-out or old-fashioned housing there would be no pressure of demand. The replacement rate could be expected to be in equilibrium.

Similarly, if the population were static so also would be the size of our urban centres. Employment would be static. Towns and cities would not grow. There would be no point in reviewing district planning

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would work equally well. Some solicitors might regard some of the points raised as being somewhat sophistical and they are of course entitled to their own view.

It is hoped that this note will be a timely reminder to solicitors of the dangers in blindly relying on a standard form Agreement (notwithstanding that the present Agreement has received the approval of the Auckland District Law Society and the Real Estate Institute). The writer believes that the point requires emphasis particularly when we face the possibility of losing some of our conveyancing practice. In these circumstances, it is imperative that our clients and the public in general be made aware of the fact that some expertise is required when dealing with Agreements for Sale and Purchase and that solicitors have the most expertise in this regard. Certainly, almost without exception, the reactions of the writer's clients have been extremely favourable when the provisions of the Agreement have been fully explained and discussed with them.

Finally, it should be recognised that the standard form Agreement is a compromise between fully protecting the rights of the vendor and the rights of the purchaser. A standard form Agreement cannot do both and that fact alone should give most solicitors food for thought. □

schemes since land use within urban areas would be constant. Urban land would be recycled by redevelopment necessitated by obsolescence, not by increased population pressure or economic activity. The classic models of urban growth, land use invasion and land value increase would cease to apply.

Given such a situation of total absence of real growth in any terms there is only one other factor that could lead to an increase in property values and that is currency inflation. But in the scenario painted above inflation would be unlikely. The illustrations are valid as such — however unlikely in the real world we have become used to. With neither growth nor inflation there is no reason for property values to rise: the capital growth factor would not exist.

While we have endeavoured to illustrate capital appreciation by explaining circumstances where there might not be any growth, it might be opportune to include the caution that property values can decrease as well as increase or merely remain the same. The most obvious measure of the movement of values is the quantum of dollars and it is on this that we are principally making our judgments. There have recently been a growing number of reports of drops in rural land values. Farms have been selling at less than purchase price. This is the reverse of capital appreciation!

Farm land has for years been changing hands at inflated prices. The price freely paid is supposed to represent market value. It might also be opportune to suggest that price paid does not always represent sustainable value. By measuring a contemplated purchase against prices previously paid the overpricing can be perpetuated indefinitely. Unless farm land is being bought as a luxury item it must, sooner or later, relate to productive capacity in terms of the profitability of the farming operation. This is perhaps a lesson that the present Government should be thanked for making obvious.

Growth comes in various forms: population growth, economic growth, industrial growth, urbanisation, agricultural growth. They are all related, the one influencing the other. Inflation is a factor of economic activity, not always of growth. All of these, the various growth elements and the rate of inflation, vary independently of each other.

We have thus traversed the environment in which capital appreciation is unlikely; we have isolated the factors which, in practice, give rise to capital appreciation. We have examined growth, no-growth (even reverse growth or depreciation) and the imponderables with which they are surrounded. Let us now take a look at several essentially urban property sectors to see what capital appreciation means to the owner in these situations.

Residential property and the homeowner

More than most we, as a nation, are property conscious and this shows in our house purchase decisions. Even at the stage of first home purchase often with government financial assistance, most buyers are already looking at their property's potential for improvement, capital appreciation and profit at the time of re-sale. Housing requirements change with the arrival, growth and departure of children, but during most of the individual's career as a home-owner the aim will be to increase the standard of living, the quality of life, the status symbolism and the value derivable from the dwelling unit.

Against this background, each purchase inevitably costs more than the last. Also, invariably, the amount of mortgage finance required climbs with each move. And yet the re-sale price is always greater than the purchase price. There is capital growth. So, what happens to it? The homeowner rarely sees it. The solicitors do: it features in the settlement statements. It passes straight from one transaction to the next and the vendor/purchaser who get a whiff of it in its passage is lucky indeed!

The growth factor probably makes it easier to purchase the next home. But the old home you want to dispose of and the new home you want to acquire are both increasing in value at about the same rate and, relatively, the new home is usually bigger and of a better quality than the old. Capital appreciation is certainly there and it can be put to good use in facilitating the ongoing process of moving from one home to the next. As to who finally collects the capital appreciation? Most probably the beneficiaries of the deceased's estate after the will is read. After all legal and other expenses of course.

Industrial property and the industrialist

Let us consider an industrialist's productive plant: the one major factory that is this industrialist's only important real real estate asset. It is a sound property, it fulfills the industrialist's purposes efficiently and the building is being well maintained. It is revalued on a regular basis and provides an increasing security on which to raise loans for the business. Apart from a takeover there are probably only two things that can disturb the industrialist's equanimity with regard to this factory: the need for new premises because of expansion, obsolescence or whatever, or the failure of the business.

The first eventuality demands redevelopment or relocation. The circumstances arising out of the second possibility are probably beyond the owner's control. With regard to redevelopment or relocation, the industrialist is in much the same position as the home owner contemplating a move from one property to another. The capital appreciation will have accrued but will become diluted in the costs of the transfer from the old smaller factory to the new larger factory. In the case of business failure the capital appreciation will, hopefully, contribute towards the satisfaction of outstanding creditors.

The only way the industrialist (in a private company situation) can receive any of the capital appreciation is if the business continues to run successfully and is sold as a going concern. There are those happy industrialists who achieve this satisfactory conclusion. But most successful businesses need to become public, even listed, companies or to merge with larger concerns. The rewards received by our industrialist in these situations probably include an element of capital appreciation in the real estate asset, but it is the value of the company's profits which really dictate the financial consideration.

Property investment and the individual investor

The average investor is seeking a regular income as well as an element

of capital growth. The emphasis might be on the one or the other depending upon the investor's priorities. The measure of an investment is its financial performance; and this is the aggregate of both income and capital growth. Nowadays, distressingly, the object is to keep ahead of inflation. Most sound commercial and industrial investments have, historically, yielded a return of around 8% to 11% per annum. Their market value is the net income multiplied by a multiplier reflecting the appropriate rate of interest for the particular type of investment. It is net income which creates value.

Most of these properties are leased so that there are rent reviews at regular intervals of between two and five years. This means that, all things being equal, the opportunity to increase the rent occurs regularly. This is important because it is these increases in net income which produce the increases in capital value. In other words this is the process of capital growth. No income growth: little likelihood of capital growth. And it is the product of annual net income plus annual capital growth which represents performance. And it is performance which will reveal whether the investor is keeping ahead of inflation or not.

However, performance and capital appreciation are not the same thing. The latter contributes towards performance as a means of measuring one investment against alternative avenues of investing funds. Net income is positive cash flow in the hand; capital growth is not. The capital appreciation is only notional until it is realised. It is not a profit until the cash comes in from the sale of the asset.

Perhaps it is our investor who is best placed to take advantage of capital appreciation. Unlike the home owner and the industrialist there is no pressing need to purchase another property investment immediately after one is sold. It is possible to pocket the capital appreciation and use it for something quite different, such as buying a new sports car or enjoying a world trip or whatever else strikes the fancy. It all depends on the individual's circumstances if, and when, the capital appreciation is collected.

Property investment and the property company

The proliferation of listed property companies is a recent phenomenon in New Zealand. It is a welcome development in that it creates a new sector of companies traded on the Stock Exchange and facilitates participation in real estate activities at minimal outlay. And the existence of a property sector in the public company world — provided no one does anything silly — is evidence of a growing maturity in the financial treatment of property assets.

Capital appreciation is important to property companies as a measure of growing market strength and expanded security base. As values increase so does the ability to raise additional funds secured on the appreciating properties. As financial resources grow so does the ability to acquire additional properties. The greater the asset base the greater will be the regard of the financial analysts and the greater should be the scope for the company to operate successfully.

It is, of course, a mistake to regard the upward revaluation of a property as a profit in respect of that property: unrealised perhaps, realised certainly not. The property company is probably one of the entities which comes nearest to seeing capital appreciation in tangible terms through the opportunities it offers for expanding the company's property portfolio and growth of company generally.

Property investment and managed funds

In this context managed funds include a range of investment vehicles in which property investment may comprise only a proportion of the assets of a particular fund. These vehicles include superannuation funds, pension funds, mutual funds, unit trusts and the like. The distinguishing feature is the placement of money by an investor in regular or other instalments — even a lump sum — into the hands of professional managers.

These managers then invest the collective funds received to the best advantage of the numerous investors, small and large, who contribute to the particular fund. This type of operation is organised by trustees on behalf of employees, by life offices, by trading and merchant banks, by sharebrokers and other financial intermediaries. The rules vary as to when and how contributors can cash up their investment, but the object in all cases is that the investor shall eventually recover the accumulated total moneys contributed plus the income return plus the capital growth attributable to the individual cash investment over the period of the investment.

This is perhaps the only instance where the investor is entitled to receive from the fund, in cash, the capital appreciation in the value of the fund's assets without their having had to be sold first. This is possible because managed funds go on for ever and only a small proportion of the fund's investors are likely to be withdrawing their entitlements at any given moment. As such funds are concurrently expected to be receiving a growing amount of contributions from a growing number of contributors and to be growing in tangible worth all the time, the confident expectation is that the fund can stand this normal form of attrition. It is an actuarial calculation.

The fund managers would not be doing the job they are being paid to do, as specialists in this field, if they were not managing the fund to increase its annual income, increase its capital value and maintain sufficient liquidity to cope with all expected withdrawals.

These five examples have been isolated to illustrate the varying nature of capital growth/appreciation in different situations. They are probably sufficient to show its sometimes elusive and other times more tangible nature. Capital growth/appreciation is always — in the conditions we are currently familiar with — present as a factor. It can often be used to good advantage even though it may sometimes be difficult to identify it in real terms and to get one's hands on it in physical terms. If we lived in conditions of greater economic stability and with a more consistently acceptable inflation rate, it would not be necessary to be so concerned about the capital growth/appreciation factor in our property acquisition and investment decisions. □

It's All Quite Legal

By George Luke

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The court of law is a place where segments of life are selected and produced in dramatic form. Players assume roles with expertise – personalities change before your eyes – dialogue and speeches flow with a balanced rhetoric and all the scripts are artistically constructed. The performances are always original and the material has been filched for centuries by hack scribblers and playwrights of genius. It is in essence a theatre.

A solicitor frequently gets far more information than he needs for the script. Like the GP he inspires trust. Some clients pour out their life-history — detailed accounts of verbal trivia and unrelated problems. Can you blame them? Who can resist a sympathetic ear? This is a cross the solicitor must carry.

Before the curtain rises there is a frantic concern for detail. Last minute perusal of the script. Dialogue is checked and re-checked. It might be a short run in a small town but no matter — things must be just right. There is the same regard for the performance as though it was a long run in a big city.

Even the most sophisticated institutions will reveal some faults. Some call it the "human element". No matter how steeped in traditions or how couched in ritual is the activity — when there are people there is friction.

Witnesses are very important to the development of the plot. Each one introduced by a curious ceremony. They must "swear to tell the truth" *in spite of the fact that truth is so elusive a quality that sages have searched for centuries to unravel its ingredients with slim results.*

The Judge knows all the rules and his main job is to see that these rules are not bent. He wears a wig and gown of ancient origin which add to his dignity. He can offer kindly advice or withering criticism as he sees fit and expects an attitude of token respect from the barristers. Everybody else treats him with the utmost reverence. The judge can be a colourful figure but by and large he has little to do with the gist of the play and at times needs to be reminded just what play it is. This prompting is done by a harassed-looking person called the "judge's associate" whose other duty is to find long-forgotten plays referred to by perverse barristers and show these to the judge.

Personal computers for practitioners

By M A Hamel of Dunedin

In this article Mr Hamel points out that members of the profession would seem not to be making full use of the computer technology that is now available to help them in their work. He points out that computers should not be regarded as something mysterious. Also that what is needed is an awareness of what they can do. Learning to use the computer is then relatively straightforward.

Introduction

Why is it that law firms spend large sums of money on computer systems that are used entirely by the staff and do not directly aid the working solicitors? To anyone who has had anything to do with the computers currently available to small businesses, the answer will be obvious – no high-minded altruism is involved, but sheer common sense. In this paper I would like to look at why this is so and to suggest when and how there will come to be computers on lawyers' desks helping them with their daily work.

The state of the art

A good place to begin looking at computers for small businesses is with their history or rather lack of history. The introduction of the micro-computer as an economically feasible tool for small businesses has occurred very rapidly over the last ten years. Although the hardware (the actual physical bits and pieces of the machine) has been undergoing truly revolutionary improvements in cost-effectiveness, the software that tells the computer what to do has not undergone anything like such a revolution. Software is written by programmers, and programmers, especially ones with original ideas, are a scarce resource. Although improvements have been made in programmer productivity, they are nothing like the improvements that have been made in computing hardware. It always takes much longer (and much more money) to make major changes to software than it takes to change and improve hardware.

As a result, the business computer industry tends to emphasise hardware rather than software, producing ever faster machines running effectively the same software. In this sense almost all small business computers are the same. Most of them can trace the ancestry of their controlling software directly back to the mini-computers of the 1960s. Many of the fundamental ideas behind the software have remained unchanged for 20 years. In order to sell micro-computers to the business user and to survive in a very competitive market, manufacturers have found it necessary to use quite extraordinary amounts of "hype" in their advertising to assure customers that their machine is in some way superior to the hundreds of others on the market. In fact very few microcomputers incorporate any truly innovative improvements over their competitors.

The ancestral mini-computers of 20 years ago were expensive machines for use primarily by scientists, who were concerned to do scientific work that placed a heavy load on the calculating abilities of the computer. Because each mini-computer cost hundreds of thousands of dollars and was to be used by several people at once, the software used on it had to give maximum performance at the expense of everything else. It was important to have easy access to the most fundamental levels of the mini-computer so that calculations could be done as quickly as possible. The scientists did not care if the machine was difficult to learn to use as long as it was fast and reliable – partly because it was the job of a professional programmer to make it work for them.

The generation of micro-computers that will be sold to small businesses in the near future have substantially more power than a 1960s mini-computer. Unfortunately most of them will still be using the software and the ideas developed for such machines. For example, here is an only slightly contrived example of a command ordering a mini-computer to print out some information:

```
cat ../letters/jim>/dev/lpt &
```

To which the computer would respond with the informative remark:

```
%
```

This particular variety of gibberish was developed in the early 1970s by two programmers who were mainly concerned to produce an efficient method of instructing the computer that minimised typing while allowing them to do what they wanted. This system, known as *Unix*, is now being widely touted as the next great advance in business microcomputing – a nice example of how the software industry tends to bring you yesterday tomorrow. The example speaks for itself. This is not the sort of progress that of itself will put computers on solicitors' desks.

One solution that has been widely applied to convert software like *Unix* (or more usually something even less welcoming) into usable word processors and accounting machines has been to add a system of menu choices "over the top" of the original system. These menus present the user with numbered alternate choices, selection of which often leads to further menus listing various things that the user might want the computer to do. This approach is rigid and can lead to a lot of chasing up and down a "tree" of menus, but it does allow a novice to use a computer without much frustration and has been very successful in well-defined fields like word processing. However, the menus are inevitably influenced by the underlying software structure. This can lead to some rather peculiar menu choices which force the user to do or not to do certain things in certain orders which appear to make no logical sense — unless you understand what is happening at a lower level in the computer.

For example, such systems usually take significant amounts of time to move from one piece of work to another, and do not allow you to rapidly break off one activity to do something else, and then resume again where you left off. This is because one of the fundamental features of the controlling software is "one user, one task", and no facilities exist to save the temporary state of work in progress and pick it up again later. This state of affairs derives directly from mini-computers and large mainframe computers, which were never envisaged as directly assisting someone who works the way a lawyer does, by way of constant interruptions. There are many similar implicit limitations built into present systems that are seldom mentioned by manufacturers, salesmen, or commentators, perhaps because they are so used to them that they seem self-evident.

In summary, despite startling improvements in hardware, most software and the ideas behind it are necessarily historical relics that reflect the internal operations of the computer rather than any considered study of how people like lawyers might wish to use them. In fact, the computer industry can be amazingly conservative in introducing new ways of using computers. A nice example is the common tendency of computers to print everything in capital letters. This is a habit that dates back to the days when computer displays and printers did not have lower-case letters because of the extra cost involved. Those days are long gone, but the idea persists, despite the fact that capitals rudely shout at the reader and are significantly more difficult to read.

The impenetrable keyboard

To examine how a computer could be useful on a lawyer's desk, I should like to consider the primary reason why the vast majority of practitioners cannot even start to use a computer themselves. Very few lawyers are effective typists. By this I do not mean the standard of typing routinely practised by secretaries but the most basic ability to find keys on the keyboard. With little motive to do so, most lawyers have never found the time or the mental energy needed to learn to type. And on most small business computers this is an impenetrable barrier — nothing can be done except through the keyboard. Fortunately, this concentration on the keyboard as the sole method of communication with the computer is another historical relic.

In fact, a keyboard is a specialised device for entering written text. If you are unable to use one, you will find entering text into the computer very slow. This does not mean that you should have any difficulty telling the computer what to do or in reading the text that it prints out, only that you cannot write a letter on it. All that is needed is another kind of input device that you can use without so much training. Several such devices are appearing on the market now, and human ingenuity will doubtless devise others in the near future. The only reason they were not available earlier was that the notion that anyone might want to use a computer without actually being a professional computer operator of some kind is a relatively new one.

The simplest and cheapest of these devices are the pointing devices. They come in different forms: currently the touch-screen and the "mouse" are most readily available on the *Hewlett Packard HP150* and the *Apple Macintosh* respectively. The touch-screen is what is sounds like — you reach out and touch the screen to indicate what you want. The "mouse" is only a little more complex; it is a little box on wheels that is somewhat nearer the size of a rat than a mouse — but then rats have a negative marketing image. You move the mouse about on any convenient flat surface, and a pointer on the computer screen follows the movement. You press a button on top of the mouse to draw the computer's attention to the thing you are pointing to. The idea behind both of these devices is that this is all that is required to issue commands to the computer. For example, in a menu-controlled system you can point to the item you want on the menu rather than having to locate and press a key on a keyboard. Both of them have the advantage of being quite fast to use — in many cases faster than a conventional keyboard. And anyone can use them.

A lawyer with one of these devices on his desk could use it just as effectively as a keyboard to obtain information from his own computer, or any other computer it was connected to. It is also worth remembering that while a non-typist might not be able to put written information into the computer, few people are unable to find their way around a calculator keyboard. A lawyer should certainly be able to manufacture bills and operate computerised accounts without learning to type. One can envisage information about clients, the firm's accounts, case law, statutes, even the contents of the Land Transfer Office, being immediately available on the computer screen without any need to use a keyboard at all. A few jobs will require the keyboard, but these can be minimised by careful design.

For example, let us imagine that (in an ideal world) you wish to search the Chattels Register to check that there is no charge already registered on a caravan belonging to your client, Mr Sierpinski. You begin by searching your list of clients held on the computer and copying Mr Sierpinski's name to a temporary holding area — by pointing at the copy command, then at the name, then at the holding area. Then you point to a command that calls up on the screen a form

that specifies a chattel search, and move Mr Sierpinski's name from the holding area into the appropriate place. Then you point to a command that checks that you have not missed out any necessary information and then despatches the request by telephone to a computer in Wellington. A reply comes back a moment later and is displayed on the screen. You point at the reply and at a symbol representing a printer, and the result of the search is printed out. At no point has the keyboard been needed.

It should be noted that the above example illustrates what could be done with the pointing hardware, given appropriate software. This does not mean to say that it will be done at all. Pointing devices have become very fashionable in the microcomputer industry, but we are still in the earliest stages of developing proper methods of using them. It is all too easy for manufacturers to add a "mouse" interface on top of an existing product without having any understanding at all of the radically different design needed to take advantage of it. As usual, it is much quicker and cheaper to add hardware than to spend money making major changes to software as well.

A second method of avoiding the keyboard that is starting to attract attention is voice recognition. Such systems recognise commands spoken into a microphone. However, despite progress in this field, systems with reasonable prices only recognise a few hundred words and not very reliably at that. It is necessary to speak quite slowly and distinctly, if the computer is to understand and to train the computer to recognise your voice beforehand. As you might imagine, a computer adjusted to recognise words spoken with an American accent has great trouble in coping with a New Zealander. Furthermore, if voice recognition is to be truly useful, it needs to be more than just a way of issuing commands. Pointing devices already do this very reliably and cheaply. Voice recognition systems need to be able to take dictation in some form. A vocabulary of a few hundred words is not enough, although it might meet approval from those who wish to simplify legal language. A few thousand words might be acceptable, and there is some prospect of this becoming economic within the next five years.

When this does occur, there will continue to be some subtle and deep-rooted problems with voice recognition. These arise from the fact that the computer does not usually have the slightest understanding of what you are talking about. Consequently it has difficulty selecting homonyms – eg between rose, rows, and roes. Nor can it distinguish and ignore remarks directed at other people in the room or to the telephone. Problems like these will not be easily solved, as they lead directly into the bottomless swamp of artificial intelligence research. It seems likely that it will be many years before talking to a computer in an office environment is anything other than an exercise in frustration, particularly in comparison to the abilities of a secretary to understand dictation.

The mystery of the computer

Given that the hardware already exists to allow practitioners to make some use of computers themselves, there remains the major problem of making the computer understandable and easy to work with. Computers are the most general-purpose tools ever invented, but unless they are presented in an understandable form, they are unusable. For some well-defined jobs like word processing or accounting, they have been highly successful. But a major problem with the sort of software packages available at present is that they are "canned" solutions to particular problems. If your firm does not have exactly the problem that the package solves you simply have to make do. If you have a small problem you may have to buy an expensive general-purpose piece of software and use only a small part of it. Worse yet, software may force you to use it to solve problems you did not want to have in the first place. The legal profession is particularly susceptible to this due to the diversity of its work and the different ways that practitioners approach it. What lawyers require is general-purpose software that can be customised to the needs of the firm by members of the firm. This may be an ambitious demand by present standards, but it is by no means an unreasonable one.

This state of affairs is closely related to the second major barrier that currently prevents lawyers from making full use of computers – a lack of understanding of how the machine works. This makes it impossible to develop realistic expectations of what a computer should do, and leads to wild over- or under-estimation of its abilities. Lacking clear understanding, it becomes essential to consult a computer guru of some variety to find out if the computer can be made to do some particular job. From the non-expert's point of view, the guru's responses vary wildly for no apparent reason from, "no, that is absolutely impossible", through, "yes, it should do that but in practice it can't" to, "certainly, do you want it to do this as well?" The real difficulty is that the novice does not know what questions to ask, and it may never occur to either party to raise a particular matter – one assuming that it cannot be done, and the other never realising that it might be useful.

I would like to suggest that the solution to this problem from the practitioner's point of view is not to attempt to acquire some form of what passes these days for computer literacy. All too often this is taken to mean buying a small home computer and learning to program it in BASIC. While such an exercise will eventually yield some insight into how computer software works, it is rather like learning how to make a motor-mower engine when you really want to fly to Sydney. The point is that the precise internal workings of the computer or of a jumbo jet should be of no concern to you. What matters is the mental model that you can use in dealing with them – in the case of the jumbo jet it is simply something you get into and get out of once it has travelled the distance. The model is very straightforward because aircraft are designed to do nothing but fly from place to place.

The difficulty posed by the computer is that it is such a general-purpose device that there is no obvious model for thinking about it. At the bottom level, the computer hardware is a complex collection of electronics that behaves like nothing else on earth and operates millions of times a second. It offers no solid ground for building an easily

understood model at all. However, the hardware has served as a model in the past for reasons of efficiency. This is one of the reasons why computing has become such a complex and obscured field, and why I feel that lawyers should not go to the trouble of getting involved in it. The latest generation of microcomputers have far more processing capacity than is needed for most work. That capacity can be put to work to make them comprehensible. What the legal profession needs, in common with many other occupations, is a simple, consistent and reliable model that is sufficiently powerful to allow use of the computer's abilities. This model will in fact be created by software running on the computer, but for all practical purposes this should be quite irrelevant. The model should provide a complete computing environment — a self-contained world.

Some progress is now being made towards this goal. Its origins lie in research conducted by Xerox into "the human-machine interface". The researchers went to the trouble of spending some 30 man-years deciding how the computer should look to the user before they built the hardware and wrote the software. The Xerox team examined what office workers were doing before they decided what the computer should do. This may seem like common sense, but almost all computers are designed hardware-first by electronic engineers who may have only the vaguest idea of who is going to be using the machine. The results of the research eventually appeared in 1981 in a machine called the Star, a personal microcomputer for offices. It was very expensive and did not sell well for that reason, even in the United States. The research team broke up and left Xerox for other firms such as Hewlett-Packard and Apple, and these companies are now producing machines that incorporate the lessons learned.

The Xerox research laid much emphasis on using a model that was already familiar to office workers. The importance of this cannot be overstated. Instead of having to learn how the computer works, the computer goes to the trouble to work like something you already understand. This enormously reduces the amount of information you have to learn. The Star system provides a picture of a desktop on the screen where everything happens. One of the objects on the desktop is a recognisable waste paper basket symbol. Few people have to be told that to get rid of something they no longer want they should move it into the waste-paper basket. Another aspect of this approach is that it makes what you are working on in the computer visible in the form of recognisable pictures that can be manipulated with a pointing device. The model to use in thinking about the computer is there on the screen in front of you.

Provided that attention is paid to making the model consistent and reliable, it becomes possible to find out how to do things with the computer by exploration rather than reading a manual. Operations that work in a part of the system that you are familiar with work in exactly the same way elsewhere or new operations that look very similar operate in an analogous way. The advantages of this approach over trying to keep the contents of an inch-thick manual in your head while you talk to the computer through something much more like a telephone conversation are enormous. It is undoubtedly a major improvement on more conventional computer systems and does make it possible for someone like a lawyer to usefully use a computer system with little effort. The pointing devices make typing a useful but not essential skill, and the "desktop" model presents the computer in a form that can be understood and immediately worked with.

While these developments are most encouraging, they do have limitations which should be remembered before euphoria sets in. The physical desktop model cannot easily provide access to the full power of the computer without losing some degree of consistency. Some things that computers do very well, such as rapidly searching through electronic files for specific information, cannot be presented as recognisable physical tools. The whole point of using a computer to manage information is that it provides new methods of working on it that were previously unheard of. Fitting these abilities neatly into the model is a difficult software design job which may or may not be competently performed, as is allowing users to customise the model to their particular needs. As the computing industry takes up the quest for market success through "desktop"-type systems, I confidently expect some disastrous experiments to be made, and possibly sold to innocent customers.

The "desktop" interface does not yet present a completely self-contained world. One of the objects on the desktop is a "floppy disk" — a computer storage device which is unlikely to appear on real desks. It has to be there to represent the machine's ability to store information on floppy disks that you can then remove from it and file somewhere else. This is not in fact an ideal state of affairs. How and where the computer is storing information should be no concern of yours — it should have sufficient capacity to cope with whatever you wish to do and that should be the end of the matter. The reason for the appearance of the floppy disk is that technology has not yet reached this desirable point. Fortunately we may expect that it will in the near future.

Finally, a much more fundamental problem is distantly visible and will become important in the near future. Because it is possible to deal with so much more information by using a computer, new methods of organising information will be needed. One of the most interesting aspects of a lawyer's office is the complexity and variability of the flow of information around the office. For example, a lawyer's desk will have on it paper relating to matters ranging from "I have been trying to look at this for the last six months" to "a note made five minutes ago about an appointment this afternoon". Many of the papers will be classified into folders that hold information about some particular client or matter, but quite a few will not be classifiable. The folders themselves as time goes by may change their roles, be divided up into other folders or coalesced into a larger file for storage in an archive. In the worst case their contents may come to bear no relation to the original label. Periodically the system breaks down for one reason or another, papers are mislaid or

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Professional education as matrimonial property: *Sullivan's Case Resolved?*

By Rupert Granville Glover, Barrister and Solicitor, Lecturer in law, University of Canterbury.

This article considers further the Californian case of Sullivan, *regarding a claim by a spouse on dissolution of a marriage for compensation for her contribution to enabling her husband to acquire a professional education.*

In two previous articles in the *New Zealand Law Journal* ([1983] NZLJ 180; [1984] NZLJ 360) I examined the question of whether a spouse, on dissolution, should be entitled to compensation for having assisted his or her partner in acquiring a professional education. My starting point, in the first article, was a Californian case, *In re the Marriage of Sullivan*, 127 Cal App 3d 656 (1982). After at least two trips to the California Court of Appeals and various remands to the Court of first instance, it now seems that Janet Sullivan has been rewarded for her persistence.

It will be recalled that, at the dissolution hearing, Janet sought to introduce evidence of the value of her husband, Mark's, medical education. That education, she said, was obtained by the joint efforts and sacrifices of the couple, it constituted the greatest asset of the marriage, and, accordingly, both parties should share in its benefits. These arguments had a stormy passage through the Californian Court system and eventually ended up in the Supreme Court of California.

The Supreme Court originally granted a hearing to determine whether a spouse, who has made economic sacrifices to enable the other spouse to qualify professionally, is entitled to compensation when the marriage breaks up. The outcome of this would undoubtedly have been influential not only in California but also in other American jurisdictions. However, before the matter was determined by the Supreme Court, the California Legislature stepped in and amended the Family Law Act, thereby apparently resolving the *Sullivan* case. The Supreme Court quickly decided the question in Janet Sullivan's favour (see 209 Cal Rptr 254 (1984)) and remanded the case to the trial Court for determination of the actual amount of compensation.

Legislative amendment

In view of my suggestion in my second article that the New Zealand Matrimonial Property Act 1976 should be amended to cover similar cases in this country, it may be of interest to practitioners to see the terms of the amended Californian legislation.

By ch 1661, the Legislature amended ss 4800 and 4801 of the Civil Code, and added a new s 4800.3. It was this new section which secured compensation for Janet, and it is worth reproducing it in full:

> 4800.3. (a) As used in this section "community contributions to education or training" means payments made with community property for education or training or for the repayment of a loan incurred for education or training.
>
> (b) Subject to the limitations provided in this section, upon dissolution of marriage or legal separation:
>
> (1) The community shall be reimbursed for community contributions to education or

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incorrectly filed, and considerable time and energy is wasted in locating them.

If this system of organising paper is picked up and transferred in its entirety to a computer, some of the problems disappear. The computer is very good at searching through its electronic files and keeping them in order, but the information revolution promises to enormously increase the amount of information accessible through it. Is a system of file folders adequate to manage this information? There seems little point in making the computer screen a window onto an electronic desktop several acres in extent. Certainly the computer can bundle folders together into "super-folders" to any extent we might like, but would a large hierarchical system be easy to work with? Should each partner have his or her own, or should there be one system of organisation for the whole firm? How should the sharing of information between individuals be controlled? While these may seem to be somewhat academic concerns at the moment, the day is rapidly approaching when they will not be. I would like to suggest that this is not a problem that can or should be left to the computing professions. It touches on much wider issues of privacy and freedom of information, and it is a general problem affecting all "information workers".

In conclusion, I hope that I have shown that although the vast majority of the computers being sold today are of no use to any but the most enthusiastic lawyer/computer buff, there is hope for the future. Methods are being developed in the marketplace now that will allow the non-typing lawyer not only to use a computer, but to do so with confidence and understanding. □

training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made.

(2) A loan incurred during marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division pursuant to s 4800 but shall be assigned for payment by the party.

(c) The reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust, including but not limited to any of the following:

(1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions made to the education or training made less than ten years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than ten years before the commencement of the proceeding.

(2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.

(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

(d) Reimbursement for community contributions and assignment of loans pursuant to this section is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party. However, nothing in this subdivision shall limit consideration of the effect of the education, training, or enhancement, or the amount reimbursed pursuant to this section, on the circumstances of the parties for the purpose of an order for support pursuant to s 4801.

(e) This section is subject to an express written agreement of the parties to the contrary.

Major features

Thus it may be seen that the section sets up a scheme with the following major features:

(1) Where one partner in a marriage receives education paid for out of joint property, such as the income of the other partner, and that education "substantially enhances the earning power" of the educated partner, the money so spent shall be reimbursed with interest to the community so that it falls to be divided in a final settlement of property;

(2) Where money is borrowed for education, it shall not be treated as a liability to be subtracted from the total property available for distribution, but shall instead be assigned directly to the partner who has benefited by the education as that partner's personal liability;

(3) The principles may be modified where justice requires it. This may be expected to occur in, but is not limited to, the following situations:

(a) Where the community has already received a substantial return on the investment made in the educated partner's training; and in this connexion, there is a rebuttable presumption that if more than ten years has passed since the expenditure, then such a return has been realised (and vice versa);

(b) That if the other partner has also been educated at the expense of the marriage community, then the cost of that education should be offset against the cost claimed by the party concerned;

(c) If the party receiving the education can make use of it to earn a living, that potential will be taken into account in any maintenance order which might be made in that party's favour;

(4) The parties may contract out of the section.

This legislation amounts to a simple yet comprehensive scheme for dealing with the potentially complex problems raised in my earlier articles. As such, it is worthy of close attention by New Zealand legislators and practitioners alike. Its attraction is that it would obviate the need for resort to difficult remedies such as the constructive trust and unjust enrichment while allowing the Courts in this jurisdiction to do justice in individual cases. Its main disadvantage is that it would not extend to stable *de facto* relationships where exactly the same problems may arise.

Conclusion

As a final word, it must be said that we still do not know how the trial Court chose to quantify Janet Sullivan's claim. We are probably entitled to assume, however, that she received a distribution that would make her feel that justice had come closer to being done than her first experiences indicated. The significance of this is wider than simply returning to Janet what was rightfully hers. The case, in its final outcome, represents an alteration in society's view of marriage; for what it says is that, in California at least, the institution of marriage may not be used as a vehicle for advancement in life for one partner at the expense of the other. This is bound to have a psychological effect on those contemplating marriage during education, and it may also, in the longer term, change the traditional ways in which lawyers classify property so that human as well as financial capital will be drawn into the equation. □

Barristers' immunity in New Zealand

By Philip Osborne, Professor of Law, University of Manitoba, Canada

This article was written by Professor Osborne on the basis of research done by him in 1984 when he was teaching at Auckland University. Professor Osborne is a New Zealander now resident in Canada. In his article he looks at the professional responsibility of solicitors and queries whether the principles of negligence applicable to them should not also extend to barristers. The article can be read as a critical analysis of the decision in Rondel v Worsley, *and perhaps reflects Professor Osborne's having been influenced by the more robust situation of North American litigation.*

Introduction

One of the most dramatic developments in the law of torts in the last 30 years has been the expansion in the scope of the tort of negligence. The Courts have responded to society's demands for protection from negligent conduct by sweeping away historical immunities and imposing a duty of care on a growing number of defendants with respect to an increasing variety of activities. The pace of expansion, rather than slackening seems to be accelerating. In light of this, the barrister's immunity from liability for negligence in the conduct of litigation appears increasingly anomalous and exceptional. It is the purpose of this article to reconsider the immunity and the justification of it given by the House of Lords in the leading case of *Rondel v Worsley* [1969] 1 AC 191 and to draw attention to subsequent English and Canadian decisions which may have sounded the death knell for the barrister's privileged position in New Zealand.

Rondel v Worsley

Worsley had defended Rondel on a dock brief in respect of a wounding charge. The defence was unsuccessful and Rondel was convicted and sentenced to 18 months imprisonment. Nearly six years after the trial Rondel sued Worsley for professional negligence. The plaintiff alleged that the defendant had failed to adduce certain evidence and had failed to cross-examine witnesses. The defendant sought to have the statement of claim struck out on the ground that it disclosed no cause of action. The motion was successful and appeals were dismissed by Lawton J and by the Court of Appeal. Final appeal was taken to the House of Lords.

The barrister's immunity from liability for negligence in the conduct of litigation had traditionally been justified on the ground that there was no contractual relationship between a barrister and his client. Their Lordships recognised, however, that in the light of *Hedley Bryne and Co Ltd v Heller and Partners Ltd* [1964] AC 465 this no longer provided a sufficient justification for the immunity and an amalgam of the reasons provided by their Lordships is set out here:

(i) The position of a barrister is different from that of other professionals because the barrister owes a duty not only to his client but also a duty to the Court and to the administration of justice generally. Furthermore, if those duties conflict, the duty to the Court overrides the duty to the client. This may not be appreciated by the client and a barrister's actions while competent and exemplary may appear inept and treacherous. The imposition of a duty of care might tempt a barrister to allow his duty to his client to predominate in order to avoid the risk of being sued. Nothing should be done to inhibit the barrister from discharging his primary duty to the Court.[1]

(ii) If the barrister was liable in negligence there would be an incentive to practise preventive advocacy. In order to appear conscientious and competent a barrister might be tempted to refrain from pruning his case of irrelevancies and might be encouraged to call more witnesses than necessary and to ask more questions than the interests of his client's case demand. Litigation would be prolonged unduly and this would not be in the public interest.[2]

(iii) The barrister is obliged to accept any client who tenders the proper fee no matter how unpopular or offensive that person might be. A duty of care should not be imposed when the relationship is not entered into voluntarily.[3]

(iv) There is a general immunity

from suit for all participants in the judicial process. This privilege which extends to Judges, jurors and witnesses should also include barristers.[4]

(v) To allow an action in negligence against a barrister would involve the retrial of the original action to decide if there had been negligence which caused damage.[5]

(vi) The action in negligence has the potential to evolve into a supplementary appeal process. It is undesirable to have a Court of co-ordinate jurisdiction decide that an earlier decision is wrong. Such a process would bring the administration of justice into disrepute.[6]

(vii) Advocacy is not a science but an art. Difficult decisions must be made immediately and in the "heat of the battle".[7]

(viii) Barristers would be faced with a plethora of unfounded, vexatious and harassing claims by disappointed clients.[8]

It is submitted that these reasons are much more impressive in their number than in their persuasiveness. Virtually all these reasons can be refuted or severely doubted.[9]

Although the barrister owes a duty to the Court, potential liability will be unlikely to affect the relationship of trust which exists between Bench and Bar. The barrister knows that he will not be found negligent if the alleged wrongful act was justifiable on the basis of a higher duty owed to the Court. Rather than being an argument for the immunity it merely sounds a caution in deciding the appropriate standard of care. Indeed who better to recognise and understand the delicate balance between conflicting duties than the Judge presiding at the malpractice action? Furthermore, members of the medical professions are continually faced with decisions which involve conflicting professional and ethical duties. One clear example is the position of a doctor involved in live donor organ transplant surgery. Decisions which balance the competing interests of donor and donee may well have to be made. Other examples are decisions involving abortion, life-support systems, experimental treatments and decisions relating to the terminally ill. Nevertheless the Courts have never suggested that doctors should not owe a duty of care to their patients.

The fear that potential liability will cause barristers to practise preventive advocacy in order to convince their clients of their competence is pure speculation. There has been some suggestion that in the United States of America some doctors practise preventive medicine and order tests and prolong hospital stays to be absolutely sure that their diagnosis and treatment is unquestionable. However the American experience in medical malpractice litigation is unique and in any event preventive medicine is likely to be in the patient's best interest. There is no suggestion that professionals in any field have taken steps which compromise their clients' interests in order to reduce the risk of being sued. The general experience seems to be that professionals who are under a duty of care do not continually "look over their shoulder" and consciously and deliberately adjust their actions in order to reduce the risk of suit. It is unlikely that the response of barristers would be any different.

It is difficult to justify the immunity on the grounds that a barrister may be obliged to accept a client. The reasoning seems to be that the client may be disreputable and offensive and it would be unfair to impose a duty of care on the barrister when he has no choice but to accept such a client. On the other hand the barrister represents himself to the public as having special skill and knowledge and it is not unduly onerous to demand that he act with reasonable competence to all clients, including those few who he is obliged to represent. Even the disreputable and offensive deserve reasonably skilled representation in return for the tendered fee. The obligation of due care on professionals attaches to their status as members of a learned profession not to the precise concatenation of relationships and events under which they provide their professional services.

Similarly the fact that other participants in the judicial process are immune from suit does not lead inexorably to the conclusion that barristers should also be immune. This is the statement of a conclusion rather than a reason for the immunity. In *Sutcliffe v Thackrah* [1974] AC 727 Lord Reid set out the reasons for the immunity of those who perform duties of a judicial character. His Lordship pointed to the fact that judicial duties involve no investigative function, they do not arise until the dispute is submitted and presented to the Judge, wrong decisions are due, almost always, to errors of judgment rather than negligence and the immunity protects the essential independence of a Judge. These factors do not appear to be automatically applicable to counsel in the conduct of litigation. The relationship of barrister and client is a special relationship. The barrister undertakes to represent the client's interests and apply his special skill, knowledge, and training to the task. Those representations should give rise to a legal duty of care just as similar representations impose obligations on other professionals.

Nobody would look with relish on the possibility of having to retry the original cause of action from which the malpractice litigation arises. However, the problem is probably exaggerated. Usually a negligence action narows down to one or two specific allegations of negligence. There seems no reason why this will not occur in a negligence action against a barrister. Often a consideration of the original transcript in light of the evidence supporting the allegations of negligence will prove sufficient. In any event it does not seem reasonable to deny a remedy on the grounds that a plaintiff may in some cases have difficulty in satisfying the burden of proof resting on him. The complexity of litigation should not lead to the denial of a right.

The fact that the negligence action might evolve into a supplementary appeal system may be something to be welcomed. The appeal system concentrates on a relatively narrow issue; in the light of the facts as established and the applicable law did the Judge come to the correct decision? The appeal system is not primarily concerned with the question of whether the trial Judge is wrong because the incompetence of counsel prevented a full and complete presentation of his client's case. The administration

of justice will not be brought into disrepute because the judicial process was thwarted by the negligence of a barrister. If the incompetence of counsel has led to wrongful convictions or erroneous civil decisions it is in the public interest that a remedy should be provided. The negligence action will provide an additional safeguard on the efficient and just administration of justice.

That the conduct of litigation involves the resolution of delicately balanced issues with little time for reflection does not distinguish the task of barristers from that of many other professionals and skilled persons. Surgeons, pilots, air-traffic controllers and many others could make a much stronger claim than barristers that they operate under great pressure without time for consideration and reflection. This whole issue goes to the question of standard of care rather than duty. No professional is liable for misadventure or error of judgment and in resolving the standard of care issue all the surrounding circumstances will be taken into account.

Underlying much of the reasoning in *Rondel v Worsley* [1969] 1 AC 191 was the fear that the abolition of the immunity would expose barristers to a flood of ill-founded and harassing claims from disappointed, offensive or disgruntled clients. To a great extent this view is a generalisation drawn from the particular plaintiff in *Rondel v Worsley* (supra). However, it also reflects a concern that a client may not appreciate the duty a barrister owes to the Court and the tactics of litigation and may, therefore, assume negligence in circumstances where such an assumption is unfounded. It is submitted that this fear is unwarranted. Professional malpractice actions are time-consuming, expensive and difficult. It will not be easy to establish the liability of a barrister and this, of itself, will discourage plaintiffs. More importantly the disappointed client will retain counsel to bring the malpractice action who will evaluate the claim with full knowledge of the judicial process, and will advise his client accordingly. That a client believes he has a right does not inexorably translate into a valid cause of action. There will no doubt be some vexatious and unfounded claims but that is a risk run by all professionals. Indeed it is a risk run by every member of the community. It can not justify the immunity.

The reasoning is no more convincing if the concern is the number of potential claims rather than their vexatious nature. The floodgates argument, heard so often in cases involving extensions in the scope of the tort of negligence, is beginning to wear a little thin. No extension in the scope of the duty of care has resulted in such a flood of litigation as to cause any concern and the better view is that of Cooke J expressed in a different context. In *Blendcraft Manufacturing Co Ltd v Fletcher Development Co Ltd* [1974] 1 NZLR 295 (SC Ad Div) His Honour stated that (p 312) "this Court should not be swayed, of course, by any fear, whether well or ill-founded, of a significant increase in the number of town planning cases in its list of business". Indeed, Cooke J has used the floodgates argument to reach the contrary conclusion that a cause of action should be established. In *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA), Cooke J stated:

> The arguments against allowing a cause of action in a case like the present tend to be largely either in terrorem or doctrinaire. The floodgates argument seems to me specious. If many meritorious claims follow, the desirability of the argument is proved. . . . And the Courts should be able to ensure that unmeritorious claims do not succeed (p 422).

The barrister's immunity is clearly an anomaly in the law of negligence and as such must be justified with *cogent* reasons. The House of Lords provided reasons but, it is submitted, they do not deserve the necessary qualification.

The New Zealand position

The New Zealand Court of Appeal did not have an opportunity to consider *Rondel v Worsley* (supra) until 1973 when it decided *Rees v Sinclair* [1974] 1 NZLR 180. In that case the respondent had acted on an application for permanent maintenance by the appellant. The respondent was sued in negligence on the ground that he had failed to lead evidence which related to the conduct of the appellant's wife. At trial Mahon J followed *Rondel v Worsley* (supra) and dismissed the action. Although the House of Lords had cautioned that its decision in *Rondel v Worsley* (supra) was confined to and reflected conditions in England and that the demands of public interest in other countries might be different (p 227 per Lord Reid), the Court of Appeal upheld the decision of Mahon J and unanimously adopted *Rondel v Worsley* (supra). McCarthy J stated that although most lawyers in New Zealand are enrolled both as barristers and solicitors, the factors supporting an immunity in England were of equal relevance to New Zealand. In particular His Honour relied on the barrister's duty to the Court, the necessity to retry the original cause of action, the barristers obligation to accept a client and the risk of preventive advocacy. His Honour concluded that it was in the public interest and in the interests of the administration of justice that barristers should be immune from liability for work done in Court and in respect of pretrial work which was, at p 187 "so intimately connected with the conduct of the cause in Court that it can be fairly said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing". Macarthur J also held that the different structure of the profession in New Zealand was not sufficient to lead to a different result and found the barrister's duty to the Court and the need to discourage preventive advocacy as particularly relevant. Beatty J agreed.

The Court of Appeal had another opportunity to consider the barrister's immunity in *Biggar v McLeod* [1978] 2 NZLR 9.[10] The issue in that case was whether the settlement of a case during the course of a trial fell within the scope of the immunity. A differently constructed Court of Appeal (Woodhouse, Richardson and Quilliam JJ) expressed no misgivings that *Rondel v Worsley* (supra) had been followed in *Rees v Sinclair* and had little difficulty in finding that the immunity covered a settlement during trial.[11]

It is submitted that the approach

of the New Zealand Court of Appeal is not beyond criticism. The Court's evaluation of the House of Lord's decision involved little more than a comparison of the structure of the legal profession in England and New Zealand. Since the status and position of the New Zealand barrister and the system of justice within which the barrister practises is essentially English the Court concluded that the decision should be followed. It is submitted that such an approach is insufficient on two grounds.

A decision of the House of Lords is a persuasive authority. It rules not by reason of authority but with the authority of reason. It was therefore appropriate for the Court to investigate whether the reasons given by the House of Lords were persuasive. Enough has already been said about the English decision to raise some doubts. But the Court of Appeal did not examine, discuss, nor evaluate the reasons given by the House. They were adopted largely at face value.

Secondly the House of Lords warned that a decision by the Court of another jurisdiction on the issue of the barrister's immunity should involve a consideration of the *conditions* in that country. Thus one might have expected a consideration of the conditions of New Zealand society which bear on to the issue. They might have included a consideration of the legal training of lawyers, the position of professionals within society, the number of young inexperienced counsel who practise on their own account, the expectations of the members of society, the fact that in New Zealand doctors and dentists are *in fact* largely immune from liability because of the Accident Compensation Act 1982, and the availability of liability insurance.[12] Unfortunately the judgments of the Court of Appeal are largely devoid of such considerations. The exception was an expressed concern that the imposition of a duty of care on barristers might prolong trials because of the encouragement to preventive advocacy. This was seen as a serious consequence in view of the heavy caseloads on New Zealand Courts. The fear of preventive advocacy is probably unfounded but this consideration points to important sociological factors which could have been at the very heart of the Court's decision.

Although the Court of Appeal appeared firmly committed to maintaining the barristers' immunity there have been some subsequent developments which may lead the Court to re-evaluate its position.

The turning of the tide?

In 1978 the House of Lords decided *Saif Ali v Sidney Mitchell & Co* [1978] 3 All ER 1033. The case concerned the liability of a barrister for giving negligent advice on whom should be joined as a defendant in litigation arising out of an automobile accident. The key issue was the scope of the immunity. A majority of the House of Lords adopted the view of the New Zealand Court of Appeal in *Rees v Sinclair*, and held that the immunity extended only to pretrial work which was so intimately connected with the conduct of the cause in Court that it could fairly be said to be a preliminary decision affecting the way the case was to be conducted at the hearing. The House refused to strike out the cause of action since the allegations of negligence did not come within the immunity. The decision is important not merely because the House of Lords adopted a narrow test for the scope of the immunity.[13] Many of their Lordships expressed some uneasiness with the anomalous position of the barrister and some of the reasons given by the House in *Rondel v Worsley* (supra) were expressly rejected.

Lord Diplock expressed the greatest reservations. His Lordship stated that in light of the duty of care on other professionals and the expansion in the scope of the tort of negligence since *Rondel v Worsley* (supra) the privileged position of the barrister must be justified clearly on the ground that the task of the barrister is different from other professionals. In particular His Lordship held that the barrister's duty to the Court and his obligation to accept a client were insufficient reasons to justify the immunity. Indeed His Lordship expressed disappointment that the House had not heard argument, (p 1045) "on the more radical submission that the immunity of the advocate . . . ought no longer to be upheld". Nevertheless Lord Diplock felt that the immunity might still be justified on the grounds that the barrister should take the benefit of the general immunity available to all participants in the judicial process and that the negligence action would give rise to a supplementary appeal system which would bring the administration of justice into disrepute. The other two Judges in the majority, Lords Wilberforce and Salmon restricted their comments to the scope of the immunity established in *Rondel v Worsley* (supra). However they acknowledged that the immunity was exceptional and should be no wider than the demands of public interest clearly require. Lord Russell dissented on the ground that so long as the immunity existed it should extend to pretrial matters. However His Lordship doubted some of the reasoning in *Rondel v Worsley* (supra). He held that neither the fact that the barrister made difficult decisions in the heat of battle nor the fact that there is general immunity on participants in the judicial process could justify the barrister's privileged position. His Lordship felt that the main reason to maintain the immunity was the duty on the barrister to contribute to an orderly expeditious and proper trial of causes in Court. Even so he admitted that, (p 1054) "much could be said for denying immunity from claims for negligence by a barrister in the conduct of civil litigation in Court". Lord Keith, also in dissent, stated that the main reason for the immunity was the barrister's duty to the Court and the undesirability of relitigating the original cause. He held that the obligation of the barrister to accept a client did not amount to much.

The tenor of the judgments in *Saif Ali v Sidney Mitchell & Co* [1978] 3 All ER 1033 is totally different from the tenor of the judgments in *Rondel v Worsley* (supra). The House in 1967 expressed a few doubts or questions about the immunity. Eleven years later the doubts are articulated and few of the reasons for judgment given in *Rondel v Worsley* (supra) escape unscathed. To a large extent the change in attitude reflects the different facts of the cases. In *Rondel v Worsley* (supra) at p 516, the plaintiff's claim was "clearly as devoid of merit as it was of any prospect of success". The House delivered a decision protective of

barristers. In *Saif Ali v Sidney Mitchell & Co* (supra) p 1036, the "plaintiff . . . started with an impregnable claim to damages, [and] found after five years that he had nobody to sue". In the light of the expansion of the tort of negligence towards a greater protection of the interests of the consumer of goods and services it would have been inequitable to deny the plaintiff a remedy. The House responded by delivering a decision reflecting the plaintiff's interest in receiving competent legal representation. The decision in *Saif Ali v Sidney Mitchell & Co* (supra) may not amount to a prospective overruling of *Rondel v Worsley* (supra) but there seems little doubt that the tide has turned.

A Canadian breakthrough

Although the issue of a barrister's immunity from suit was not directly addressed by a Canadian Court until 1979 there were indications that the reception of *Rondel v Worsley* (supra) in Canada might not be as warm as it was in New Zealand. There was some old authority, (*Leslie v Ball* (1863) 22 UCQB 512; *Wade v Ball* (1870)), that a barrister was not immune from liability in negligence and the Canadian commentators were almost uniformly of the opinion that *Rondel v Worsley* (supra) should not be followed in Canada. Professor Klar argued that it was not in the public interest that "clients damaged by the incompetent work of independent but unreasonable barristers go uncompensated" (Annotation (1978) 4 CCLT 2, p 5), and he found nothing to distinguish the lawyer from other professionals. Linden who assumed that *Rondel v Worsley* (supra) did not represent the law in Canada stated that its adoption should be "resisted" (Linden, *Canadian Tort Law* (1977) pp 111-112). Sgayias concluded his examination of *Rondel v Worsley* (supra) with a view that there were (p 682), "no compelling reasons to adopt [it]" and that "the client should be permitted to sue his lawyer in respect of all aspects of litigation. . . ." Perhaps even more compelling was the opinion of the former Chief Justice of Canada, Laskin CJ, voiced extrajudicially when he was a member of the Ontario Court of Appeal, that *Rondel v Worsley* (supra) was "based on considerations which have no Canadian relevance" (Laskin, *The British Tradition in Canadian Law* (1969) p 26). Only Catzman predicted that Canadian Courts would follow *Rondel v Worsley* (supra).

Furthermore in *Banks v Reid* (1977) 18 OR (2 ed) 148 the Ontario Court of Appeal had thrown doubt on the applicability of *Rondel v Worsley* (supra). The facts were similar to *Saif Ali v Sidney Mitchell & Co* (supra) and the main allegation of negligence was the failure to include a party as a defendant in the action. Brook JA, speaking for the Court stated:

> If it is applicable at all in this jurisdiction, where practitioners are both barristers and solicitors, *Rondel v Worsley* should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a Court. . . . (p 153)

The lawyer was held liable for his negligence. Finally in the case of *Demarco v Ungaro and Barycyk* (1979) 21 OR (2 ed) 673 the issue of the barrister's immunity came squarely before the High Court of Ontario. In 1975 Demarco was sued for the sum of $6,000. He retained the defendant Ungaro to represent him in defence of the action. The defence was in fact conducted by the co-defendant Barycyk who stood in for Ungaro. The defence was unsuccessful and judgment was awarded against Demarco. Demarco then sued the defendants in negligence. One allegation was that Barycyk had (p 676), "failed to lead evidence which he knew was available and which would have supported the plaintiff's position". This raised the question of the barrister's immunity directly and an application was made by the defendant to determine if there could be liability of a lawyer in Ontario in respect of the negligent conduct of litigation.

Krever J began by drawing attention to the fact that the position of an English barrister is somewhat different from the barrister and solicitor in Ontario. In Ontario there is a fully fused profession. All lawyers are both barristers and solicitors and are officers of the Court. Furthermore all lawyers in Ontario contract directly with their clients and may sue for their fees. Thus the structure and form of the profession in Ontario, if not the substance, is different from that in England.

Krever J then turned to Canadian authority on the issue. His Lordship reviewed two very old decisions and concluded that the immunity was not part of the law of Ontario. However, since the House of Lords had chosen in *Rondel v Worsley* (supra) to reaffirm the immunity on the grounds of public policy rather than the barrister's inability to sue for his fees, it was only proper that the question be re-examined.

His Lordship's re-examination of the issue began with a consideration of the judgments in *Rondel v Worsley* (supra) and the reasons given for the immunity. His Lordship had no hesitation in accepting the reasons given as being entirely valid for England but found none of them compelling in relation to Ontario. His Lordship noted that there was no empirical evidence to suggest that the absence of the immunity would lead barristers to prefer the interest of their clients over their duty to the Court. Certainly any risk of this was not so serious as to rob a client of his remedy. Secondly, while Krever J did not look upon the prospect of relitigating a case with any degree of relish he noted that the res judicata rule permits the possibility of relitigating what is essentially the same issue in an action in personam so long as the defendant was not a party to the original action. Better to relitigate than leave the client without a remedy. Furthermore lawyers in Ontario are under no obligation to accept a client so that factor could not be used to support an immunity. The argument that the barrister's immunity was part of the general immunity for participants in the judicial process found no favour with Krever J. His Lordship's view was that there was special relationship between barrister and client and the fact that others involved in the judicial process were immune does not in itself argue for an extension. Finally His Lordship ruled that the experience over the last 100 years in Ontario was that the duty of care did not give rise to the plethora of claims nor did it lead counsel to practise preventive advocacy and thereby prolong trials.

However, while all these considerations argued against the establishment of an immunity they did not form the basis of His Lordship's decision. Krever J went to the heart of the matter and considered whether or not the immunity was in the public interest. His conclusion was categorical:

> I have come to the conclusion that the public interest in Ontario does not require that our Courts recognise an immunity of a lawyer from action for negligence at the suit of his or her client by reason of the conduct of a civil case in Court. (pp 692-693)

His Lordship's reasons for this conclusion were varied and far reaching. The resolution of what is in the public interest is not an easy task for any Judge and often what results is a barely disguised personal preference. However, Krever J made it clear that for him a resolution of the public interest involves neither personal nor lawyer's values but, (p 693) "the values shared by the rest of the community". More particulary His Lordship tested the reaction of the "enlightened non-legally trained members of the community" and concluded that they would not favour an immunity. Indeed on the question of the immunity there was no conflict between the community's values and lawyers' values. Krever J noted that there was a consensus among Canadian legal writers that a duty of care should be imposed.[14]

His Lordship then took judicial note of some sociological facts which seemed to support his conclusion. His Lordship noted that over 12,000 lawyers serve a population of eight and a quarter million people in Ontario and all have the right to appear before any Court in Ontario as well as the Federal Court of Canada and the Supreme Court of Canada. Most lawyers are in private practice and all carry liability insurance. Of greater concern was the fact that the law profession is increasing at the rate of 1,000 lawyers per year and the articling experience of these lawyers is (p 693) "extremely variable". Many will not have had the opportunity of working with experienced and competent counsel. Yet many of these inexperienced lawyers will be appearing in Courts on behalf of their clients. The assumption appears to be that the risk of incompetent counsel is greater than that in the past. Indeed the trend in Canada seems to be that as the market becomes saturated, lawyers are commencing practice on their own account at an earlier point in their career and with less experience. The careful grooming of counsel within a law firm is becoming an exception. In the light of these sociological facts Krever J found the immunity insupportable. As a final consideration Krever J noted the position in the United Stats of America where a lawyer is under a duty of care in respect of the conduct of litigation.

It is submitted that the view of Krever J will be adopted by the Courts in other Canadian provinces[15] and ultimately by the Supreme Court of Canada. His decision is particularly compelling because it is so firmly anchored in the sociological, economic and political realities of Ontario. One of the criticisms of Commonwealth Judges has been that they display an undue willingness to assume the applicability of the decisions of the House of Lords without examining the different conditions of the jurisdiction in which they preside. No criticism can be levelled against Krever J on this ground. His decision reflects the Canadian milieu and anticipates a uniform approach in North America: the barrister will be under the same obligation of due care as any other member of a learned profession.

Portents of change in New Zealand

It is of course a matter of speculation how the New Zealand Court of Appeal will react to a renewed attack on the barrister's immunity. The Court has had no opportunity to comment on it since 1978. However the Court has in two recent decisions given close attention to the extent of a *solicitors'* duties to third parties. In the course of those judgments the Court strongly asserted a policy of professional responsibility and accountability to the consumers of professional services. This policy seems inconsistent with the barrister's privileged position and it may foreshadow a change in the Court's position on the immunity.

The more important decision from the point of view of a general formulation of policy is *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 (Cooke, Richardson, McMullin JJ). In that case the Court held that a solicitor owed a duty of care in the preparation and execution of a will, not only to the testator, but also to the beneficiaries designated under the will. Cooke J supported his decision in part by reference to the nature of the lawyers undertaking in providing professional services, the pivotal role that lawyers play in society, the high degree of reliance members of the public place in lawyers to provide competent legal services, the importance that lawyers are accountable and responsible to the public and the need to provide effective remedies for innocent members of the public who suffer damage traceable to a lawyer's incompetence. In His Honour's view it was neither just nor fair to deny a remedy. His Honour stated:

> To deny an effective remedy in a plain case would seem to imply a refusal to acknowledge the solicitor's professional role in the community. In practice the public relies on solicitors . . . to prepare effective wills. It would be a failure of the legal system not to insist on some practical responsibility . . . to recognise that the solicitor owed a duty of reasonable care to the intended beneficiary would produce a just result. It offers a remedy that should be available. (p 43)

It is submitted that these words apply equally to barristers conducting litigation. Richardson J struck a similar chord. In His Honour's view the acceptance of a duty played an important role in the (p 57) "promotion of professional competence" and provided "an incentive for lawyers to conform their conduct to a standard of reasonable care". In His Honour's view an additional desirable social objective achieved by the imposition of the duty was the "compensation of a deserving plaintiff". He stated that the cost of a solicitor's carelessness should be "borne by the professionals concerned for whom it is a business loss against which they can protect themselves by professional negligence insurance and so spread the risk rather than be borne by the helpless third

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Books

Professional Negligence

By D F Partlett. Published by The Law Book Co Ltd (Sydney), price $A48: pp 425

Reviewed by P J Downey of Wellington

The last chapter of this book begins as follows:

> An insurmountable problem in writing about this law, the subject of this book, is that it changes rapidly. A book must take a still photograph but the law is an epic movie. Some recent cases were fitted between the text and footnotes at the proof stage. . . . The High Court, however, has conspired against such tactics, by handing down, on 4 July 1985, the decision of *Sutherland Shire Council v Heyman.* This chapter is designed in a short space to discuss the significance of this decision. . . .

This latter case involved the failure of the building inspector for a local body to notice defective foundations in a building. The High Court was unanimous in holding that the home purchaser had no right of claim against the Council. The importance given to this indicates the breadth of the meaning of the term "professional" as it is used in this book. It should also be said that the book makes full use of New Zealand decisons, as in its discussions of the *Hedley Byrne* case. It also refers to the New Zealand Court of Appeal decision in *Dimond Manufacturing Co Ltd v Hamilton,* and the author devotes four full pages to a careful analysis of the judgments in the case of *Scott Group Ltd v McFarlane.*

For members of the legal profession of course, the book will have a particular interest in respect of its comments on the reliability of

Continued from p 22

party". Again these factors appear equally compelling with reference to the barrister's liability.

In *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22 the Court held that a lawyer owed a duty of care in the preparation of a certificate attesting to his client's liability under a security to the holder of the security even though the latter had legal representation. Many of the themes that were amplified in *Gartside v Sheffield, Young & Ellis* (supra) are present in the Court's decision. The nature of legal services, the degree or reliance placed in lawyers, the need to provide an effective remedy for the innocent victims of legal malpractice all played a part. Clearly the self-serving image of the barrister's immunity stands in dramatic contrast to the Court's current view of a solicitor's professional responsibility to the consumers of legal services.

Conclusion

As the expansion of the tort of negligence continues the barrister's immunity will appear increasingly anomalous, exceptional and indefensible. The reasons given in *Rondel v Worsley* (supra) are discredited. They have been attacked by commentators, questioned by the House of Lords itself and rejected in Canada. Moreover the immunity appears to be incompatible with the Court of Appeal's current notions of professional accountability. The privileged position of the barrister seems destined to bring the legal profession into disrepute with an increasingly sophisticated and demanding public. If, in the future, the Court of Appeal reaffirms the barrister's immunity it would seem incumbent upon it to provide a fresh and compelling rationale grounded in the nature of the New Zealand legal profession, the relationship of that profession to the public and the public concern for competent and accountable legal practitioners. It is submitted that a new and cogent justification will prove to be a most elusive commodity. □

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1 Pp 227-228 per Lord Reid; p 247 per Lord Morris of Borth-y-gest; p 272 per Lord Pearce; p 282 per Lord Upjohn.

2 Pp 228-229 per Lord Reid; p 251 per Lord Morris of Borth-y-gest; p 272 per Lord Pearce; at p 283 per Lord Upjohn.

3 P 227 per Lord Reid; p 275 per Lord Pearce; p 281 per Lord Upjohn.

4 Pp 229-230 per Lord Reid; pp 252-254 per Lord Morris of Borth-y-gest; p 266 per Lord Pearce; pp 283-284 per Lord Upjohn.

5 P 230 per Lord Reid; pp 249-250 per Lord Morris of Borth-y-gest.

6 Pp 249-251 per Lord Morris of Borth-y-gest.

7 P 248 per Lord Morris of Borth-y-gest; p 283 per Lord Upjohn.

8 Pp 268 and 275 per Lord Pearce.

9 Many of the arguments here have been made elsewhere. See Heerey, "Looking over the Advocate's Shoulder: An Australian View of *Rondel v Worsley*" (1968), 42 Aust LJ 31; Sgayias, "Liability of a Lawyer for Negligence in the Conduct of Litigation" (1978), 8 Manitoba LJ 661.

10 It should be noted that no reliance was placed on s 13 Law Practitioners Act 1955 which states that barristers shall have the same privileges as those in England. The Court preferred to deal with the issue on the basis of the public interest.

11 It is interesting to note that on the whole the New Zealand commentators have supported the maintenance of the barrister's immunity. See, RA "The Barrister the Client and the Court" (1968), 1 Univ of Auck LR 82; MAV "Tort – Professional Negligence – Immunity of Barrister" [1974] NZLJ 150; "Tort, Professional Negligence – Immunity of Barrister" [1974] NZLJ 150 "Tort, Professional Negligence – Immunity of Barrister in New Zealand" [1974] *NZ Recent Law* 43. The only "doubting Thomas" is the author of a note on *Biggar v McLeod* [1978] 2 NZLR 9 in [1978] *NZ Recent Law* 298.

12 This approach was adopted in the Canadian decision of *Demarco v Ungaro* (1979), 21 OR (2 ed) 673 which is discussed later.

13 For an excellent discussion of the scope of the immunity see Hughes, "Liability for Pre-Trial Negligence" [1979] NZLJ 81.

14 For an interesting discussion of public interest in this context see Ramsey "The search for Schlicheit: Ideal or ideology" (1979) 8 CCLT 245.

15 The decision has been welcomed in Canada. See Hutchinson, "Comment" (1979), 57 Can Bar Rev 346. For a less enthusiastic response see Traviss, "A Barrister's Liability to Civil Suit in Ontario: A Case Comment on *Demarco v Ungaro and Barycyk*" (1979), 13 *Law Society of Upper Canada Gazette* 262. The case has been applied by the Ontario County Court see *Wechsel v Stutz* (1980), 15 CCLT 132 (no negligence). It has also been noted that the law in Saskatchewan is the same as that in Ontario, see *Garrant v Moskal*, [1985] 2 WWR 80 (Sask QB).

laywers, whether barristers or solicitors. Again the New Zealand case of *Gartside v Sheffield* is given adequate coverage in its appropriate place, along with *Biggar v McLeod.*

On the liability of barristers, he has some interesting comments to make under the subheading of Wider Thoughts. He refers particularly to an article by Professor Lucke in (1982) 98 LQR 29, in which the professor said:

> It seems undeniable that, given the barrister's influence upon judicial law-making, his independence and his commitment as an officer of the Court to the cause of justice [the immunities] are desirable safeguards which help to ensure not too much bad law is made by cases (whether hard or not) which are too fiercely fought.

This argument is an extension of the comment by the House of Lords to the effect that the mere positing of a duty of care would have an affect on the behaviour of advocates. It can be clearly understood that they would become more cautious and more prolix. For instance, a decision not to pursue a particular line of argument in the Court of Appeal, which subsequently turned out to be successful could presumably render the barrister for all costs incurred as a result. Ironically, even the opposite could be said, in that a barrister was negligent in arguing a case successfully at appeal level when it is subsequently reversed by a higher authority on the ground that the argument before the Appeal Court was one that had no substance and should never have been adduced in the first place. It also raises the more entertaining possibility of Judges being sued for negligence whenever they are reversed on a appeal.

This is a book that can be recommended. It contains a good deal of useful and interesting background material, as well as looking at the specific areas of professional responsibility. The book is full and informative. It adopts a critical and analytic view of the material, which being at the same time of practical value in dealing with issues at adequate length. □

Books

Counsel

The journal of the Bar of England and Wales

Published quarterly by the Senate of the Inns of Court and the Bar.

Reviewed by P J Downey of Wellington

This is a new journal. Volume 1 No 1 is dated Michaelmas 1985. I did think of checking up when that was, but I decided that it was only fair to leave those who have an actual knowledge of the arcane aspects of the English legal system to have an advantage over the rest of us with that particular piece of knowledge as to terms.

In his introductory article, Robert Alexander QC, as Chairman of the Bar Council, explains that "it isn't always easy to keep people fully informed about what we are doing on the Bar's behalf. But we are determined to meet the challenge! The new magazine is part of our programme to meet that challenge, to communicate better within the Bar, and with the wider public."

The journal contains a good deal of practical information about work being done within the profession on behalf of the profession. In addition, there are articles on such matters as *high-tech,* and a report on Lord Hailsham's speech on the procedure for appointments of Judges. From this latter it would seem that the normal practice is for people to apply for appointment, except to the High Court. Lord Hailsham is reported as having said:

> High Court Judges are selected from the most eminent and able members of the Bar, and, for the most part, from leading silks. From time to time Circuit Judges are promoted to the High Court, but this does not happen very frequently. The convention in the case of High Court Judges, unlike other appointments, is that no application should be made.

There are then articles on Bowrings the insurance brokers, accountants as witnesses, news from various areas, book reviews with an interesting star system of approval and disapproval, and a good deal of other incidental information.

On the lighter side there are two articles of particular interest. The first is on holidays, and consists of a brief article on Tuscany. The second is about motorcars, which are described as conveyances for briefs.

The writer of this last article says he was rather baffled as to what sort of cars he should write about so he looked around the car parks at the various Inns of Court, and was able, from astute observation, to come up with a pattern which read as follows:

> *QCs:* Jaguars, Rovers or similar.
>
> *Juniors of over 15 years' call:* larger BMW
>
> *Juniors of 11-15 years' call:* Peugot Estate, and other similar models sufficient to hold family and impedimenta.
>
> *Juniors of 6-10 years' call:* smaller BMW
>
> *Juniors under five years' call:* Golf GTI, or anything remotely affordable.

The piece about cars may be the main item of interest for most New Zealand barristers! On the other hand it is interesting to see the particular pressures and issues under debate that are afflicting the Bar in England. After all the chances are that our problems are rather similar, or will become so in the near future.

No doubt the High Court libraries will all want to have copies of this quarterly publication for the entertainment, enlightenment and stimulation of barristers waiting for juries to come back with unsatisfactory verdicts — at least, that is, for counsel on one side of every case. □

Law and the biological revolution:

Changes in attitude, behaviour, medical standards and technology

By J Desmond Dalgety and Marilyn Pryor, both of Wellington

This article is an edited version of a paper prepared for the Seventh World Congress on Medical Law held in Gent, Belgium at the end of August 1985. The authors, who are from Wellington, are both well-known for their active involvement in the public issue of legalised abortion and the rights of the unborn. Mr Dalgety, who is a senior partner of a large legal firm, is also a Vice-President of the World Association of Medical Law. In this article the authors point out that in-vitro fertilisation and genetic engineering have introduced something totally new in the human experience and suggest that attitudes to this development have been and are being affected by the marked changes in the recent past to the law of abortion. They conclude by drawing an analogy between the legal emancipation of slaves and the need for legal protection of unborn or disabled children.

Life began for each one of us, unseen and unremarked in some remote fold of our mother's fallopian tube. That is how the human race has been perpetuated since the beginning of time. Not so in the future because of dramatic developments during the past decade. What these developments will bring two or three decades hence is difficult to predict. It may be that many children will begin their lives in a petri-dish noticed, and checked for quality at regular intervals.

In-vitro fertilisation and genetic engineering have introduced something that is totally new in the human experience and in so doing they have altered our understanding and our expectations about human reproduction. In the seven years since Louise Brown was born, more than a 1,000 children have been born whose beginnings in a petri-dish were studied through a microscope as they were checked for quality, (Wallis C, "The New Origins of Life"; *Time* 10 September (1984). Already technologists speak about "old fashioned IVF" where a woman's ovum, fertilised by her husband's sperm is replaced in her own womb. For them "modern IVF" involves a wide range of choices as to who will provide the sperm, who will provide the ova and in whose womb the resulting embryo will be placed. We have moved in seven short years from the first test tube baby to frozen embryos, surrogate motherhood, embryos grown especially for experimental purposes, artificial wombs, cloning and the fertilisation of non-human ova by human sperm.[1]

The biological revolution we have witnessed over the past decade will unquestionably influence mankind's social development. The big question will be whether the revolution is to be unbridled. In the end that will depend on whether the medical profession and/or lawmakers will impose on those involved in that revolution constraints as to what they can or cannot do in the interests of society as a whole.

While this question poses a challenge for the future, the technology brings into sharp focus the progressive failure worldwide to safeguard the status of the unborn over the past 65 years[2] and more particularly the last 20 years, by settling once and for all questions that might once have been raised about the beginning of human life. Following the birth of the very first test tube baby, Dr Edwards who helped bring her into existence said, "The last time I saw the baby she was just eight cells, in a test-tube. She was beautiful then, and she's still beautiful". (*Newsweek*, 7 August 1978).

Our generation is the first to ever have had a reasonably complete picture of the development of human life from its very beginning. In 1930 the liberation of a human egg from the ovary was first observed.[3] That same decade, Davenport Hooker studied the reflex and voluntary motor behaviour of miscarried human embroys and foetuses.[4] By 1944 the union of human sperm and ovum was first seen through a microscope and during the 1950s the first six days of human embryonic development were documented.

In the 1960s three further important advances occurred. First, the direct diagnosis and treatment of illness in a baby before birth became a reality.[5] Secondly, the physical environment and physiological behaviour of the foetus became accessible to study.[6] Thirdly, the structure of the DNA molecule was established as a double helix and with this discovery came an understanding of the genetic alphabet which ensures every human being is unique and different from every other human being.[3]

During the 1970s, fetology developed as a major speciality in the medical community along with ultrasound, fetal heart monitoring and the fibreoptic endoscope which

enables direct observation of the unborn child within the maternal womb. Today the state of medicine is so refined that doctors can study the eye movement in the middle of pregnancy; they can study the tone and minutiae of the functions of the heart; they can diagnose congenital heart disease in the unborn child and they can perform intrauterine surgery.[7]

The last 50 years of discovery and development put an end to centuries of guesswork, controversy and speculation. It is not surprising that the "Father of Fetology", the late Sir William Liley was compelled to comment:

> For a generation which reputedly prefers scientific fact to barren philosophy, we might have thought this new information would engender a new respect for the welfare and importance of intrauterine life. Instead around the world we find a systematic campaign clamouring for the destruction of the embryo and foetus as a cure-all for every social and personal problem. I for one, he said find it a bitter irony that just when the embryo and foetus finally arrives on the medical scene there should be such sustained pressure to make him – or her – a social nonentity. In this Orwellian situation, where so much semantic effort and logical gymnastics are expended in making a developing human into an "un-person", modern anatomical, genetic, immunological, endocrinological and physiological facts are a persistant enbarrassment.[3]

It is indeed a remarkable irony when you consider the history of medicine going back 400 years before the birth of Christ when the Hippocractic Oath was formulated in ancient Greece. By the end of antiquity the Oath, which included a pledge not to give a woman the means of procuring an abortion, had become accepted as a part of medical practice and it went on to become the nucleus of all medical ethics. Not only Jews and Christians embraced its ideals but so did the Arabs, mediaeval doctors, men of the Rennaissance, scientists of the Enlightenment and scholars of the nineteenth century.[4]

Its acceptance during the nineteenth century was demonstrated in a striking way by the American Medical Association. Having studied criminal abortion for two years, a committee of the Medical Association condemned induced abortion at all stages of pregnancy, the sole exception being those circumstances when the mother's life was at stake. They issued a report in 1859 saying abortion is "no mere misdemeanour, no attempt upon the life of the mother, but the wanton and murderous destruction of her child . . . ". This committee's resolutions, which were passed unanimously, called upon physicians to condemn abortion and persuade state legislatures to enact laws that would protect the unborn child at all stages of development, (Brennan W, "Medical Holocausts – Exterminative Medicine in Nazi Germany and Contemporary America" Vol 1; Nordland Publishing International Inc, New York 1980; pp 25-27). In 1871 the American Medical Association issued a further compelling public pronouncement against abortion. In this they refuted as false any contention that life did not exist in the foetus because no motion could be felt. Their document read:

> It was generally supposed that the foetus becomes animated at the period of quickening; but this idea is exploded. Physiology considers the foetus as much a living being immediately after conception as at any time before delivery. . . . Indeed, no other doctrine appears to be consonant with reason or physiology but that which admits the embryo to possess vitality from the very moment of conception. (pp 27-28)

The part played by American doctors in getting laws enacted that were protective of human life at all stages of pregnancy was so significant that historian James C Mohr dubbed the period 1857-1880 as a veritable "physicians' crusade against abortion". Over that period their campaign produced the most important burst of anti-abortion legislation in the history of the United States, (p 33).

Until the twelfth century, the legal situation in England, as in the rest of Christendom was that laid down by ecclesiastical law. The first commentaries on English common law mentioning abortion as homicide were those of Henry of Bracton and Fleta in the thirteenth century.[4] In these and succeeding legal commentaries a distinction was made between quickening, when the mother was able to feel her child's movements, and the period before quickening. Writing in the seventeenth century, Sir Edward Coke stated that under common law:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder; but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder. . . .[4]
>
> Note: Misprisons . . . are in acceptation of our law, generally understood to be all such high offences as are under the degree capital, but nearly bordering thereon. Blackstone, "Commentaries of the Laws of England" (1765) Vol 1, p 119)

By the eighteenth century, Sir Williams Blackstone a profound English legal commentator followed closely on Coke's position. "Life," he said "is the immediate gift of God, a right inherent by nature in every individual, and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb."[4]

A statute known as Lord Ellenborough's Act was passed in Britain during 1803. This Act made it an offence, punishable by death to cause or procure a miscarriage of any woman quick with child and a felony punishable by fine, imprisonment, pillory, whipping or transportation to attempt such an act on a woman "not being or not being proved to be quick with child", it was not until 1837 that the distinction between quick and non-quick was removed, In that year, the Offences Against the Person Act laid down the term of life imprisonment for attempting to induce abortion at any stage of pregnancy, (Grisez G, *Abortion: the Myths, the Realities and the Arguments*, The World Publishing Co, New York (1972) pp 188-189).

At the beginning of the twentieth century, induced abortion was illegal throughout the world with a common

exception that the act was excused where it was undertaken to prevent the death of the mother. The first breach occurred in the Soviet Union, and it was a massive breach. In November 1920, a decree was issued by the Commissariats of Health and Justice making abortion available at the woman's request. The sole restriction was that it had to be performed by a doctor in a hospital. The Soviet statute was unique and became a model for efforts to introduce permissive abortion laws in other countries, (Grisez G, pp 194-195).

In the United Kingdom, the first breach took place in the Courts in 1938. It was a "classic" case A 14-year-old girl had been raped with great violence. As a consequence of this rape she became pregnant and on 14 June was aborted by Dr Aleck Bourne at St Mary's Hospital in London. That same day, Dr Bourne was interviewed by the police and a month later he stood trial, (*R v Bourne* [1939] 1 KB).

A letter written to him by a woman colleague was entered as evidence. She had urged the value of a cause celebre suggesting that ". . . the best way of correcting the present abortion law is to let the medical profession gradually extend the grounds for therapeutic abortion in suitable cases until the law becomes obsolete as far as the practice goes", ("Medico-legal", *British Medical Journal,* 2 (1938) 199).

After presentation of the case against Bourne, the defence counsel asked the Judge, MacNaghten J to rule on the meaning of "unlawfully" in the statute prohibiting abortion. In his direction to the jury, MacNaghten J rejected any definite distinction between danger to life and danger to health arguing that the former was only proved by death. He ruled that if the doctor believed continuance of pregnancy would make the woman "a physical or mental wreck" then he operated "for the purpose only of preserving the life of the mother". The jury had to decide whether the prosecution had proved, beyond reasonable doubt, that Bourne did not believe the operation was necessary to preserve the life of the mother.[8] Dr Bourne was acquitted and the *British Medical Journal* joined in the premature rejoicing. "It was less a criminal trial," the journal's editor frankly observed "than a co-operative effort by Judge, jury, counsel and witnesses to create law out of strong but ill-defined feeling."[9]

For the United Kingdom, the final act in dismantling protection for the unborn was the Abortion Act of 1967 which permitted abortion for virtually any woman making a request during the first 28 weeks of pregnancy, (Grisez G, "Abortion the myth" pp 360-364). This and the 1973 decision of the American Supreme Court to strike down all United States laws against abortion were the major landmarks in the avalanche of changes that have taken place worldwide during the past 18 years. Some of these changes took place through the legislature, others took place through the Courts, while in other countries, changes occurred in medical practice without any change in the law itself.

It is reported that some 55 million abortions are performed annually across the globe.[10] The practice has come to be accepted as a major method of fertility control. It has the support of United Nations, European Economic Community and Commonwealth agencies. There has been a conspiracy of silence about the ongoing consequences for women. These include sterility,[11] severe depression,[12] attempted suicide[13] as well as an increased risk of miscarriage and stillbirth in subsequent pregnancies.[14]

Against this background, a history-making encounter between medicine and law was played out in 1983 before the Court of Queen's Bench in the Canadian mid-West city of Regina, Saskatchewan. Joseph Borowski, a former Cabinet Minister in the Manitoban Provincial Government, had been granted the necessary standing to bring a case before the Courts on behalf of the unborn. He submitted that the 1969 amendments to Canada's Criminal Code which permitted abortion infringed the right to life provisions of their Charter of Rights and Freedoms known as the Bill of Rights. Article 7 in that Charter reads:

> Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

If the term "everyone" in that article included unborn children, then Canada's abortion laws would have to be found unconstitutional, (Tahn A "A case of life or death: the trial of the century", pp 4-9).

Mr Borowski was represented by Dr Morris Schumiatcher, a nationally recognised civil rights lawyer. He called 15 witnesses, a number of them experts from other countries. The first of these was Sir William Liley from New Zealand. Accepted as an expert witness qualified to speak on the health care of mothers and babies before and immediately following birth, he spent a day-and-a-half giving evidence and responding to cross-examination. He told the Court there was no dispute among doctors and scientists as to when life began adding that it was "only the social definition" that had been contested, (pp 22-24).

From France came the renowned geneticist, Professor Jerome Lejeune. He testified that life began when an egg was fertilised by a sperm – the moment when all the genetic information necessary and sufficient to make a human being had been gathered together, (pp 24-26).

A major witness during the second week of the trial was an American specialist who had once been the most prominent medical figure promoting permissive abortion in the United States. Dr Bernard Nathanson explained how the new technologies of the 1970s had lead him to an acceptance that the child in the womb was a human being. As a consequence of this realisation he had become an advocate for the legal protection of unborn children. He told the Court there was no question that there was a human being within the uterus. "Our problem," he said "is in communicating with this being just as if we'd discovered life out there in the solar system. These (beings) however, are more interesting than any 'ET'. We don't have a myth. There is a real continuing story" (pp 34-37).

"Tell us when the real story begins," Schumiatcher asked him. "It begins with the union of sperm and egg," Nathanson replied. "The continuum of life begins as a fire burns. A fire has to start with a

spark. The spark, at union of sperm and egg, is a definable start. This biological fire that we call life begins with the spark – the union of sperm and egg – and ends with death. The unborn child is individual human life. We know when the spark is struck. We've done it in-vitro. There is no longer any question. We have seen it. We are no longer back in the dark ages when we didn't how how the fire begins. We've done it ourselves in the test tube," (pp 34-37).

Under cross-examination he was asked "Are you of the opinion that a group of learned men can determine when life begins?"

"I think, replied Nathanson "that the time is passed when the determination of this issues requires an opinion. It is observable fact. . . . The fetus is a person and that can be stated as scientific fact. The rest is politics," (pp 44).

It took 19 days for Dr Schumiatcher's witnesses to complete their testimony and cross examination. Counsel representing the two defendants – the Canadian Attorney-General and their Minister of Finance – announced that he would be calling no witnesses. Plainly there was nobody to contest the mass of scientific and medical data that had been presented during the 19-day trial (p 9).

Mr Justice Matheson handed down his judgment on 13 October 1983. He dismissed Borowski's claim saying that "Although rapid advances in medical science may make it socially desirable that some legal status be extended to foetuses irrespective of ultimate viability, *it is the prerogative of Parliament*, and not the Courts to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons."[15] The underlining is by the authors of this paper. [A different approach was taken by the New Zealand Court of Appeal in a majority decision in 1976 *R v Woolnough* [1977] 2 NZLR 508-524.]

Mr Justice Matheson did however go on to acknowledge the importance of the scientific advances that had been presented when he said the evidence brought on behalf of the plaintiff had substantiated that:

1 modern biological and genetic studies have verified that the foetus is genetically a separate entity from the time of conception or shortly thereafter; and
2 advances in medical procedures have made it possible for a foetus to be treated separate from its mother and, although not sufficiently developed for normal birth, to survive separate from its mother.[15]

This has been the first clearcut acknowledgment by a Court in the English speaking world of the scientific evidence now available in such abundance. On the day the Borowski trial ended, Dr Schumiatcher pointed out that the door had been opened for the unborn child and it would only be a matter of time before claims that the unborn child be recognised as a person in law would succeed. In New Zealand, a first attempt was made to obtain such recognition from Parliament in October 1983 – it failed by a vote of 48 to 30, (NZ Parliamentary Debates (*Hansard*) 19 October 1983, p 302. The killing of disabled babies by doctors shortly after birth is now a well documented fact.[16]

It was in May 1789 that William Wilberforce outlined in the British House of Commons the case for abolishing slavery. In a speech judged later that evening by Edmund Burke as "the equal of anything he had heard of in modern oratory", Wilberforce set before his colleagues evidence of the effects of the slave trade on Africa. Having dealt with the arguments of his opponents he went on to say: "Sir, the nature and all the circumstances of this Trade are now laid open to us. We can no longer plead ignorance. We cannot evade it. We may spurn it. We may kick it out of the way. But we cannot turn aside so as to avoid seeing it. For it is brought now so directly before our eyes that this House must decide and must justify to all the world and to its own conscience, the rectitude of the grounds of its decision. . . . Let not Parliament be the only body that is insensitive to the principles of natural justice."[17]

It was to be 18 years before his efforts bore their first fruit when in 1807 the British Parliament prohibited the trafficking in African slaves by British ships (pp 60-63).

His final victory however was still 26 years away. As he lay on his deathbed in July 1833, William Wilberforce was brought the news that Parliament had decreed that all slaves in the British Empire were to be freed (pp 165-167). Where is the unborn child's William Wilberforce? □

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