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SEARCH AND SEIZURE: A FURTHER VENTURE INTO WONDERLAND

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SEARCH AND SEIZURE: A FURTHER VENTURE INTO WONDERLAND

Alice: Come we shall have some fun now. I'm glad they've begun asking riddles - I believe I can guess that.
March Hare: Do you mean you can find out the answer to it?
Alice: Exactly so.
March Hare: Then you should say what you mean.
Alice: I do, at least - at least I mean what I say - that's the same thing you know.(1)

I. INTRODUCTION

The decision in Auckland Medical Aid Trust v. Taylor (2) illustrates once more the urgent necessity for the reform of the law of search and seizure. The Court of Appeal tried valiantly to tread delicately in an already confused area of the law but was overwhelmed by the subject matter of the seizure and left the law more uncertain and restrictive than before. As with Alice they appear to have stumbled into an unfamiliar and confusing land. Their intentions to appease all are laudable, but the result is at best lacking in helpful clarity or at worst totally inexcusable. The writer's mind went back to an article by A.K.Grant (3) on the overwritten judgment, where he submitted that "any case in which the golden thread of the common law is wound through wad after wad of cotton wool should unhesitatingly be declared bad law." The judgments in this case would have been classified by that learned writer as judgments with no authority on the ground of being "overwritten sans law" i.e. written in a style of hazy Romanticism, containing little in the way of decipherable legal principle. (4)

II. AUCKLAND MEDICAL AID TRUST v. TAYLOR

A search warrant was issued by the first respondent, a Stipendiary Magistrate, to Detective Sergeant Lambert to enter the premises of the Auckland Medical Aid Centre, (hereinafter called the "centre"), a charitable trust set up to provide in the words of its manual a

1 Carroll, Lewis. Alice in Wonderland, ch.7.
2 1975 1 N.Z.L.R. 728 (C.A.).
3 "The Overwritten Judgment - Its Diagnosis and Cure" 1973 N.Z.L.J. 134 at 135.
4 ibid., at 134.

comprehensive service with regard to the lawful termination of pregnancies.

Detective Sergeant Lambert made an application for a search warrant swearing an information that he was satisfied that (5) "written records of interviews with women seeking abortions by counsellors and registered medical practioners, and other clerical and medical records" would be evidence in support of the commission of the offence of "abortion". Included with the application was a deposition containing the centre's operating manual, the fact that 447 terminations had been carried out between 17 May 1974 and 30 August 1974 and that seven women had been admitted to National Woman's Hospital with complications following abortions at the centre. Detective Sergeant Lambert included in his application detailed depositions from Dr Green, a senior obstetrician and gynacologist at National Women's Hospital, and a Mrs Barry-Martin, a member of the Society for the Protection of the Unborn Child. Dr Green's deposition gave information of four of the admissions and a subsequent examination of those patients' records at the centre, and an account of a conversation he had with the Director of the Centre at the time of the visit.

The Magistrate issued the warrant to Detective Sergeant Lambert. The text of the warrant was as follows (6):

"SEARCH WARRANT
"Summary Proceedings Act 1957

C.R. No:

"To: Every Constable
(or to Garry James LAMBERT, constable)

I am satisfied on an application
*(in writing made on oath)

THAT there is reasonable ground for believing that there (are) in (1) premises known as the Auckland Medical Aid Centre, situated at 182 Great South Road, Greenlane,

the following thing(s) namely: written records of interviews, of women seeking abortions, by counsellors and doctors the latter being registered medical practitioners, and other medical and clerical records.

*(which there is reasonable ground to believe will be evidence as to the commission of an offence of (2) abortion.

THIS IS TO AUTHORISE YOU at any time or times within one month from the date of this warrant to enter and search the said (1) premises situated at 182 Great South Road, Greenlane with such assistants as may be necessary, and if necessary to use force for making entry, whether by breaking open doors or otherwise, and also to break open the * (box) (receptacle) (any box or receptacle therein or thereon) by force if necessary; and also to seize

*(anything which there is reasonable ground to believe will be evidence as to the commission of the offence)

DATED at Auckland this 16th day of September 1974.

'N R Taylor'
Magistrate"

*Delete item(s) which do not apply
(1) Here describe building, aircraft, ship, carriage, vehicle, box, receptacle, premises or place.
(2) State offence, being an offence punishable by imprisonment.

5 ibid., at 730.
6 ibid., at 732.

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Detective Sergeant Lambert went to the centre where he demanded all the files and removed between 425 and 475 of them to the Central Police Station. Lambert made it clear that he was not looking for any specific files.

The centre's application to the Supreme Court for an order quashing the search warrant issued by the first respondent was refused by Wilson J. The writer concurs with the view expressed in Recent Law (7) that while the learned judge is to be congratulated on giving an oral judgment, when haste is the order of the day, might it not be appropriate to err on behalf of the party whose interests are most subject to irretrievable violation.

Before the Court of Appeal the centre sought various orders (8):

(i) That the decision of the first respondent be removed to the Supreme Court for review.

(ii) That the search warrant issued by the first respondent be brought into the Supreme Court for review.

(iii) That the said decision and the search warrant issued thereunder be quashed.

(iv) A declaration declaring that the police were not entitled to the possession of the records or copies or notes taken or made.

(v) A declaration stating the files private and confidential and an order prohibiting the police from contacting anyone named in the files or any employee of the centre.

The court allowed the appeal and made orders (i), (ii) and (iii) which in effect meant that the decision of the Magistrate to issue the warrant was quashed. The court also made the fourth order but specifically excluded copies and allowed the respondents several weeks to apply to the Court of Appeal for an order exempting from the order any orginals of the records which they may consider that they have legal justification for retaining on some basis other than the validity of the search warrant itself. (9)

The search warrant in question was issued under section 198 of the Summary Proceedings Act 1957. The relevant parts of the section are:

7 1975 Recent Law 145 at 146.
8 1975 1 N.Z.L.R. 728 at 729.
9 ibid., at 738 - 739.

. . ./4

(1) Any Magistrate or Justice, or any Registrar (not being constable), who, on an application in writing made on oath, is satisfied that there is reasonable ground for believeing that there is in any building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place -

(a) Any thing upon or in respect of which any offence punishable by imprisionment has been or is suspected of having been committed; or

(b) Any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or

(c) Any thing which there is reasonable ground to believe is intended to be used for the purpose of committing any such offence -

may issue a search warrant in the prescribed form.

(2) . . .

(3) . . .

(4) . . .

(5) Every search warrant shall authorise any constable to seize any thing referred to in subsection(1) of this section.

(6) . . .

(7) . . .

(8) It is the duty of every one executing a warrant to have it with him and to produce it if required to do so.

Subsection(1) speaks of a warrant in the prescribed form. The Summary Proceedings Regualtions 1958 made pursuant to the powers conferred by section 212 of the Act set out the prescribed form, form 50. (10)

The court found no difficulty in disposing of the appellant's first two submissions that: (1) there was insufficient evidence before the Magistrate to satisfy section 198(1)(b), and (2) that neither the information nor the warrant stated an offence punishable by imprisonment, both referring to the "offence of abortion". There was plenty of evidence available to the Magistrate to issue the warrant and the court was of the view that hearsay evidence is acceptable. (11) Further it was clear that everybody concerned knew that the words " offence of abortion" were used loosely to cover the

10 ante, p.2.

11 1975 1 N.Z.L.R. 728 at 735.

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offence of unlawfully using an instrument on a woman with the intention to procure a miscarriage, contrary to section 183(1)(b) of the Crimes Act 1961. The court upheld Wilson J's use of section 204 of the Summary Proceedings Act 1957 to cure this particular defect. Section 204 provides that:

> No information . . . warrant . . . shall be quashed, set aside, or held invalid by . . . any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court os satisfied that there has been a miscarriage of justice.

In these circumstances the court found that there had been no miscarriage of justice due to the use of the colliquial name for the offence. (12)

The appellant's third and major submission, that the warrant and application were unreasonably vague and general, found favour with McCarthy P. and McMullin J. (13), with Richmond J. concluding that the excessive generality of the description of the things to be seized made the warrant defective and led in a real sense to a miscarriage of justice. (14)

A Magistrate when issuing a warrant must be satisfied that there is reasonable grounds for believing that there is on some premises evidence of the commission of an offence. It is not enough for him to feel that there may be evidence which might be ~~might be~~ evidence of the commission of an offence. (15) The Magistrate's grounds for satisfaction must be the information given to him by the police and that information must provide evidence of the commission of an offence. It follows from this that as the application was made with respect to a specific offence or series of offences then the warrant must be issued in respect of that specific offence or series. The President continued (16):

> The application and the issue of the warrant are manifestly linked together by s 198 in a consequential way, and in my opinion it would be an unwarranted and an undesirable construction

12 ibid., at 735 and 747.

13 ibid., at 736 - 738 and 748 - 750.

14 ibid., at 742.

15 Bowden v. Box 1916 G.L.R. 443; Mitchell v. New Plymouth Club Inc., 1958 N.Z.L.R. 1070.

16 1975 1 N.Z.L.R. 728 at 736.

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of the section to hold that once sufficient evidence of an offence is given the Magistrate may then issue what is in effect a general warrant.

If then a warrant can only be issued following information relating to a particular offence and in respect of that offence, one would expect to see in the warrant particulars which indicate the offence with sufficient particularity . . .

McMullin J. also viewed the generality of the warrant as a fundamental defect which could not be cured by section 204 of the Act, and that it was a defect directed at the generality of the things to be seized. Such a defect, in the learned judge's opinion, defeated firstly the purpose of form 50 which says "State offence, being an offence punishable by imprisonment" and secondly subsection(8) of section 198. (17)

It is important to consider the rationale behind subsection(8) and the necessity to make the warrant clear in its meaning and intent. McCarthy P. and McMullin J. both considered that the warrant must be sufficiently particular in the naming of the offence to enable (18):

(a) the officer executing it to know to what offence the articles he is searching for must relate, and to enable

(b) the householder to understand, and if necessary to obtain legal advice about, the permissible limits of the search.

McMullin J. also points out that the production of the warrant may have a twofold purpose (19): (i) to satisfy a householder that the person presenting the warrant is a person having the judicial authority to enter the premises, and (ii) to enable the householder to ascertain to what things the search is to be directed.

It is submitted that the court's formulae for the attainment of the objectives are impractical and duly restrictive on police activity. The whole process of the execution of the warrant must be considered in relation to the statutory form of warrant provided. The Court of Appeal did look at various aspects of the warrant but in the view of the writer they attempted to achieve the above named objects by attaching them to the wrong sections of form 50.

A constable is to produce a warrant if asked to do so, to show that he has the judicial authority to enter the premises.

17 ante, p.4.

18 1975 1 N.Z.L.R. 728 at 736 - 737 and at 749.

19 ibid., at 749.

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Form 50 clearly comtemplates that the section saying "State offence, being an offence punishable by imprisonment" should contain a clear description of the offence as in the Crimes Act 1961 or the relevant statute. It is unreasonable of the court to require a Magistrate to be specific in the naming of the offence beyond the wording of the statute. The writer can find no authority for such a proposition and submits, with respect, that the court has been less than careful in its use of The Queen v. Tillett, Ex p Newton (20) to support its contention that the offence must be named with (21) "a sufficient measure of particularisation."

The statutory form provided by the regulations makes it clear that a necessary part of any warrant is a clear and accurate description of the things to be seized. McCarthy P. and McMullin J. were both concerned that the householder must know what things were to be seized at the time when the officer is making the search, however they did not relate this important facet of the warrant to the section of form 50 which says "Here insert description of the things to be searched for." Instead the court chose to make specificity as to the items to be seized an adjunct to the naming of the offence. The writer believes that if the Court of Appeal was referred to the long line of Canadian authority (22) on the necessity for specificity in the description of the items to be seized the decision in this case would have been the same, in theory, and the reasoning more helpful.

It is a worthwhile excerise to consider the examples given by McCarthy P and McMullin J. when they attempted to illustrate the points that they were trying to make. McCarthy P. (23):

> I do not wish to suggest that a warrant must set out with precision as much detail as would be required in a charge sheet, and I agree with the submission made to us that whether the particulars given are adequate must turn in many cases on the individual crime. For instance, I would imagine that if the warrant was issued in respect of "theft of clothing from XY Ltd" that would be adequate. But by no stretch of the imagination can the description in the present case be said to convey to anyone that it was issued in respect of a particular instance of illegal termination of pregnancy.

20 (1969) 14 F.L.R. 101 (S.C.); discussed post, pp. 13 - 14.

21 1975 1 N.Z.L.R. 728 at 749.

22 post, at pp. 15 - 18 the cases are discussed.

23 ibid., at 737.

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A Magistrate when issuing a warrant may have before him many types of information which indicate the commission of a crime. The police may be able to provide information about the type of goods stolen, the place from where they were stolen, the place where the offence was committed, the place where the fruits of that offence are now hidden, the place where evidence of the commission of a specific offence can be found. Such matters related to the description of the items to be seized, not to the offence itself. In many cases it would be impossible for the police to say exactly where the items were stolen from, to use McCarthy P's example, but they may be able to show conclusively that particular premises are being used to store stolen property. They may even know what type of property it is, from the brand of clothing to the make of colour television. Surely the learned President did not contemplate the situation where the warrant would say in the "State Offence . . . " section of form 50:

> which there is reasonable grounds to believe will be evidence as to the commission of the offence of theft being colour television sets the property of persons unknown.

Such a description is ludicrous when there is provision earlier in the form for a description of the items to be searched for and seized if found. The type of description proposed by the President may be suitable for a common law warrant as was issued in Chic Fashions (West Indies) Ltd. v. Jones (24), (where coincidentally the warrant was issued in respect of clothing the property of I.P. Ltd which had been feloniously stolen), where there was no statutory form, but it is unacceptable when a clear form has been provided.

McMullin J. (25):

> It [the warrant] referred only to an offence of abortion although it would have been no less invalid if the warrant had referred to "an offence under s 183 of the Crimes Act 1961", or "an offence of unlawfully using an instrument on a woman with intent to procure her miscarriage". . . .
> While I do not think that a search warrant must state the offence in respect of which it is issued with particularity as to place and date of commission or the person on whom it has been committed, because that may not always be possible I am of the opinion that there should be a sufficient measure

24 1968 2 Q.B. 299 (C.A.).

25 1975 1 N.Z.L.R. 728 at 749.

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> of particularisation of the offence. . . to know just what are the metes and bounds of the search and seizure contemplated.

If one does not have to state the offence in respect of date and place of commission or on whom it has been committed, as was suggested by the President; XY Ltd., then the only other thing that can be stated in the warrant is a description of the fruits of the commission of the offence or a description of other evidence which may be evidence as to the commission of an offence, information which the legislature thought fit to provide a special place for in the statutory form. It is submitted that it is more reasonable to require the date and place of the commission of the offence to be named with the offence, than it is to require a description of the articles to be seized to be the adjunct to the description of the offence. The court did not analyse the form section by section and appears to have ignored the earlier provision as to the description of the articles.

It can be concluded that McMullin J. would not approve of the President's example. Firstly because it referred only to "theft" and that does not even meet the learned judge's rejected standard of "an offence under section 220 of the Crimes Act 1961", and secondly "theft of clothing from XY Ltd." only gives an indication of on whom the offence was committed, a detail which the warrant does not have to state according to the judge.

In attempting to illustrate their thinking the learned members of the court did not give an example of how the warrant might have been framed in the present case. McCarthy P. saw fit to give an example from the field of theft, and McMullin J. told us what was wrong with the examples he gave and why they were unacceptable without enlightening us as to what was acceptable. One is left with the feeling that the Court of Appeal found it impossible to frame an example which related to this case. Richmond J. also had great difficulty in giving an example, although he approached the issue from the point-of-view of the articles to be seized and their description. The learned judge destroys much of the substance of his discussion by the use of an illustration which if used in this case would give the police a warrant as wide in its discretion as the one which they thought they had obtained.

It was a submission of the appellant that the concluding words of the warrant (26)"any thing which there is reasonable ground to

26 ante, p.2.

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believe will be evidence as to the commission of the offence" as provided in the warrant are not in a form authorised by section 198 of the Act. Richmond J. concluded that the draftsman had intended subsection(5), (27) "Every search warrant shall authorise any constable to seize any thing referred to in subsection(1) of this section", to refer back to paragraphs (a), (b), and (c) of subsection(1) only. But that as subsection(5) refers back to the entirety of subsection(1) it therefore in the context of this case authorised the seizure of such things only as regards which the Magistrate, in the words of subsection(1) "is satisfied that there is reasonable ground for believing that there is in any . . . place . . . any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence." This would mean on a strict interpretation that the search is limited to anything which the Magistrate has reasonable ground to believe will be evidence of the commission of the offence at the time of issue of the warrant. (28) Contrasted with this Richmond J. concludes that (29):

> The concluding words of the warrant, in their ordinary meaning when construed by a lawyer, probably authorise the seizure of any thing, whether within or without the earlier description of things contained in the warrant, which there is in fact, at the time of the seizure, reasonable grounds to believe will be evidence as to the commission of the offence.

If the warrant leaves a discretion to the executing constable as contemplated by the concluding words of the warrant, then such a warrant is outside the ordinary and natural meaning of section 198 in the view of Richmond J. A warrant drawn to comply with section 198, i.e. covering the seizure of such things which the Magistrate is satisfied that reasonable grounds for belief exist, (30) then (31):

> . . . enables both the constable executing the warrant and the occupier of the premises to ascertain what is to be seized by reference to the description of the articles. Such a warrant, if validly issued, will cover the seizure of the described articles whether or not there is at the time of

27 ante, p.4.

28 1975 1 N.Z.L.R. 728 at 740.

29 idem.

30 idem.

31 idem.

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of seizure actual and reasonable grounds for believing that they will be evidence as to the commission of the offence.

The learned judge's analysis of the situation, although it does not find favour with McCarthy P. (32), goes to the heart of the issue; the description of the articles. Such a warrant as described by Richmond J would not be a general warrant and would not allow the police to go on a fishing expedition as undoubtedly they thought they could do on this occasion. McMullin J. was in basic agreement with Richmond J. on the interpretation of section 198 and the scope of the search authorised by the warrant. (33) However the judge postulated that there were two discretions involved in the issue of a warrant. Firstly that of the Magistrate as described by Richmond J. and secondly that of the executing constable which he finds less objectionable than Richmond J.

McMullin J. inclined to the view that the warrant allowed the officer a (34) "discretion which allows him a wider choice of things but can only be exercised if there exist in the mind of the constable reasonable grounds for the belief that the things will be evidence as to the commission of the offence. It must be able to survive subsequent objective scrutiny." Under the Richmond analysis the subsequent scrutiny would not be necessary as the articles seized would be within the description in the warrant. The only scrutiny would be of the Magistrate's decision to issue the warrant and whether the articles are within that description. The McMullin views involves the further scrutiny of the reasonableness of the constable's decision, a position that is unacceptable when there is no provision in the Act for the constable to have to carry the 'extra' items before a Magistrate and justify their seizure. The only way in which the constable can be brought to account for his actions is through proceedings such as these. The giving of a discretion to the executing constable defeats the whole purpose of having a Magistrate exercise a judicial function in issuing the warrant. The fact that the legislature considered that the sole discretion was in the Magistrate is further emphasized by the specific exclusion in subsection(1) of the constable from the people capable of issuing a warrant. The Richmond view is to be preferred to the majority view allowing for the fact that McCarthy P. and McMullin J.

32 ibid., at 738.
33 ibid., at 746.
34 idem.

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specifically decided against deciding this matter. (35)

Richmond J. saw the real danger of the concluding words of the warrant in that they may divert the issuing Magistrate from his duty to sufficiently define the nature of the articles to be seized. (36)

> There was certainly no evidence before the Magistrate on which he could be satisfied that there was reasonable grounds for believing that all the records described in the warrant . . . would be evidence as to the commission of the "offence of abortion". . . . it was in my opinion his [the Magistrate's] duty to ensure in the particular circumstances of the present case, that the warrant would authorise seizure only of such records as in fact would be evidence of such an offence and not to issue the warrant in the form which could be reasonably understood as one which authorised the removal of all records without previous selection by a study of their individual evidential value.

A Magistrate would have to define in a reasonable way the nature of the articles to be seized. In some cases some indication of the circumstances of the offence may go a long way to achieve this result. The judge continued (37):

> That, however, was not done in the present warrant which merely refers to "an offence of abortion" without giving any particulars as to whether the police were investigating the miscarriage of a particular woman or the cases of all the women who had attended the clinic. In other circumstances a sufficiently precise description of the articles could suffice notwithstanding that the offence involved was described (as in the present case) in a general way.

This sounds excellent. In this case the police had a declaration from Dr Green saying that one of the two women referred to him with sepsis had told him that the only counselling she had received at the centre prior to the abortion was that she was asked why she wanted the abortion. The reason that she gave was that she was unwilling to upset her parents and on this basis she obtained an abortion. The evidence available to the Magistrate relating to

35 ibid., at 738 and at 746 -747.
36 ibid., at 742.
37 idem.

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the inspection by Dr Green of specific files at the centre and the other cases admitted to National Women's Hospital all provided ample information for him to issue the warrant including a description in the warrant such as:

> . . . the written records of interviews, medical and clerical, of Mrs A, Miss B, Mrs C and Miss D by counsellors and doctors, the latter being registered medical practioners.

Such a description is not an unreasonable demand on the police in this case and would completely satisfy Richmond J's criteria. It is specific and does not allow the police to go on a fishing expedition through all the files in the centre. However the judge gives as his example of an adequate description in this instance (38):

> I would think that in the present case the situation could have been reasonably met by adding to the words of the warrant which describe the articles to be searched for some such qualification as "which indicate that the pregnancy of any woman (or women) therein referred to was terminated unlawfully.

This description is in effect no better than that actually in the warrant used by Detective Sergeant Lambert. The police would be authorised to inspect all the records and then on the basis of a discretionary decision to decide in each case whether that particular file indicted that the pregnancy of the woman therein referred to was unlawfully terminated. The learned judge earlier (39) had commented that if properly issued, the warrant will cover the described articles whether or not there is at the time of seizure actual and reasonable grounds for believing that they will be evidence as to the commission of the offence. The description provided by the learned judge does not meet this criteria as there is no difference between this description and that in the warrant used as it requires the executing constable to think that the file indicates that the pregnancy was terminated unlawfully, which it is submitted is exactly the same as allowing the officer a discretion to decide whether the file being studied is evidence as to the commission of the offence of abortion. In effect the example provided by the judge is a general warrant. The officer is still permitted to go on a fishing expedition through every file in the centre and can take any file which he thinks indicates that the pregnancy of the woman therein referred to was unlawfully terminated.

38 idem.

39 ante, footnote 31.

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The only difference between the decisions of Richmond and Mcmullin JJ. is that the view of the latter is to be preferred as at least it allows an objective scrutiny of the officer's action after the seizure, whereas Richmond J. was of the opinion that once validly issued with an adequate description of the things to be seized, and presumably he considered his own adequate and that if fulfilled his theoretical criteria, any seizure within that description was lawful.

Of considerable interest in this case is the Court of Appeal's curious lack of the use of authority to decide the various issues raised. The major authority cited by all members of the court was a decision by Fox J. in the Australian Capital Territiory's Supreme Court in 1969. Tillett's case is worthy of close study.

The warrant in Tillett's case was issued under a statute very similar to section 198 and the statutory form provided by the regulations, form 50. Where it is required to "State offence . . ." the justice, Mr Tillett, followed the wording of the information before him in saying that there was (40) "reasonable grounds for believing that the same [books, documents, or other things] will afford evidence as to the commission of an offence against the Commonwealth Crimes Act contrary to the Act . . ." Fox J. in his decision when speaking of the necessity to state a "particular offence" did not mean it in the same sense as found favour with McCarthy P. (41) and McMullin J. (42) The learned judge used it solely in the context that the warrant must state an offence and not give the Crimes Act or any other statute as a general reference. This is not obvious from the passages chosen by the members of the court to support their judgments.

There are two factors which indicate that the Court of Appeal (McCarthy P. and McMullin J.) were aware of the true significance of the decision of Fox J. Firstly there is a curious change of emphasis in the judgment of McCarthy P. over several paragraphs leading up to his discussion of Tillett's case. It is arguable whether the word "particular" is synonymous with "specific", however it is clear from the judgments that the court regarded them as the same because of the constant interchange that takes place. In the first paragraph of reasoning on the appellant's

40 (1969) 14 F.L.R. 101 at 105.

41 1975 1 N.Z.L.R. 728 at 736 - 737.

42 ibid., at 744.

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principle submission the President speaks of the necessity for the application and the warrant to speak of a "specific offence." The word "specific" is used four times in the one paragraph in relation to the offence, without a mention of "particular." (43) In the next paragraph a very long one, the learned judge changes to the constant use of the word "particular" when explaining the type of description he is looking for in the warrant, except for on one ocassion when speaking of an argument presented by the Solicitor-General. Also in the middle of this paragraph comes the extract from the decision of Fox J. who also uses the phrase "particular offence", but as has been pointed out, in a completely different context. McCarthy P. worked Tillett's case into his judgment well.

The second and perhaps the most telling point against the members of the Court of Appeal is if one takes the trouble to look up Tillett's case to find out what the three little dots in the passage quoted by McMullin J. signify has been left out. This one sentence, only thirty five words and an authority, which the learned McMullin J. found convenient to excise from his judgment's only quoted authority are most revealing. Fox J. discusses the use of the word "any" in paragraph (b) of the equivalent of section 198 (1) and concludes that the justice must have before him, before he can issue the warrant, material which he can relate to an offence, and he goes on (44):

> The word 'any' is unlimited in the sense that it invites selection from an entire field, but primarily it denotes one from that field and in my opinion it is necessary that one be selected (see 3 Corpus Juris Secundum, p.1399).

What Fox J. wanted was the selection of an offence from the entire field in the Commonwealth Crimes Act and not the more specialised meaning read into his judgment by the members of the Court of Appeal.

The court's use of Tillett's case is curious to say the least, and the way it has been used further shows the inadequacy of the decisions in this case.

The Court of Appeal delivered this judgment over the Christmas period. The case was argued on 2, 3 December 1974 and the judgment given on the 10 January 1975. The court's desire to give a hasty

43 ibid., at 736 - 737.
44 (1969) 14 F.L.R. 101 at 112.

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decision has led to some poor conceptualising of issues and the provision of adequate solutions to the issues raised will have to await further consideration. It seems a pity that the court was not referred to the extensive line of Canadian authority on the description of the articles to be seized under a warrant or that if they were they chose (apart from Richmond J.) to ignore it.

Another feature of this case, which is worthy of an article in its own right, was the order made by the Court allowing the police to retain some of the files which they consider they may have legal justification for retaining on some basis other than the validity of the warrant itself, and the specific exclusion from that order of all copies, whether or not there was legal justification for their retention or not.

This order defeated the value of all the other orders made for the appellant and the purpose of the appeal was completely and totally negated. The police could, and did, copy all the records and continue on as before in their investigations. This issue is the subject of further appeal to the court in another action and the decision of the Court of Appeal is awaited with interest.

III. THE CANADIAN VIEW

The following are cases where Canadian Courts have held that the description of the things to be seized was too vague and general and did not give the householder an adequate picture of the metes and bounds of the search and seizure.

It is as well to remember the description of the things to be seized in the present warrant (45) and to ask what a court in Canada may have done with the warrant. In the writer's opinion there can be no doubt that it would have been unacceptable. The warrants in these cases were issued under section 443 of the Criminal Code of Canada or similar previous legislation. Section 443 and the statutory form provided are very similar to section 198 and form 50.

(i) R. v. Solloway & Mills (46)

The description of the things to be searched for was as follows (47):

> That books of account, ledgers, financial statements, documents, confirmations, share registers, exchange floor slips, and all

45 ante, p.2.

46 1930 3 D.L.R. 770.

47 ibid., at 776.

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other records of every description which there is reasonable ground to believe will afford evidence that . . .

The Ontario Supreme Court (F.C.) held that such a description was too vague and general.

(ii) Re United Distillers Ltd (48)

The things to be searched for and seized were described as "Documents, Records, and Correspondence dealing with the export of liquor by United Distillers Ltd." or other named persons or corporations and "cheques, vouchers and statements showing the payment of monies" to a named firm "which will afford evidence . . ." In the British Columbian Supreme Court Chief Justice Farris held that the description was insufficient and that it left the actual choice of what was to be seized to the police.

(iii) Shumiatcher v. A.-G. Sask., and Salterio, J.P. (49)

The justice issued a warrant with this description:"certain letters, copies of letters, cancelled cheques, files, agreements, statutory declarations and drafts of the same, various documents, and type-writers pertaining to the following charges . . ." Chief Justice Hall held that the description was insufficient and left to the discretion of those executing the warrant what should be seized thereunder and for that reason he had no hestitation in quashing it.

(iv) Regency Realties Inc. v. Loranger (50)

The offending description was "purchase invoices, sales invoices, cheques paid and others, band statements, account books, cashiers' returns, inventory lists, contracts, minute books, and all other documents relating to the operation of Regency Realties Inc." The reason for the careful approach of the Canadian Courts is well expressed by Brossard J. when he states (51):

> To permit an officer of justice to proceed blindly in a search of someone's home when neither the information nor the warrant make it possible for him to know in a reasonable fashion the circumstances of the crime to which the warrant is linked, or to identify in an equally reasonable manner the "things" towards which his search should be directed, would be of such a nature to lead to

48 1947 3 D.L.R. 900.
49 (1960) 129 C.C.C. 267.
50 (1961) 36 C.R. 291.
51 ibid., at 299.

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abuses and grave injustices, for no one would any longer consider himself protected against such a search.

(v) Re Criminal Code, s. 429, (52)

Again there was a very general description provided and Mr Justice Morrow citing Brossard J.(53) with approval said (54):

> To avoid search warrants becoming instruments of abuse it has long been understood that if a search warrant fails to adequately describe the offence, fails to accurately describe the premises to be searched, or fails to give an accurate description of the articles to be seized then it will be invalid.

There are other cases on the same issue:

Regina v. Read, Ex Parte Bird Construction Co. Ltd. (55)

Regina v. Colvin, Ex Parte Merrick. (56)

Re Purdy and the Queen. (57)

R. v. Johnson and Franklin Wholesale Distributors. (58)

It would seem that it would have been more fruitful for the Court of Appeal to have said that the description "written records of interviews, of women seeking abortions, by counsellors and doctors, the latter being registered medical practioners, and other medical and clerical records" was too vague and general based on this solid foundation of case-law. What it has in fact done is to confuse the law relating to search warrants even more and makes the need for legislative reform extremely urgent.

IV. REFORM

There are two major areas that could be studied with a view to reform. The first being the power of the police to seize articles both within and without the description of the warrant and the second being the establishment of effective sanctions against the police for any abuse of those powers.

52 (1970) 74 W.W.R. 688.
53 ante, footnote 51.
54 ibid., at 698.
55 1966 2 C.C.C. 137.
56 (1971) 1 C.C.C. (2d) 8.
57 (1972) 28 D.L.R. (3d) 720.
58 (1972) 16 C.R.N.S. 107.

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A. The Extension of Police Powers of Search and Seizure

A review of the recent decisions of the English Court of Appeal and our own on the extent of the police powers of search and seizure is beyond the scope of this paper. (59) The writer feels that many of the objections raised by those cases would disappear if the legislature saw fit to enact in the Summary Proceedings Act 1957 a provision similar to section 445 of the Criminal Code of Canada, which slightly amended would read:

> Every person making a lawful search may seize, in addition to the things that may be seized pursuant to that lawful search, any thing that on reasonable grounds he believes has been used in the commission of an offence, and carry it before the justice who issued the warrant or some other justice to be dealt with in accordance with section Z

If such a provision were enacted section 199 of the Act would also have to be amended to allow a Magistrate the power to review the additional seizures made by the executing officer. Such a section would overcome Richmond J's objection that the presentform of the warrant is ultra vires the statute in allowing the executing constable a discretion to seize items beyond those contemplated by the issuing Magistrate. (60)

It is respectfully submitted that this would cover the suggestion made recently by J.A.Smillie (61) that the powers of search and seizure granted to the police in Barnett & Grant v. Campbell (62) are too limited in scope and that they should be extended to authorise the police to seize any evidence of an offence which they discover in the course of a lawful search, or otherwise acting lawfully, where such an action is necessary in order to preserve the evidence. However the writer does not agree with the learned author's next suggestion, (63) "that it may not be necessary to

59 Chic Fashions (West Indies) Ltd. v. Jones ibid.; Ghani v. Jones 1970 1 Q.B. 693; McFarlane v. Sharp 1972 N.Z.L.R. 838.

60 ante, pp. 10 - 12.

61 "McFarlane v. Sharp: Affirmation or Extension of Police Powers of Search and Seizure" (1975) 6 N.Z.U.L.R. 271 at 282.

62 (1902) 21 N.Z.L.R. 484.

63 ibid., at 282.

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enact legislation in order to effect an extension of police powers." The Court of Appeal itself has asked for help twice (64) and the author finds himself in strong agreement with Bridge (65) and Leigh (66) that law reform by precedents has not proved a satisfactory method of dealing with the problem in this area of the law.

B. Effective Sanctions Against the Police for the Abuse of Powers.

It is argued by some that the extension of police powers must be accompanied by the provision of effective legal remedies which will give the aggrieved citizen redress for any wrong caused him and will operate to deter the police from exceeding their powers in the future. (67) It is evident that the present system is not an effective deterrent against future illegal action by the police. The is no exclusionary rule operating in New Zealand as to evidence obtained illegally and the general rule as laid down in R. v. Kuruma (68) is that all evidence is admissible except that which was obtained in a way which would operate unfairly against the accused.

The difficulties with civil remedies are discussed by Smillie (69) and it was with some degree of hope that one read his suggestion that the "best solution [of dealing with the illegal action of the police] may be the creation of a responsible, individual civilian authority possessing wide powers to investigate charges of police illegality, discipline individual police officers, and to award damages to aggrieved citizens." All good things must come to an end and Smillie decided that the next sentence would be a good enough time to disappoint. Quoting Professor J.D. Heydon (70) he says that in the absence of some effective alternative deterrent the rule governing admissibility of illegally obtained evidence must be changed so as to exclude much more evidence than at present.

64 McFarlane v. Sharp 1972 N.Z.L.R. 838 at 844; 1975 1 N.Z.L.R. 728 at 739.

65 "Search and Seizure: An Antipodean View of Ghani v. Jones" 1974 Crim. L.R. 218 at 221.

66 "Recent Developments in the Law of Search and Seizure" (1970) 33 M.L.R. 268 at 277.

67 Smillie at 285; Leigh at 280.

68 1955 A.C. 197.

69 ibid., at 277.

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It appears to this writer that Smillie does not even consider his own idea which he describes as "perhaps the best solution" as an "acceptable alternative." Instead of developing the "best solution" he launches himself into a justification of Heydon's discursive call for the introduction of a stronger exclusionary rule than that in Kuruma.

In short Smillie's brief resume of the Heydon analysis can be reduced to the general rule that illegally obtained evidence is inadmissible in criminal proceedings subject to a discretionary power vested in the court to admit eveidence where:

(a) the illegality was both accidental and trivial, or

(b) the evidence obtained as a result of the illegal action is crucial evidence of a serious criminal offence for which public policy demands that the offender be not allowed to go free, and the evidence was seized in circumstances of great urgency which called for immediate action by the police. (71)

Such a change in the direction of the law at this stage would be a retrograde and regressive measure. It would be on the police to prove that exceptional circumstances (72) exist allowing the evidence to be admitted. If this burden was not discharged the evidence would be excluded, a mandatory injunction would be issued for the return of the material and all copies, state and offender would be saved expediture and the criminal would be protected against some unfavourable publicity. Such a system does not take into consideration the rights of the community. It allows criminals to go free just because some constable was negligent in his duty. Society suffers because of the mistake of one individual. The United States has a very rigid exclusionary rule as seen in the decision of Mapp v. Ohio (74) but recently a considerable body of acedemic writing has been building up against the rule as it is constituted by that decision.

This body of opinion received the support of Chief Justice Burger in his dissenting opinion in Coolodge v. New Hampshire (75) and Bivens v. Six Unknown Federal Narcotics Agents (76) It should be noted that

70 "Illegally Obtained Evidence" 1973 Crim.L.R. 603 at 690.
71 (1975) 6 N.Z.U.L.R. 271 at 286.
72 ibid., at 287.
73 idem.
74 376 U.S. 643 (1961).
75 403 U.S. 443 (1970).
76 403 U.S. 388 (1970).

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while the exclusionary rule has its foundation in the Fourth Amendment the conceptual basis of the exclusion of evidence is the same no matter what jurisdiction is considered.

In Bivens Burger C.J. puts forward a framework which would allow the exclusionary rule to be abandoned and would replace it with a more efficient and effective system of deterrents and exclusions. The Chief Justice said (77):

> "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantee against unlawful conduct of government officials. Without some protective sanctions, these protections would constitute little more than rhetoric. . . . But the hope that this objective could be achieved by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hestitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective."

The deterrent aspect of the rule has little validity when closely examined. The rule does not impose any direct sanction on the police. When a prosecutor loses a case he can rarely set in motion any corrective or administrative penalties against those responsible. The educational effect the rule conceivably might have in theory is greatly diminished in fact by the reality of police work.(78) The rule is not an effective sanction in the many cases that do not result in a prosecution. The learned Chief Justice uses an interesting and informative analogy to show a basic defect in the suppression doctrine(79):

> "Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. . . .I wonder what would be the judicial response to a police order to "shoot" to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or shoplifter.
>
> I submit that society has at least as much right to expect rationally graded responses from judges in place of universal

77 (1970) 403 U.S. 388 at 415
78 ibid., at 418
79 ibid., at 419

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"capital punishment" we inflict on all evidence when police error is shown in its acquisition."

The Burger model is based on the "venerable doctrine of respondeat superior" (80):

(a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;

(b) the creation of a cause of action for damages sustained by any person aggrieved by the government agents in violation;

(c) the creation of a tribunal quasi - judicial in nature to adjudicate all claims under the statute;

(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases;

(e) a provision directing that no evidence otherwise admissible shall be excluded from any criminal proceedings because of a violation of the statute.

The Wanganui Computer Centre Bill 1975 creates a precedent for such a change with the provision in that Bill, now before the House, for a claim for damages against the Crown (81) for persons who have suffered loss or damage as a consequence of the unauthorised publication of information from the law enforcement computer. It is noted with interest that subclause(3) that it shall not be a defence to any proceedings under this clause that the breach was unintentional or without negligence on the part of the defendant, although the conduct of the defendant may be taken into account in assessing damages. Subclause (4) says that the court shall award costs to every person who brings an action for damages unless it considers that the action is frivolous or vexatious or that the award of costs would be inappropriate.

A statutory provision such as this removes many of the objectionable features of the present system and that suggested by Heydon and Smillie. It includes effective deterrents against the police, effective remedies in damages for aggrieved citizens and the use of the evidence in most cases. In an appendix to his opinion the Chief Justice included the tentative draft by the American Law Institute of a model pre-arraignment code. The code sets out instatutory form the factors which a judge must consider before admitting illegally obtained evidence (82):

80 ibid., at 422 - 423.

81 clause 28.

82 ibid., at 424 - 425.

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(2)Unless otherwise required by the Constitution of the U.S. or of this state a motion tosuppress evidence based upon a violation of any of the provisions of this code shall be granted only if the court finds that such violation was substantial. In determining whether a violation is substantial the court shall consider all the circumstances including:

(a) the importance of the particular interest involved;

(b) the extent of deviation from lawful conduct;

(c) the extent to which the violation was wilful;

(d) the extent to which privacy was invaded

(e) the extent to which exclusion will tend to prevent violations of this code;

(f) whether, but for the violation the things seized would have been discovered; and

(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceedings in which the things seized are sought to be offered in evidence against him.

(3)Fruits of Prior Unlawful Search

If asearch or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under subsection (1), and if as a result of such a search or seizure other evidence is discovered and is subsequently offered against the defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search and seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this code.

"Capital punishment" of all illegally obtained evidence is as unacceptable as the present Kuruma rule which provides for almost total acceptance of all evidence. If the legislature sees its way clear to amend the law relating to search and seizure it must also review the present rules governing the admission of evidence. Any widening of police powers must be accompanied by effective remedies for the protection of the citizen.

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V. CONCLUSION

It is an unfortunate day in the history of our still young Court of Appeal when a decision such as the Auckland Medical Aid Trust v. Taylor is delivered. The court while saying that the police had acted unlawfully by taking all the files on a warrant that was too vague and general by their orders condoned that excessive seizure and reduced their lengthy opinions to nothing more than overwritten judgments sans law.(83)

The judgments of two members, McCarthy P. and McMullin J., are without foundation in law as illustrated by the difficulty the learned members of the court had in formulating a proper wording for the warrant and the noticable lack of authority put forward in support of their reasoning. Richmond J. from whom comes judgments of some quality gives the most promising analysis of the situation and in theory puts forward a logical and legally acceptable interpretation of section 198 and the warrant form provided by the regulations.

The law to many people, lawyers and laymen, seems to be like an oarsman in a row boat, moving forward while facing the rear and moving into the future while facing the past. So urgent is the law's need for movement that it seldom stops long enough to sight what lies ahead. Ahead may be rapids, calms, rocks or beaches the law does not know of them until it has arrived. The time has come for the law to prefer the canoe in which it can paddle facing forward, needing only to glance occasionally to the rear to see how far it has come and from where. The time has come for us to distil from the past the principle features protecting the rights of the individual and place them in the context of a society with rising crime rates. It may well be that there are no principles from the past that are relevant today and that new protection of the individual is needed. Reform by precedent is an unacceptable proposition and legislative reform is the only answer.

83 ante, p. 1.