> . . . there is certainly no warrant under the new Act for treating property of the husband and wife generally as a type of community property, to be considered as part of a pool which may be divided up according to whatever may strike the tribunal as 'fair'. It is therefore important to realise just how far the new Act goes: and it is rather more limited in its effects than many might suppose.

At that stage the learned writer had only two reported decisions before him but it seems that the courts have adopted a somewhat less conservative approach in subsequent cases, e.g. as pointed out by Wilson J. in *Robinson's* case (*supra*) at 750, the judge or magistrate is probably justified in the "community property" approach if he is satisfied there was an expressed common intention within the terms of s.6(2).

It is submitted that such limiting factors are clearly defined by the Act (especially s.6) and the courts have not trespassed beyond these limits. At any rate a wide discretion has been given to the court and has, within its stated limits, enabled equitable and commonsense law to be applied, where strict principles had previously bound the court.

R. G. McElrea, B.A.

JURISPRUDENCE

On 26 July 1966 Lord Gardiner, L.C., (see Note, [1966] 1 W.L.R. 1234), on behalf of himself and the Lords of Appeal in Ordinary stated that while their Lordships regarded the use of precedent as indispensable in providing some degree of certainty and a basis for orderly development of legal rules:

> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

The statement, qualified though it is, clearly puts an end to the rule in *London Street Tramways Company Ltd.* v. *London County Council* [1898] A.C.375, and reiterated recently in *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C.446, that a decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent cases. The way is now clear for the House to develop the law in view of changing circumstances without passing all responsibility for law reform on to the shoulders of the Legislature. Decisions such as that in *Searle* v. *Wallbank* [1947] A.C.341, need no longer be binding on the House and in a similar situation today a decision could be made which would be more compatible with common sense and modern conditions on the highways.

Although the Lord Chancellor made it clear that the change of approach by the House of Lords was not intended to affect the use of precedent in other courts, the question must arise as to whether the New Zealand courts, and in particular the Court of Appeal, will now revise their attitude to the binding authority of a House of Lords

decision, particularly in the light of recent decisions of the High Court of Australia, and apparently, the Supreme Court of Canada. The present New Zealand attitude appears to be that New Zealand courts will follow decisions of the House of Lords where these either do not conflict with a Privy Council decision or, in certain cases, where they are subsequent to a conflicting Privy Council decision. In *Smith* v. *Wellington Woollen Manufacturing Co. Ltd.* [1956] N.Z.L.R.491, the New Zealand Court of Appeal held that it was bound to follow a decision of the House of Lords upon a matter of general principle where there was a clear conflict between a decision of the House of Lords and one of its own decisions following a statement of the Privy Council in *Robins* v. *National Trust Co. Ltd.* [1927] A.C.515. It is interesting to note that a similar decision was made by the High Court of Australia in 1943 in *Piro* v. *W. Foster & Co. Ltd.* (1943) 68 C.L.R. 313.

A somewhat different situation arose in 1962, in the case of *Corbett* v. *Social Security Commission* [1962] N.Z.L.R.878, where there was conflict between the decision of the Privy Council in *Robinson* v. *State of South Australia* [1931] A.C.704, and a later decision of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.* [1942] A.C. 624. In *Corbett's* case a majority of the Court of Appeal elected to follow the Privy Council decision, and the views of the majority judges are of considerable interest. North J. held that only in very exceptional circumstances would the Court of Appeal be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, e.g. where the House of Lords had discussed the Privy Council decision and pointed out where it erred and also the question involved only principles of English law and there were no relevant differentiating local circumstances. Cleary J. was of the opinion that the relevant question in such instances of conflict was whether the Privy Council was likely to adhere to its own earlier decision. Now, however, there is no certainty that the House of Lords will adhere to its prior decisions, thus any argument in favour of regarding their decision as binding on a New Zealand court is severely eroded.

Recent decisions, particularly of the High Court, in Australia have shown a marked trend away from regarding House of Lords decisions as binding, in contrast to the views of the same courts not so many years ago. In the cases of *Skelton* v. *Collins* (1966) 39 A.L.J.R.480, and *Uren* v. *John Fairfax and Sons Pty. Ltd.* (1966) 40 A.L.J.R.124, the High Court approving the dictum of Dixon C.J. in *Parker* v. *The Queen* (1963) 111 C.L.R.610, refused to be bound by decisions of the House of Lords in *H. West & Son Ltd.* v. *Shephard* [1964] A.C.326, and *Rookes* v. *Barnard* [1964] A.C.1129, respectively, although the Court recognised the high persuasive value of such cases. Further, the High Court held that other Courts in Australia should follow the High Court where there was a direct conflict between a decision of the House of Lords and the High Court upon a matter of legal principle — a marked contrast from the approach shown in 1943 in *Piro's* case. This has been followed by the Court of Appeal of New South Wales in *Ex Parte Brown*: *Re Tunstall* (1966) 84 WN (Part 2) (N.S.W.) 13, (noted (1966) 40 A.L.J.235), a case concerning state privilege where there again was conflict between *Robinson's* case and *Duncan's* case, and the Court chose to follow the Privy Council, after pointing out that its first

question should be whether there was a decision of the High Court upon the specific point. Apparently the Supreme Court of Canada has now, too, refused to follow a decision of the House of Lords. (see note in 40 A.L.J.281.)

In view of the recent Australian cases, and now the statement by the House of Lords that they will not treat prior decisions of the House as necessarily binding, there seem to be grounds for suggesting that in New Zealand, decisions of the House of Lords, at least in the future, should be regarded as highly persuasive but not binding on New Zealand courts. The freedom which the House has given itself to deviate from its previous decisions will undoubtedly mean that it will adapt this approach more to suit contemporary conditions in England and the principles it lays down may become more particularly applicable to English conditions and less to conditions in Commonwealth countries such as Australia, Canada or New Zealand. In these circumstances it would be unrealistic for New Zealand Courts to continue to hold themselves necessarily bound by the House of Lords.

A. H. Young, M.A.

TORT

Ever since the famous judgment of Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C.562, the test of foreseeability as to who may be a neighbour has been considered by the courts. In *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B.164, the Court of Appeal held that in the absence of any contractual or fiduciary relationship between the parties, a negligent mis-statement causing financial loss was not actionable. This case was later overruled by the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C.465, and the "neighbour" principle was extended to an action in tort for negligent mis-statement. That there may be a neighbour where a negligent mis-statement results in financial loss is now certain, what remains uncertain, is the question as to who may be that neighbour.

The English Court of Appeal in *Rondel* v. *W.* [1966] 3 All E.R. 657, has now answered the question in part. A barrister does not have a neighbour. The Court of Appeal (Lord Denning, M.R., Danckwerts and Salmon L.JJ.) unanimously held that on the grounds of public policy (and, per Lord Denning, M.R., and Danckwerts L.J., by long-standing usage) an action cannot be maintained against a barrister for negligence on his part in the conduct of a criminal or civil cause, whether at first instance or on appeal; nor does an action lie against him for negligence in work or preparation for the conduct of a cause, such, for example, as drawing pleadings.

The Court also held, Salmon L.J. dissenting, that the same applies to work in chambers in advising, settling documents and conveyancing in matters which may never come before the Court.

The court further held, Salmon L.J. not concurring, that the immunity of a barrister from being sued for negligence as an advocate does not extend to a solicitor acting as advocate.

The facts of the case are of small significance. The plaintiff had been convicted and sentenced nearly six years previously on a charge of causing grievous bodily harm. The present action alleged negligence