ment, express or implied, or of any unequivocal statement or conduct of any defendant precluding him from contending that the goods had not, in fact, been validly impounded or otherwise secured.

Legislation

There were no major legislative changes affecting the general law of real property. In the specialised field of Maori land law a number of detailed amendments which were made to the Maori Affairs Act 1953 and to the Maori Vested Lands Administration Act 1954 are embodied in the Maori Purposes Act 1970. Some changes were also made to the Land Act 1948 by the Land Amendment Act 1970.

J. W. Troon

TORTS

Negligence

(1) *Duty of Care*

In *Ross* v. *McCarthy* [1970] N.Z.L.R. 449 the Court of Appeal upheld the decision of Richmond J. that there is no liability in negligence on the owner of an animal which strays on to the highway and causes damage. In *Bativala* v. *West* [1970] 1 Q.B. 716 however, the defendant was held liable in negligence for damage caused by an animal which was on a highway. The defendant held a gymkhana in which one of the events involved young people unsaddling and saddling horses and riding them around a circuit as quickly as possible. One horse bolted, galloped on to a highway and caused damage to the plaintiff's car. The defendant was held liable for the damage in negligence on the ground that she ought to have realised that there could be " . . . a foreseeable reaction on the part of the animal to an incident of the activity in which the animal is engaged." (*ibid.*, 730).

An interesting fact situation is added to the list in which the duty of care as laid down in *Donoghue* v. *Stevenson* [1932] A.C. 562, has been applied by the decision of the House of Lords in *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] 2 W.L.R. 1140. The Home Office was held liable for the damage caused by trainees who had escaped from a borstal as a result of the negligence of the borstal officers. The case is also interesting because the House of Lords showed its willingness expressly to analyse its own law making processes and to admit the way in which concepts such as justice and reasonableness were used by judges. Lord Morris emphasised that a judge's first task is to consider analagous cases and look to authority but if no lead was to be found then he was able to resort simply to whether it would be fair and reasonable for a duty to exist in such circumstances. He said, "Policy need not be invoked where reason and common sense will at once point the way" (*ibid.*, 1157).

(2) *Damages*

Before 1970 the position regarding the awarding of damages in negligence for economic loss was uncertain. However, as a result of the decision of the English Court of Appeal in *S.C.M. (U.K.) Ltd.* v.

Whittal [1970] 3 W.L.R. 694 the times when a court can award such damages can be more clearly understood. The defendants had negligently damaged a power cable which led to the plaintiff's factory. The resultant power failure caused material damage to machines in the factory and economic loss. The court unanimously held that the defendant was liable for the economic loss as well as the material damage from which the loss flowed. Lord Denning M.R. stated that the economic loss was not to be considered as to whether it was direct or indirect but as to whether there was a duty of care and was the resulting loss and damage foreseeable. The difficulty in such cases was the line to be drawn between the foreseeability and the unforseeability of the loss and Lord Denning and the two other judges would go no further than stating that it was up to the judge himself to decide in these cases. Lord Denning accepted the words of Lord Wright in *Bourhill* v. *Young* [1943] A.C. 93, 110, when he said, " . . . in the particular case the good sense of the judge decides".

Section 2 of the Law Reform Act 1944 (N.Z.) provides that a plaintiff can recover for physical injury caused by mental or nervous shock. There had, however, been some doubt until *Hinz* v. *Berry* [1970] 2 Q.B. 40 whether a plaintiff was able to recover for mental injury arising out of nervous shock. In this case the plaintiff was nearby when a car driven by the defendant ran into her family, killing her husband and injuring her children. She claimed that she had suffered severe psychiatric derangement, a morbid depression for five years, and that there was no likelihood that she would recover. Notwithstanding the absence of physical injury the trial judge awarded here £4,000 for the mental injury. It must however, be realised that the mental illness must be some recognised psychiatric condition and that mere sorrow or minor disturbances of a mental nature will not sustain a successful claim for damages.

Negligent Misstatement

There has been much judicial action which concerns New Zealand between 1969 and this year in the law relating to negligent misstatements. In *Barrett* v. *J. R. West Ltd.* [1970] N.Z.L.R. 789 the Supreme Court resiled from its earlier view in *Jones* v. *Still* [1965] N.Z.L.R. 1071 and held that special skills on the part of the representor were only an indication of the necessary relationship that must exist between the two parties if a negligent misstatement claim is to be successful. The Court based its decision mainly on the interpretation of the judgments in *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.* [1964] A.C. 465 by the High Court of Australia in *M.L.C. Assurance Co.* v. *Evatt* 42 A.L.J.R. 316, an interpretation which has found favour with McCarthy J. in the Court of Appeal in *Dimond Manufacturing Co. Ltd.* v. *Hamilton* [1969] N.Z.L.R. 609.

In *Barrett's* case the defendant land agent negligently supplied false information concerning the sewerage system of a house which the plaintiff bought. The court held him liable for his misstatement and it appeared, at least for a few months, that Australasia had adopted a wide liability for negligent misstatements.

However, since *Barrett's* case was decided, *Evatt's* case has been on appeal to the Judicial Committee of the Privy Council where that decision was reversed. The Judicial Committee delivered a narrow

interpretation of the judgments of Lord Reid and Lord Morris in *Hedley Byrne* and held that special skills were necessary and that these skills must be relied on by the plaintiff and in addition these skills must relate to the business in which the representor was engaged. Thus, the representee must show, inter alia, a connection between what is said and the business of the representor. Being bound by the Privy Council, New Zealand courts are now bound to accept the narrow interpretation of the liability for negligent misstatements and are precluded from adopting the wide view taken by the High Court of Australia in *Evatt's* case.

How does the decision of the Privy Council affect *Barrett's* case? It appears that the decision is now wrong as to the law but on the facts it is probable that the decision would have been the same. The representor's business was the selling of properties and he negligently supplied information in the course of that business and the plaintiff relied on his statement.

It may be pointed out that the decision of the Privy Council was 3:2, the majority interpreting the judgments of Lord Reid and Lord Morris in *Hedley Byrne* as favouring the narrow liability discussed above. Who were the dissenting members of the Privy Council? Lord Reid and Lord Morris who have to be content with the majority interpretation by their colleagues of their own words spoken in judgment some seven years previously!

Nuisance

The plaintiff was bothered by golf balls being driven on to her property from an adjacent golf course in *Lester-Travers* v. *Frankton* [1970] V.R. 2 and she sued in nuisance. The court held that as the balls came on to her property at least thirty six times in one year there had been an infringement of the reasonable enjoyment of the property and the plaintiff could recover damages. This case could perhaps be contrasted with the case of *Bolton* v. *Stone* [1958] A.C. 280 where it was held that a cricket ball being hit on to a roadway six to ten times during ten years was not a substantial interference with the rights of the wayfarer and therefore would not sustain a successful action in nuisance.

Defamation

An important change in the tort of defamation was made by the English Court of Appeal in *Morgan* v. *Odhams Press Ltd.* [1970] 1 W.L.R. 820. The court changed its earlier view in *Cassidy* v. *Daily Mirror* [1929] 2 K.B. 331 and in *Hough* v. *London Express* [1940] 2 K.B. 507. The defendant claimed that he had been defamed by a newspaper article which stated that a key witness against a dog doping gang had been kidnapped and that therefore his associates who knew that the kidnapped witness had been living in his house would think that he was the kidnapper. He relied on *Cassidy's* case and *Hough's* case where in each case a wife had claimed successfully that she had been defamed by newspaper reports of her husband in the company of another woman so described that the wife's friends and associates would think that she in fact had never been married and was therefore 'living in sin' with the man mentioned. The court refused to follow these cases on the ground that there must be some reference to the plaintiff in the article complained of.

Lord Denning M.R. said ([1970] 1 W.L.R. 828):

> There must be some key or pointer in the words themselves indicating that it refers to the plaintiff. If the reader draws his own adverse conclusion from other facts and not from the words complained of, then it is no libel.

This case is at present on appeal to the House of Lords. It could perhaps be pointed out that the Court of Appeal chose not so much to distinguish *Cassidy's* and *Hough's* case except to say that "they may perhaps be explained by the relationship between husband and wife". Rather, the court based much of its judgment upon the dissenting judgment of Greer L.J. in *Cassidy's* case.

M. R. D. Guest