In *Carl-Zeiss-Stiftung* v. *Rayner & Keeler Ltd.* (*No. 2* [1967] 1 A.C. 853 both Lord Reid and Lord Wilberforce expressed concern at the consequences flowing from non-recognition, the former finding it unnecessary to form any opinion concerning the adoption of doctrines supported in the United States in order to mitigate the consequences of non-recognition, the latter stating that nothing in the English decisions prevented the acceptance of the United States doctrines, and that "some glimmerings" could be discovered, in the United States, of the notion that non-recognition could not be pursued to its ultimate logical limit.

Under section 28 of the Marriage Act 1955 in New Zealand a Registrar is obliged to issue a marriage licence unless he has reasonable cause to believe that the marriage is prohibited under the Act or that any of the requirements of the Act have not been complied with. Section 23 of the same Act requires that a person intending to marry in New Zealand shall give notice to a Registrar and shall make a statutory declaration that the particulars set forth in the notice are true, that he believes that the marriage is not prohibited under section 15 of the Act (marriage of persons within the prohibited degrees of relationship) and that there is no other lawful impediment to the intended marriage. It appears in practice, that if a person is unable to present documents evidencing the dissolution of a former marriage, the Registrar will accept the declaration under section 23(2) that there is no lawful impediment to the marriage, as conclusive. Thus it would seem that the Registrar-General in New Zealand does not exercise the power of the Registrar-General in England, as evidenced in Mrs Adams' application for a marriage licence, to refuse to recognise a decree of divorce as a valid judgment of a lawful court.

In New Zealand recognition of overseas decrees is governed by section 82 of the Matrimonial Proceedings Act 1963. If a New Zealand Court is called upon to examine the validity of a decree of divorce pronounced in Rhodesia since U.D.I., it is possible that the reference to "Court" in section 82 may be interpreted as a Court presided over by a judge competent to pronounce the decree under the 1961-1964 Constitution, and not one appointed since U.D.I., following the decision in *Adams* v. *Adams, supra.*

K. E. Dawkins

JURISPRUDENCE

Precedent in English Court of Appeal—Civil Division

In *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 the English Court of Appeal was asked to overrule two earlier decisions. It would not and declared itself bound by its own decisions except in three situations: where there were two previous conflicting decisions; where an earlier decision of the Court of Appeal was in conflict with a subsequent decision of the House of Lords; and where a previous decision had been made *per incuriam.*

This decision still appears to hold except for the rather surprising dicta of Lord Denning M.R. in two recent cases. In *Gallie* v. *Lee* [1969] 2 Ch. 17, Lord Denning, disagreeing with the decision of the Court of Appeal in *Carlisle and Cumberland Banking Co.* v. *Bragg* [1911] 1 K.B. 489, said ([1969] 2 Ch. 37):

> I do not think that we [the Court of Appeal] are bound by prior decisions of our own, or at any rate, not absolutely bound. We are not fettered as it was once thought. It was a self-imposed limitation: and we who imposed it can also remove it . . .

But this view did not coincide with the views of the other two judges.

Lord Denning's view that the Court of Appeal was no longer bound by itself reappeared in a further case before the Court of Appeal soon after *Gallie* v. *Lee, supra.* In *Hanning* v. *Maitland* (*No.* 2) [1970] 2 Q.B. 711, the question arose whether the Court should follow observations made in *Nowotnik* v. *Nowotnik* (*Hyatt intervening*) [1967] P. 83 on the interpretation of the phrases "just and equitable" and "severe financial hardship" in the construction of the Legal Aid Act 1964 (U.K.). Lord Denning thought that there the court had interpreted those words too strictly and said:

> This present case affords us the opportunity of putting the matter right for the future: and I think we should do so. There is nothing in the doctrine of precedent to prevent us: *for we are no longer absolutely bound by prior decisions of our own,* no more than the House of Lords are.

Again the other two judges were not of the same opinion, stating that *Hanning* v. *Maitland, supra,* could be distinguished from *Nowotnik* v. *Nowotnik, supra,* on grounds with which in fact Lord Denning agreed.

It does seem clear that the House of Lords did not intend the Court of Appeal to begin correcting its own decisions. In the Practice Statement ([1966] 1 W.L.R. 1234) in which the House of Lords announced that it was no longer absolutely bound by its own previous decisions, Lord Gardiner L.C. said, "This announcement is not intended to affect the use of precedent elsewhere than in this House".

Precedent in English Court of Appeal—Criminal Division

There are indications, on the other hand, that the doctrine of stare decisis is becoming less strict in the Criminal Division of the Court of Appeal. In *R.* v. *Taylor* [1950] 2 K.B. 368 a full court declined to follow an earlier authority and Lord Goddard L.J. justified the action of the court to a large degree by the fact that in that case a departure from authority was necessary in the interests of the appellant. Two recent cases have widened this principle. In *Reg* v. *Gould* [1968] 2 Q.B. 65, a case concerning bigamy, the earlier decision of *R.* v. *Wheat* [1921] 2 K.B. 919 was not followed. Diplock L.J. in giving the judgment for the Court said:

> If upon due consideration we were of the opinion that the law had been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision, notwithstanding that the case could not be brought within any of the exceptions laid down in *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718.

Reg v. *Newsome* [1970] 2 Q.B. 711 was a case where diverging from a previous decision would not have been in the interests of the appellant. It was argued for the appellant that *Reg* v. *Gould, supra,* was not stating a principle any wider than *R.* v. *Taylor, supra,* and that the court when of the opinion that the law had been misapplied or misunderstood might only depart from a previous decision where the departure was necessary in the interests of the appellant. Widgery L.J. giving the judgment for the court dismissed this argument saying (*ibid.,* 716): "We

do not so read it and I subscribe to that view the more readily because I was a member of the court in *Reg.* v. *Gould* [1968] 2 Q.B. 65." He then suggested that the court should be more reluctant to depart from an earlier decision where the question at issue determined whether an act was criminal or not than where that issue did not arise. However, he upheld the argument for the Crown that in the restricted sphere of the issue of a judge's discretion and the principles upon which a judge's discretion should be exercised an earlier decision may not be followed, saying "we take the view that a court of five can, and indeed should, depart from an earlier direction on the exercise of a judge's discretion if satisfied that the earlier direction was wrong" (*ibid.*, 717).

The New Zealand Court of Appeal could well adopt this approach for it has never explicitly restricted itself to the exceptions laid down in *Young* v. *Bristol Aeroplane Co. Ltd., supra.* In *Preston* v. *Preston* [1955] N.Z.L.R. 1251, 1259, North J. said:

> It may well be necessary on some future occasion for this Court authoritatively to determine whether the Court of Appeal in New Zealand, in considering whether it is bound by its own previous decision, should regard itself as governed exclusively by the principle laid down in *Young* v. *Bristol Aeroplane Ltd.*

Precedent in Privy Council

An interesting problem for the doctrine of judicial precedent arises from a recent Privy Council decision on the negligent misstatement principle expounded in the House of Lord's decision of *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.* [1964] A.C. 465. In *Mutual Life and Citizens Assurance Co. Ltd.*, v. *Evatt* [1971] 1 W.L.R. 23, Mr Evatt had brought an action against the insurance company of which he was a policy holder claiming damages for the negligence of the company in giving gratuitous information on the financial stability of an associated company with the knowledge that he would act on the information and invest in the associated company. He had invested and as a result incurred financial loss. The insurance company had entered a demurrer that the facts alleged did not disclose a cause of action. The demurrer was dismissed by the Supreme Court of New South Wales and the decision was upheld by a majority of the High Court of Australia. The case was then brought before the Privy Council and the respondent relied heavily on the speeches made by Lord Reid and Lord Morris of Borth-y-Gest in *Hedley Byrne, supra.*

The majority of the Privy Council in *M.L.C.* v. *Evatt* (Lord Diplock, Lord Guest and Lord Hodson) were of the opinion that those two speeches were not sufficiently wide when read in the context of *Hedley Byrne* to give rise to a cause of action by Mr Evatt. The *Hedley Byrne* principle was founded on a fact situation that involved advice given in the course of a business or profession of giving that advice. Lord Diplock, delivering the opinion of the majority, said that read out of this context Lord Reid's words were wide enough to sustain Mr Evatt's case but that read within their context they had a more limited meaning. By this reasoning, the majority of the Privy Council formed the opinion that since it was not the business or profession of the appellant to give advice or undertake inquiries of the nature that Mr Evatt had requested, then the apellants were not under a duty of care, and no cause of action was available to Mr Evatt to claim damages in negligence.

An interesting situation in precedent arises because the two dissenting members of the Judicial Committee in *M.L.C.* v. *Evatt* were Lord Reid and Lord Morris. They were of the opinion that the appeal should have been dismissed on the grounds that the insurance company's action came within the scope of the duty of care principle as expounded by them in *Hedley Byrne, supra.* They did *not* agree with the explanation given of their speeches in that case and said: "We are unable to construe the passages from our speeches cited in the judgment of the majority in the way in which they are there construed."

It seems logical to ask however how a decision can be founded upon a principle formulated by two judges who disagree that their principle can so found the decision. For surely no judge is in a better position to say what a legal principle is than the judge who first stated the principle. This consideration seems to suggest a "precedent within precedent" rule involving judges rather than courts: judges who first formulate legal principles have the authority binding on all other judges to state when these principles apply in later cases.

Yet such a rule could well have a restricting consequence. Judges cannot always envisage all the implications of a legal principle, for often legal principles develop gradually through numerous individual decisions. It is possible that Lord Reid and Lord Morris did not realise that their formulation of liability in *Hedley Byrne* could be qualified in the way indicated by Lord Diplock, but it is this possibility that gives the law its dynamic rather than static character. For judges should always be able to improve upon and correct the statements of legal principles enunciated in earlier decisions.

What are the implications for precedent in New Zealand arising from this case? In *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 871 the majority of the Court of Appeal took the view that the Privy Council should be followed but pointed out that there could be circumstances in which the Court would be justified in following a later decision of the House of Lords in preference to an earlier Privy Council decision which conflicted with it.

It will be interesting to see what position the New Zealand Court of Appeal will adopt if the House of Lords faces a fact situation similar to that in *M.L.C.* v. *Evatt, supra,* and comes to a different decision.

Precedent in Restrictive Practices Court

In *In Re Electrical Installations at Exeter Hospital Agreement* [1970] 1 W.L.R. 1391, the Restrictive Practices Court in England faced conflicting decisions in the construction of section 6(1) of the Restrictive Trade Practices Act 1956 (U.K.). It was possible to take a broad or narrow construction of paragraphs (a) and (c) of that subsection, although the "preponderance of judicial reasoning" in relation to paragraph (c) favoured the broad construction. It was held that "where there are conflicting decisions the preponderance of judicial reasoning should be followed", thus demonstrating in a court where the doctrine of stare decisis has not been formally adopted, the need for some consistency in approach.

S. F. D. Guest