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Voting methods

There is always some degree of distemper in society, a sense of ill-humour and disaffection, a feeling of there being a disordered condition of affairs; and this will probably ever be so. For the past few years however this feeling of disquiet, of the times being out of joint, of the political system not just being inadequate but totally unsatisfactory, has been markedly greater than it used to be. New Zealand is not alone in this. A recent article in the *Guardian Weekly* (19 July 1992), reprinted from *The Washington Post*, began.

> The American political class is caught up in a trend found throughout the world's democracies toward grumpiness, alienation, disaffection and anger. Call it democratic distemper. Almost everywhere there is a sense that traditional political leaders are failing.
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> French newspapers are filled with assaults on old-style political leaders of all persuasions. Italians speak with contempt about what they call the "partyocracy." Canada has been on the verge of a constitutional nervous breakdown for years. In the ultimate anti-incumbent vote, Denmark recently voted against Europe's entire political establishment by rejecting further union in the European Community.
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> Why should democracies be in such turmoil at the very moment when democracy seems so triumphant around the world? Why are democratic electorates so edgy?
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> Insecurity bred by economic stagnation certainly has played a role. Lousy economies always mean lousy politics for incumbents. And communism's collapse has disoriented the right and the left alike.

So much for the world scene. We have our own peculiar and particular additional causes for electoral malaise. Above all else there is the sense that most politicans of one major party are, in large measure, liars and cheats, while most of those in the other are cheats and liars. While the depth of present discontent may be greater than at times in the past, there has always been a certain healthy cynicism about politicians and their activities. This has probably been most marked in the United States with Ambrose Bierce (1842-1913) and H L Mencken (1880-1956) ranked high among the journalistic mud-slingers. But even Westminster attracted its share of satire, as in some lines from Hilaire Belloc who was an MP in the early years of the century and whose experience seemed to embitter him. He wrote on a general election result:

> The accursed power which stands on privilege
> (And goes with Women, and Champagne and Bridge)
> Broke — and Democracy resumed her reign:
> (Which goes with Bridge, and Women and Champagne).

A certain degree of disbelief by the public in political promises is to be expected; as is a certain degree of rhetorical exaggeration and debating-point scoring among the politicians themselves. They are, after all, in the business of selling. But the level of cynicism can become too great. It can become destructive. The political process itself can lose its credibility, rather than just the personalities of politicians and their parties; and this is a serious matter.

The present dissatisfaction with the electoral process, the machinery for electing our legislators and administrators, is a mark of a more general sense of disquiet. So it is thought by some, and hoped by more, that a change in the manner of electing Members of Parliament will improve the political climate. It needs to be recognised however that what is proposed in the forthcoming referendum might affect the people who get elected, but does not affect either the power of those elected to break promises or to make bad laws. Nor does it affect the methods by which the laws will be made.

Proportional representation is a constitutional mechanism — it is not an end itself. It is merely one way of organising constitutional arrangements for the selection of those who will have the responsibility of governing the country. A change to proportional representation may have some good effects and some disadvantages. Its primary effect will be to replace the emphasis on representation based on geographical areas by an emphasis on representation by the larger and more unrestrained entity of political party machines.

The present system, as it works in practice, is a combination of both geographical area and political party in that candidates in the various areas, (the individual electorates) are normally sponsored by political parties. Theoretically, and even to a marked degree in practice,

those elected are representatives of the individual electorates. Their party affiliations are the means by which they seek to fulfil their responsibility to their own electorates and to the country. Thus if a member resigns or let us say is expelled from his party – there is no obligation to resign his parliamentary seat.

It is necessary in an area of such fundamental importance as the electoral system to distinguish between principle, policy and practice while recognising the relationships that should exist between them. Practice needs to be assessed in terms of policy, and policy judged in terms of principle.

Two basic questions can be asked:

1 Is the present system *as it works in practice* justifiable and acceptable?
2 If not why not?

The answer people give to question two will suggest an answer to the *type* of electoral mechanism that should replace the present one. Proportional representation emphasises *party* as the primary political entity. At a time when it can be seen that all political parties, but the two main ones in particular, are showing signs of a lack of cohesion and an absence of ideological consistency, it might seem ironic to some people that there is so much pressure for representation by party on a proportional basis.

What the present pressure for change probably represents is a general feeling of dissatisfaction with the way the present system works, that is how our elected representatives behave once they are in office by comparison with what voters thought they stood for at the time of an election. In this regard experience from 1984 to the present day has disillusioned the electorate to the point that many people believe there has to be a better way of selecting our representatives. Is proportional representation such a better way?

If the effect is merely to strengthen the power of political parties over their representatives in Parliament by having members drawn from party lists the answer must be at best problematic. It must be borne in mind that party lists will be prepared by the parties in some different way from the present system. The degree of local input will inevitably be considerably less. The list candidates will be even more dependent on the party machine to get on the list, to get high up on the list, which is equally important – and to stay there. Those selected as list candidates will therefore be much more indebted to party headquarters and much more dependent on it for their political futures.

Secondly there is the even greater difficulty of what voters would be voting for. Experience over the past few years has meant that the electorate has learnt that no party promises or manifesto can be trusted. If, however, there are to be say four, or more, parties represented in Parliament with no party having a majority, then what arrangements, what deals, what breach of principles, what breaking of promises must inevitably follow, first to form a government and then to pass legislation. Proportional representation, in itself, is not a method of getting a workable consistent governmental system. The examples of Italy and Israel are cases in point, as is the present awkward situation in Poland where there are 29 parties in the legislature – including a More Beer Party!

The problem for the voter under a system of proportional representation is knowing, or guessing, what he or she will be voting for. Certainly not the policies and programmes put forward by the preferred party. What will have to happen (presuming no one party gets a majority) will be consultation and negotiation and, in effect, surrendering certain policies each party was committed to, and an acceptance of those they had denounced. That is to say the party leaders will have to do deals, to make concessions, to set aside principles. The point is not that the present system is immune from such activities, but proportional representation makes it a necessary and essential part of the system.

Is this a credible alternative?

The degree of disillusionment about the present system means that something must be done if the credibility of our political and constitutional arrangements is to be maintained. The question is no longer whether something should be done, but what.

Politicians like Helen Clark and Simon Upton have opposed a change in the electoral system and advocated substantial but unspecified changes in the way Parliament operates. The short answer many would make to that is that such changes could already have been made and have not; and in any event a scheme for that type of change is not provided for in the referendum.

In principle the electoral system should be one that reflects the general views of the citizens: it can never be an accurate reflection because, to achieve that, there would have to be individual votes by each citizen on every measure that came up, and Parliament as a representative legislative body would have to be dispensed with. In any workable system of proportional representation there is proposed an arbitrary percentage minimum requirement of votes for *any* party representation. But if say it were 4% (a quite low percentage), as recommended by the Royal Commission on the Electoral System, and four parties only got in the 3% margin, would the more than 12% of the electorate voting for those parties be excluded from representation; and if so, on what basis of policy except the pragmatic one of seeking arbitrarily a workable system?

Change in the voting system is needed as a matter of policy to preserve the credibility of our democracy. The particular type of change that should occur is one of practical judgment after taking into account the variety of effects, both good and bad, that each of the proposed changes are considered to have by the individual voter. The questions of electoral reform and our constitutional arrangements have been dealt with in earlier editorials at [1987] NZLJ 201, [1987] NZLJ 233, [1990] NZLJ 341, [1990] NZLJ 377 and [1990] NZLJ 421. In those editorials it was suggested that a more realistic and effective way of dealing with the present difficulty would be by the creation of a Second Chamber with limited but specific powers, and elected at least in part by a system of proportional representation. The question of a possible Second Chamber still remains open for decision at a later date; and for some this possibility may well affect their attitude to the simple question now proposed of whether or not to have proportional representation for the present House of Representatives.

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Case and Comment

Duty of care in contract and tort

Judgment in the appeal of the case of *Edginton v Citicorp New Zealand Ltd* (unreported High Court, Auckland, CL 41/87, 8 May 1991, Henry J) was given by the Court of Appeal on 10 June (CA 235/91), *Citibank NA v Stafford Mall*. This case raises an interesting comparison of the standard of care applied for a breach of an implied contractual term with the tortious standard of care.

The facts of the case were that Edginton entered into a development scheme for a shopping mall and needed finance. The project was going to be viable only if the financing could be done off-shore at a lesser interest rate than the current domestic rate. A loan offer was made by Citibank and accepted by Stafford Mall. Management of the loan was seen as important by both parties and Citicorp agreed to provide the service. A formal agreement was entered into between Citibank and Stafford Mall under which Citibank undertook to provide currency management advice and also forward exchange contracts as requested by Stafford Mall "to minimise the currency exposure . . . in respect of the facility." In its management of the loan Citibank occasionally provided forward exchange contracts, being mainly hedge contracts, some of which yielded profits but overall resulted in substantial losses with the consequence that Stafford Mall was placed into receivership.

Citibank had established in New Zealand a foreign exchange advisory committee which made recommendations to customers who had taken out foreign currency loans with Citibank. These recommendations related to what steps should be taken during the course of the loan to manage the customer's exposure arising from the adverse effects of exchange movements. The advisory committee made these recommendations following assessment of the market. The committee also advised on the currency in which a loan should be drawn down or rolled over. Under this general procedure a series of hedge contracts was entered into by Citibank on behalf of Stafford Mall.

The Court found that the purpose of the currency management agreement was for Citibank to give advice on measures to minimise the impact of adverse exchange rate movements on the original loan. It was accepted by counsel for Citibank that an implied term of reasonable care and skill in giving this advice should be imposed and that the standard of care was that of an expert in the field. The issue in both the High Court and Court of Appeal was: had that standard been breached?

In the High Court Henry J said:

> For Citibank [it was] submitted that the obligation was a subjective one, namely to take action if Citibank thought it was reasonably prudent or reasonably necessary at the time in order to protect Stafford Mall in relation to its currency exposure under the loan agreement. . . .

But this was not accepted. Henry J held that the test for the advice was objectively expert. The discretion element did "not affect the objective nature of its advice obligation."

As to whether the expert standard had been breached: what Citibank did was to advise the plaintiff of the recommendations of the foreign exchange advisory committee generally. There was no separate consideration of Stafford Mall's loan or evaluation of its position in relation to the recommendations. The expert evidence in the case said that there should have been some measure of assessment of the appropriateness of a recommendation for the individual borrower but this was never undertaken. Henry J therefore held that the standard of care required of Citibank had not been met.

Citibank appealed against this finding. Richardson J delivering judgment for the Court of Appeal said:

> The whole purpose was to protect the loan agreement against adverse exchange rate movements . . . . Citibank was not an insurer against loss. It was required to exercise the care and skill reasonably expected of one expert in this field. If at any time it recommended the taking by Stafford Mall of a forward contract its advice to that effect had to withstand the test that an expert currency management adviser with full knowledge of the contract between Citibank and Stafford Mall and exercising reasonable care and skill could have given that advice to Stafford Mall.

The Court of Appeal found that the High Court had not erred in its assessment of compliance with the required standard of care; that the foreign exchange committee's approach was to make a global assessment of the market and anticipate short term currency moves with blanket recommendations applicable to all customers, but that other considerations relating to Stafford Mall's individual position ought to have been taken into account by Citibank. Richardson J said that it seemed to have been assumed throughout by Citibank that to pass on these blanket recommendations was an adequate discharge of its obligations under the currency management agreement. Presumably the advisee thought so

also as, in the High Court, Henry J found that the procedure was for the Citibank account manager to telephone the recommendations to the plaintiff and obtain his confirmation of the advice. In retrospect however, this was found to be insufficient.

One wonders whether this expert standard may not differ according to whether the cause of action is in contract or tort. Assuming that concurrent liability will be accepted, as seems probable in the near future, if, in *Edginton*, the advisee had been an experienced commercial investor would that individual assessment have been required under the tortious standard of care?

A contractual assessment uses as its guide a consensus approach, "a meeting of the minds" to ascertain what the parties' intentions were when they contracted. If the advisee is a commercial investor it may well be found that the standard contracted for was that of an expert as it was in *Edginton*. The yardstick upon which that standard is then judged is objective, which is to say a comparison of what was done with accepted expert evidence on what should have been done. The knowledge or commercial experience of the plaintiff does not seem to be a factor in this assessment because the standard *has already been set*. It may of course be pleaded by way of contributory negligence but the application of that principle to a contractual duty of care is yet unsettled.

When one looks at the tortious assessment one sees the objective test being used but this is not the sole determinative. The tortious standard reflects the parties' positions because it uses the tools of reasonable foreseeability and proximity to determine the existence of the duty of care. One can see this in the Australian foreign exchange cases where the tortious standard of care is examined.

In *Lloyd v Citicorp Australia* (1986) 11 NSWLR 286 at 288 Rogers J said:

> It may be that the nature and extent of the advice required from a foreign currency exchange adviser will vary with the known commercial experience of that client. It seems to me likely that the advice to be given to the treasurer of a multi-national incorporation ... will be minimal compared to that required to be given to a farmer ... who, to the knowledge of the adviser, is entering the foreign exchange market for the first time.

A similar approach was taken in *Davkot Pty Ltd v Custom Credit Corporation* (unreported, Wood J, Supreme Court of New South Wales, 27 May 1988). Wood J said that standard would be very high when the customer had "limited commercial experience and lacked real understanding" of the commercial and financial field. This makes an assessment of the defendant's knowledge of the plaintiff's degree of reliance a major element of the standard of care and also allows for the possible imputation of knowledge to the defendant.

Thus, it may well be that if, in circumstances like *Edginton*, the advisee was commercially sophisticated, under a tortious analysis the standard of care would have been met by those blanket recommendations.

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Partner or employee? A question depending on "the probabilities intrinsic in the circumstances".

Johnston v McGregor (High Court, Auckland; CP 1664/89; 26 November 1991; Thomas J).

It will be recalled that s 5(c)(ii) of the Partnership Act 1908 provides that, in determining whether a partnership does or does not exist, regard is to be had to the rule that the receipt by a person of a share of the profits of a business is prima facie evidence that he or she is a partner in the business but the receipt of such a share does not, of itself, make him or her a partner in the business, and, in particular a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business, does not, of itself, make the servant or agent a partner in the business or liable as such. It is, however, accepted that an employee remunerated by means of a share of the profits is entitled to call for an account: see *Lindley & Banks on Partnership* (16th ed, 1990), s 23-71. It is also accepted that there may be a partnership even though one partner receives a salary only, or a salary plus a share of the profits, as in *Stekel v Ellice* [1973] 1 All ER 465 and *Marsh v Stacey* (1963) 107 Sol Jo 512 (CA), respectively, and Webb & Webb, *Principles of the Law of Partnership* (5th ed, 1992), s 21.

It is profitable, against this background, to examine the facts in *Johnston v McGregor* (High Court, Auckland; CP 1664/89; 26 November 1991; Thomas J). The plaintiff (J) was an experienced commercial cleaner who disposed of his own business and immediately became the employee of the defendant (M), another commercial cleaner, in June 1987. M's supervisor departed from the business and J was swiftly promoted to his position. J now claimed that M offered him a partnership in November 1987 and that he accepted. The agreement was said by J to be an oral one whereby he would cease to be paid on the previous hourly basis and would draw a gross weekly salary of $600, and would have a 49% equity in the business while M would retain the remaining 51%. J further claimed that he would have the sole responsibility of the day-to-day conduct and operation of M's cleaning services business. On 23 January 1989 M dismissed J. J now claimed that the ground for dismissal was that he did not have a driver's licence. M averred that the ground was that, despite repeated requests on his part, J would not produce a current licence for his inspection. J did, in fact, have a licence all along. J testified that his licence was unblemished. When cross-examined, however, it emerged that he had been convicted for careless driving whilst in M's employ.

J considered that his dismissal was, in effect, a unilateral dissolution of the partnership agreement and that M was liable for an order directing the taking of accounts. Since M denied that a partnership ever existed, J claimed, in the alternative, that, if it were found that he was an employee, his employment was wrongfully terminated and that M was liable in damages for wrongful dismissal. Theses issues were essentially questions of fact which had to turn on the Court's finding as to the

parties' credibility. Further relevant facts appear in the judgment of the Court.

Thomas J substantially, though not exclusively, preferred M's evidence to that of J and concluded that J's claim that there was a partnership was "implausible and, indeed, far-fetched."

His Honour accepted that, after J had been made supervisor, his duties and responsibilities, as was to be expected, increased. He became responsible for hiring and firing staff; he improved the method of recruiting staff, saving costs; he gave quotations for cleaning jobs; he supervised individual workers; he delivered their time records to M's office so that their wages could be calculated; he handed their pay packets to the employees; he was largely responsible for dealing not only with employees' complaints and with the Union but also with customers' complaints. The Court gained the impression that J carried out his supervisory work in a way which reflected the fact that he had previously been self-employed, and had come to see himself as indispensable. A more correct assessment of J's worth to M's business was that of a valued supervisor whose position and status could be described as managerial in character. On the other hand, if J were correct, the Court was being asked to believe that M, "an astute enough businessman," was prepared to give J a 49% share of the business. No consideration for this "benevolence" was mentioned in evidence. While it was true, in J's own view, that there would be a saving to the business of the difference between his hourly rate and his weekly salary of $600, this would not, in the Court's opinion, "remotely equate with the value of" 49% of the business. J further claimed that he was to undertake even greater measure of responsibility and relieve M of much of the burden of the business. Thomas J considered that these matters would not cause any business person to agree to a partnership divesting him or her of just under 50% of the business. He suspected that, because of the hours J was working, he had "become too expensive" and that, had he not been prepared to accept a salary, M "would have been prepared to 'let him go'."

Thomas J continued:

> Other matters which point to the correctness of [M's] denial of any partnership were traversed in evidence. There was no taking of the stock as might have been expected. The accounts continued to be prepared as they had been before without in any way indicating the advent of a partnership. [J] did not even know what amount his alleged partner, [M], continued to draw from the firm. He never had any signing authority for bank accounts, even in [M's] absence overseas for a time. Clients were not advised of the alleged partnership. Nor did [J] inform the firm's employees that he was now no longer just their supervisor but had become their employer or co-employer. The accountants and bankers for the firm were not approached and no guarantees were signed securing the partnership debts. These kinds of matters, in my view, make it virtually inconceivable that [M] offered [J] a partnership.

The Court noted in particular the salient facts that J made no capital contribution to the firm and that, even on J's own account, no discussion took place as to what was to happen in this regard. J had claimed to have a detailed knowledge of the financial position of the business from his own knowledge of its expenses and his involvement in the various jobs. The Court was satisfied that J never saw the accounts. Eventually J claimed that his capital contribution was to be dependent on the accounts for the year ending 31 March 1988. These were available in July 1988. Nothing, even according to J's evidence, was done for the ensuing six months to crystallise the amount of any contribution it would be necessary for J to make. This further caused the Court to consider it "inconceivable" that a business person such as M would accept that he was liable to disburse 49% of the profits to J without having received any capital contribution to the assets or goodwill. Furthermore, J had never responded to his dismissal by saying to M anything like: "You cannot do that, we are partners." Nor had he subsequently asserted that what M had done was improper because it was in breach of their partnership arrangement. Indeed, Thomas J felt that J was not the sort of person "who would not speak up for himself" and that he "would not have been slow to make the point" had a partnership been agreed to. Evidently also, the time sheets confirmed M's evidence that J later returned and claimed – correctly – that he had not been paid the holiday pay due in respect of the early part of his employment. He was then paid a further $415. This led Thomas J to say that, if it was good enough for J to raise this matter, one might have expected him to say he did not have the status of an employee who could be summarily dismissed and that, as a partner, he was entitled to something more than $415. He had not done so, simply because, in the Court's view, he was not a partner.

Two Union officials apparently testified that they dealt with J on the basis that he held a managerial position – understandable having regard to J's responsibilities. As the Court observed, this did not assist in establishing whether or not a partnership existed.

Later in his judgment, Thomas J mentioned that it would be "tempting to conclude" that J's willingness to accept a weekly salary (instead of his previous remuneration calculated on an hourly basis) indicated that he was to receive a share of the profits, although not 49%. His time sheets showed, however, that he consistently earned more than $800 gross per week. Indeed, in the two weeks before the "fatal discussion" with M, J earned $895.50 and $954.00 respectively. The Court was satisfied that J's income was "not reduced on the basis that he would obtain a share of the profits while remaining an employee." It was also noted that what J had actually claimed was a share in the profits "with reference to his alleged 49% shareholding, not that he was entitled to a share of the profits as an employee . . ." The Court also accepted M's evidence that J, as a result of the reduction in pay, had reduced his hours and workload.

The case can be seen as one showing that the Court must hold there to be no partnership if there is no intention that one is to be

created. It illustrates, once again, the distinction (which can sometimes be a nice one) between a partner, whether "full" or "salaried," and a mere employee – a matter explained further in Webb & Webb, op cit, supra, para 20. The decision may usefully be compared with *Burnell v Hunt* (1841) 5 Jur 650 (QB) and *Walker v Hirsch* (1884) 27 Ch D 450 (CA). There certainly appears to have been no evidence of J's being held out as a partner, so that the case is not comparable with, eg, *Armstrong v Powell & Powell* (1935) 30 MCR 62. Nor was there any evidence of what assets were supposed to constitute the alleged partnership's property. Further, the evidence indicates that, although J undertook managerial duties, he did not actually participate fully in the management of the business in the manner one might have expected had he been a full partner. Indeed, one cannot but wonder what J's reaction might have been had the boot been on the other leg and the partnership he alleged to exist had been sued, eg, by a supplier for the price of cleaning plant and cleaning materials supplied to the firm, or by a dissatisfied client for damages because one of the firm's workers had been negligent in the performance of his or her cleaning duties. Might J not then have been anxious to deny that there was a partnership? And equally so had he been required to share losses?

Having decided that no partnership existed, there remained the question whether J had been wrongfully dismissed. As M had stressed, it was important for J to have a current driver's licence because of the insurance complications if he were not licensed. The Court was of the view that, "by and large," J had "brought his dismissal on his own head by not producing the very evidence which was reasonably required by the proprietor of a firm concerned at the consequences of having a supervisor who was an unlicensed driver." J had been paid $600 as one week's salary in lieu of notice. In view of his managerial and supervisory responsibilities, the Court held that J was – although he had not explicitly claimed in that respect – entitled to a longer period of notice, viz, one month. Judgment was accordingly given in J's favour for $1,800 (ie, four weeks' gross salary, less the $600 already paid) on the assumption that tax would be payable by J from it. M was nevertheless awarded costs as per scale seeing that he had succeeded on the two causes of action which J had pleaded explicitly.

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Absolute liability and the search for clear legislative intent

Ministry of Commerce v Woolworths (NZ) Ltd [1991] DCR 539

There are many offences which appear to impose absolute liability. In creating offences which are prima facie silent as to any fault requirement, Parliament has left the task of interpreting the extent of their application to the Courts. If a Court, in the process of categorising the offence, decides it should remain silent, then the provision will impose absolute liability. In *Millar v MOT* [1986] 1 NZLR 660 however, the Court of Appeal established a presumption against such an imposition of absolute liability, except where there is "clear legislative intent". (at 666.) This note considers when Parliament will be taken to have indicated such "clear legislative intent"! The particular focus is the recent case of *Ministry of Commerce v Woolworths (NZ) Ltd* [1991] DCR 539. The case is only at District Court level, but it raises the most important, and arguably most contentious of the legislative clues, the provision of specific defences to an offence which is silent on its face.

In November of 1989 an inspector of weights and measures visited the Woolworth's bakery (Mr Pickwick's Hot Bread Shop) at two of its supermarkets in Auckland. At both bakeries the inspector found bread that weighed more than 5% less than the weight stated on the package. As a result, the defendant was charged with three offences under s 16(2) of the Weights and Measures Act 1987. That section provides:

> (2) Every person commits an offence who sells or offers or exposes for sale by weight or measure or number, or has in that person's possession for sale by weight or measure or number, any goods enclosed in a package that has a statement of the quantity of the goods marked thereon, or on a label attached thereto, where the quantity of the goods in that package is less than that stated on the package or label.

On its face, establishing the commission of the offence does not require proof that the defendant had knowledge, or was at fault, as to the weight of the goods at the time of the offence. It imposes absolute liability. Without any implied fault requirement which may result from the categorisation process, the doing of the act alone would have resulted in a conviction. In the case, Mitchell DCJ agreed with both counsel (at 544) that the offence was one of strict liability or "public welfare" in nature. Although it was therefore accepted that a fault requirement should be implied, this was done without any sustained consideration of the statutory context. The judgment contains little discussion of the appropriateness of this classification in the light of the statutory defences provided. The only reference to this issue is the Judge's statement that the express provision of a no-fault defence was consistent with counsels' agreement that s 16(2) is a public welfare offence. (at 545.) It is, however, the provision of express statutory defences in both ss 16 and 31 of the Act which makes the charge in *Woolworths* of more than passing significance.

Section 16(4) of the Weights and Measures Act 1987 provides a defence for a defendant who proves that the goods, "because of their hygroscopic sensitivity," have varied in weight, after being packed, due to climatic influences. To satisfy this provision, the defendant must also prove that the package bore a completed label stating the "Net weight when packed". There was no reliance on this defence in the case, nor was any special significance attached to this provision by Judge Mitchell when categorising s 16(2). The question therefore remains whether the existence of the subs (4) defence should impact on the categorisation of the offence.

There have traditionally been two alternative ways of viewing such provisions. They are either treated as indications of Parliament's desire

that some other appropriate grounds of exculpation should be available, that is, the offence should not impose absolute liability. Conversely, the provision of defences indicates a restricted scope of exculpation. In other words, Parliament has considered that only the defences expressly provided should be available, therefore the provision should be absolute for all other purposes. Which of the two approaches should be followed in any particular circumstance will depend on the nature and the scope of the defence provided. The normal rules of statutory interpretation presumably apply. Does the statutory context, in this case the defence, indicate how the issue, in this case the categorisation of the offence, should be resolved?

To answer this it is necessary to examine the operation of the subsection. If it is a defence which addresses the relevance of fault then there is a strong argument that the offence should be absolute. In other words, if Parliament has considered a state of mind or responsibility beyond the mere act and come up with only this express defence, then no other defence which goes to fault should be available. In this case it is submitted that the reverse is true. The defence in subs (4) does not relate to any lack of fault or mens rea on the part of the defendant. Instead it is an excuse relating to a particular situation where people cannot be held liable for circumstances beyond their control. In this broad sense, it could be classed as a no-fault defence but a successful reliance on subs (4) does not require proof of reasonable care by the defendant, only that she had attached the appropriate label to goods with that particular sensitivity. The defendant would also presumably need to know that the goods were of that class to rely on the defence, but this is not to say this this kind of knowledge is relevant to s 16(2). In other words, the defence in subs (4) does not require lack of knowledge that the goods were underweight, only knowledge that the goods were of the kind that might become underweight in its future shelf-life. As such, the provision of the defence does not indicate any "clear legislative intent" on the question of whether the defendant must know the bread was overweight, or take all reasonable care to ensure that it was not. If it indicates anything, it may indicate the lack of desire to impose absolute liability in every situation. At the very least, its presence does not prevent the offence being classified as one of strict liability.

This argument is similar to that made in *R v Strawbridge*[1970] NZLR 909 concerning the then s 5(5) of the Narcotics Act 1965. In that case, the Court of Appeal held that despite the provision of a specific defence that exculpated people who grew opium poppies for innocent purposes, the prima facie absolute offence of cultivating cannabis should require the prosecution to prove that the defendant knew the crop was cannabis. On this basis, it can be accepted that the provision of the defence in s 16(4) of the Weights and Measures Act 1987 does not preclude the availability of a no-fault defence under a strict liability category, nor is it conclusive on the question of mens rea. It is submitted, however, that there is no strong argument for a knowledge requirement in this situation. A defendant who has knowledge of the shortfall would presumably be charged under s 13(a) of the Fair Trading Act 1986 (false representations as to the quantity of goods) which carries a significantly heavier penalty — $100,000 for a body corporate compared with a maximum of $5,000 under s 33 of the Weights and Measures Act 1987.

The second provision which has relevance to the question of categorisation, is s 31 of the Weights and Measures Act 1987. It establishes general vicarious liability for any offences against the Act as well as providing an express defence for those potentially liable as principals. Section 31 states:

> (1) Where an offence is committed against this Act or against any regulation made under this Act by any person acting as the agent or employee of another person, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the same extent as if that other person had personally committed the offence.
>
> (2) Notwithstanding anything in subs(1) of this section, where any proceedings are brought by virtue of that subsection for any offence against this Act, it shall be a good defence *if the defendant proves that the offence was committed without the defendant's knowledge and that the defendant took reasonable precautions and exercised due diligence to prevent the commission of the offence.* (Emphasis added).

Section 31(3) operates to make directors of a convicted body corporate personally liable, subject to the same defence in s 31(2). The defence in subs (2) makes reference to lack of knowledge *and* lack of fault therefore requiring of the defendant more than just absence of intention before she will be acquitted.

The provision of this defence for principals and directors would seem to exclude the possibility of an equivalent defence for agents and employees. It may seem unfair that a company director may escape liability by proving lack of fault but an employee may not, yet to read otherwise seems contrary to the express words of the Act. Despite the persuasiveness of this interpretation, Mitchell DCJ read this section as support for a strict liability categorisation of s 16(2). In other words, an employee may escape liability if she can prove she took reasonable steps to ensure the offence does not occur. He stated that:

> The statutory defence . . . seems to me to come down to the same thing as the *MacKenzie* type defence of the second category. The statute, one might say, declares itself to be in that category for offences charged against a principal for the acts or omissions of agents or employees. (at 545.)

If the statute makes it clear that a no-fault defence is available for principals, then the fact that there is no expressed fault based defence for agents must mean something more than merely support for a general classification. How else can Parliament make it clear that a no-fault defence is not available to another clearly defined group? If

the statement of the Judge in *Woolworths* is representative of judicial opinion, then it seems the only way Parliament can impose absolute liability is to use those very words.

Some may argue that the approach in *Woolworths* is admirable as it keeps absolute liability offences to a minimum. (As is stated should be the case, see above, *Millar v MOT*, at 666.) What then of clear legislative intent? These words from the Court of Appeal in *Millar* have come to be read extremely narrowly, despite the express preservation in that decision of cases such as *AHI Operations Ltd v Department of Labour* [1986] 1 NZLR 645; above, *Millar v MOT* at 668.

Support for the view expressed by Mitchell DCJ may be found in the case of *Civil Aviation Department v MacKenzie* [1983] NZLR 78 itself. In that case the Court of Appeal discussed s 24(1) of the Civil Aviation Act 1964, which specifically provided a defence for the owner, and arguably, the pilot, where the aircraft, which had been operated dangerously, was done without his "actual fault or privity". (at 80.) The Court of Appeal accepted the holding of Casey J in the High Court, that the defence was only available to the owner, but also held that "[c]onsistency and harmony of approach" (at 82) required that due to the provision of this defence for the owner, the pilot should also not be liable if he was without fault. This meant the offence was categorised as strict liability. Professor Orchard has questioned both of these findings. (See G Orchard "The Judicial Categorisation of Offences" (1983) Cant LR 81, 100.) Even assuming the interpretation of s 24(1) was correct, the fact that Parliament had expressly denied the pilot a no-fault defence in this case was also not seen to be strong enough evidence of an intention to impose absolute liability.

As a result of *MacKenzie*, and more recently, the decision in *Woolworths*, the approach of the Courts to the question of "clear legislative intent" is not logically compelling. The preservation of cases like *AHI* indicate that the Court of Appeal is prepared to find an intentional imposition of absolute liability in some cases, but when that discovery will occur cannot now be reliably predicted. It seems that should Parliament wish an offence to remain absolute, the provision of specific statutory defences which indicate this intent will not be treated by the Courts as reflective of any such desire.

Elisabeth McDonald
Victoria University of Wellington

1 Other articles which have dealt with the imposition of absolute liability include Simon France "Absolute liability since *MacKenzie*" [1987] NZLJ 50; Gerald Orchard "Quasi-absolute liability under the Immigration Act 1964" [1986] NZLJ 66; and, more generally on questions of categorisation, Janet November "Public welfare/ Regulatory offences: Judicial criteria for definition and classification(II)" [1990] NZLJ 365.

Correspondence

Dear Sir,

The case for plain legal English in New Zealand

I write to you with reference to the essay, by Dr Margaret McLaren, Associate Professor of Management in the University of Waikato, published at [1992] NZLJ 167-169.

The general thrust of the contents of that essay may, at first sight, seem to be sound and reasonable. However, when concerned with the drafting of any document of any sort, what are the duties of a law practitioner?

(1) Those duties are *not*, fundamentally, to ensure that the document is understandable by his or her client:
(2) Such duties are to ensure that the document shall fully uphold the desires and interests of the client and shall be "Judge proof" – ie shall *not* be subject to any sort of fancy or esoteric interpretation which any Judge may elect to put on the document.

For example only: I suggest that the expressions "the legal estate in fee simple in land" and "the equitable estate for life in land" may well not (with all their implications) be readily understandable by, generally, members of the public. However, all Judges are fully aware of the import of those expressions and will give, duly and properly, legal effect thereto.

It is to be suggested that "words and phrases judicially defined" are to be cast aside to serve "the case for 'plain legal English' in New Zealand"?

"Plain legal English" may well not be "straight-forward prose, carefully written with its readers in mind" – if the "readers" are *not* Judges of our Courts.

The art of writing "legal" prose is to employ "proper words in proper places" *having regard to those persons* – including Judges – *who may be expected to read and comprehend the writing.*

No solicitor, in his or her right mind, is going to draft any sort of legal paper to the intent that it shall intrinsically be *understood* by his or her client. Such a solicitor is going to draw up the paper so that Mr Justice Niggle or Ms Justice Nitpicker shall not be able, somehow, to drive "a cart and horse" through the document.

How would Dr McLaren express, *"in plain English"* the expressions hereinbefore mentioned as far as the law of New Zealand is concerned, remembering that, in relation to her client, it is her *duty* lawfully to protect *the interests of the client.*

Of a certainty, in the ostensible cause of "Plain legal English", no law practitioner should lay his or her client unduly open to any fancy interpretation of the law by any Judge or other judicial officer – "give them an inch and they will take an ell". A document must not be "plain", it must be "legally plain" – ie *"plain" to the Courts.*

Yours,

D M Forsell

Judicial appointments

By John McGrath, QC, Solicitor-General

The appointment of Hon Mr Justice Blanchard has been noted by many as an apparent change of policy in judicial appointments. His Honour had not been active in Court work. At the swearing-in of the new Judge at the High Court at Auckland on 3 August, 1992, the Solicitor-General explained that the appointment marked an intentional change of Government policy that had been discussed with the Judges and approved by many of them. Because of the importance of the change of policy the remarks of the Solicitor-General are published as a matter of information for the profession at large.

I am pleased to bring to this sitting of the Court the congratulations of the Government and its good wishes to His Honour Mr Justice Blanchard as he embarks on his judicial career. The Attorney-General would have very much liked himself to convey directly this message to His Honour but the business of Cabinet has precluded his attendance.

The Government regards the responsibility of recommending to the Governor-General persons for appointment to the judiciary as among the most important of the functions of the executive. For many years it has been considered sufficient and appropriate for vacancies on the High Court Bench to select only those lawyers who have demonstrated outstanding performance as barristers, whether at the independent bar or practising at the bar from within a firm. It is fair to say that, although there have been occasional exceptions, in the past the Government as well as the judiciary and the profession would have regarded any departure from this traditional approach as one that might compromise the quality of the High Court Bench.

Undoubtedly the traditional approach has served New Zealand well, and in future most appointments to the Bench will continue to be able barristers in active practice in the Courts. The Government believes however that it should be recognised that the lawyers who go to Court do not provide an exclusive source of those lawyers who have the qualities to be good Judges. In general the best advocates are at the bar but the qualities sought from Judges go beyond the able presentation of one side of a case. They encompass the ability to appreciate the strengths of both sides, reaching decisions fair to the parties while upholding the law. Those further qualities are present in advocates but also in some other able lawyers whose careers have been moulded in different applications of the law.

And by enlarging the pool of lawyers considered for appointment, the judiciary will become more representative of the whole cross-section of society; indeed this can be achieved without reducing the calibre of those lawyers appointed to the Bench.

At a recent conference of Judges of this Court and the Court of Appeal the Attorney-General suggested that moves along these lines in some judicial appointments would, over a period, enhance the perception of the judiciary in society and certainly not diminish the quality of justice. He was gratified at the warm support his thoughts received from many of your Honours. The ideas are not of course new and reflect approaches to senior judicial appointments in Canada for some time and also initiatives in the United Kingdom reflected in the agenda of a reforming Lord Chancellor backed by a consensus over the general need for changes within the judiciary and in the legal profession's structure in that country.

Such approaches do not entail departure from the concept that the best person available for any vacant judicial position should be appointed. In that respect however, lack of present close familiarity with Court procedure need not, in the case of a lawyer otherwise meeting the test, be seen as an impediment to appointment. In England appointment to the office of Recorder, a part-time Judge, is seen as the means for overcoming gaps in technical knowledge. We do not have that office available, but in the right person, at least in the Government's view, absence of close familiarity with Court procedure is a gap of a kind that can with conscientious application readily be filled.

Against this background the appointment of Mr Justice Blanchard brings to the Bench a lawyer of outstanding and diverse achievements in the law.

The new Judge holds the degrees of Master of Laws from both the University of Auckland in 1968 and of Harvard University in 1969.

He has practised as a senior commercial law partner with Simpson Grierson Butler White, and has built up a specialist commercial practice over the years especially in the area of land law. In his textbook and other legal writing in his special fields has made a significant contribution to the resources available to New Zealand lawyers. He is the author of *The Handbook of Agreements for Sale and Purchase of Land* now in its fourth edition (1988), of *Company Receiverships in New Zealand and Australia* and of the *Halsbury New Zealand Commentaries on Corporations, Receivers and Sale of Land*. As a practising lawyer the new Judge also appeared as one of

the counsel for the Crown before the Waitangi Tribunal in the major claim brought by the Ngai Tahu people under the Treaty of Waitangi Act and heard during 1989 and 1990.

Over the past two years His Honour has been a member of the Law Commission, the central advisory body responsible for systematic review, reform and development of the law of New Zealand. His Honour, as Law Commissioner, has worked on a range of law reform issues including, in the area of judicial remedies, contribution by joint defendants to damages awards and on the issue of entitlements to interest on damages. His major project has been the rewriting of our Property Law Act, one I believe to be now very close to completion. But the Law Commission works in a collegial way and there have been few aspects of its work which have not benefited from his enthusiasm for the law and for developing the policies to be followed in reforming it.

I should also mention that the Judge has been a member of the Electoral Referendum Panel, which is a small, official, and non-political group convened to advise the Minister of Justice on the forthcoming referendum on 19 September on the reform of the electoral system.

I said there has been great diversity of His Honour's professional work. On that note I move from law reform to the regard in which he is held by the commercial community. This is reflected in the positions he held when appointed on the boards of public companies, including New Zealand's largest public company Fletcher Challenge. I am told that in that company's boardroom he was as much respected for his valued contributions in the areas of entrepreneurial judgment as for his advice and participation on corporate policy issues of more legal significance.

His Honour will undoubtedly bring to the office of Judge of this Court great diversity of experience in the law and commerce. That his path to the Bench has not followed a traditional route cannot be denied. It is equally apparent however that he enjoys qualities as a lawyer that have put him in the highest rank of his former colleagues, in practice, in commerce, in law reform and as a legal author. The Government is confident that he has the attributes to satisfy well the needs of the community. On its behalf I wish him well confident that this pinnacle in his legal career will provide him and the community with continuing mutual satisfaction. □

Recent Admissions

Barristers and Solicitors

Adams L	Christchurch	3 August 1992	Ng K K W	Auckland	12 June 1992
Atkins S M	Auckland	12 June 1992	Nixon F H	Auckland	12 June 1992
Bhargav S	Auckland	12 June 1992	Norton M J	Auckland	12 June 1992
Brochner R P	Auckland	12 June 1992	Patel S D	Auckland	12 June 1992
Cara	Auckland	12 June 1992	Pitman S L	Auckland	12 June 1992
Carnachan R S	Auckland	12 June 1992	Prasad L V	Auckland	12 June 1992
Cogswell P R	Auckland	12 June 1992	Rajapakse D K K	Auckland	12 June 1992
Corlett M A	Auckland	12 June 1992	Ritchie D A	Auckland	12 June 1992
Cotter G M	Auckland	12 June 1992	Roberton M A	Auckland	12 June 1992
Davies R A	Auckland	12 June 1992	Roberts J M	Auckland	12 June 1992
Edgerley M K	Auckland	12 June 1992	Ryan R E	Christchurch	5 June 1992
Faleauto E G T	Auckland	12 June 1992	Scott S J	Auckland	12 June 1992
Ferguson A E	Auckland	12 June 1992	Shepherd M R	Christchurch	5 June 1992
Girven C W	Auckland	12 June 1992	Siew Chee Wa C	Christchurch	5 June 1992
Gollin S C D A	Auckland	12 June 1992	Simpson M I	Auckland	12 June 1992
Graham H	Auckland	12 June 1992	Starr C M	Auckland	12 June 1992
Grey A E	Auckland	12 June 1992	Steen B A	Auckland	12 June 1992
Harding C J	Auckland	12 June 1992	Steere B F	Christchurch	5 June 1992
Hardy J	Auckland	12 June 1992	Stone C B	Auckland	12 June 1992
Heath G J	Auckland	12 June 1992	Stone T S	Christchurch	5 June 1992
Hern R B J	Auckland	12 June 1992	Studholme J E	Christchurch	5 June 1992
Hickson D B	Auckland	12 June 1992	Swanney J C	Auckland	12 June 1992
Hwa E L Y	Auckland	12 June 1992	Tapueluelu J V	Auckland	12 June 1992
Jacobs L A	Auckland	12 June 1992	Taylor N B	Christchurch	5 June 1992
Johnstone D G	Auckland	12 June 1992	Thomas R M	Auckland	12 June 1992
Karena H A	Auckland	12 June 1992	Treadaway L J	Auckland	12 June 1992
Kelly W	Auckland	12 June 1992	Udit J J	Christchurch	5 June 1992
Knight J A	Auckland	12 June 1992	Waetford A M M I	Auckland	12 June 1992
Ladbrook W J	Auckland	12 June 1992	Wallace P W	Auckland	12 June 1992
Lao A P T	Auckland	12 June 1992	Webber J A	Auckland	12 June 1992
Lee P T	Auckland	12 June 1992	Whata C N	Auckland	12 June 1992
Lock A G	Auckland	12 June 1992	Wilson D A	Christchurch	5 June 1992
McCabe E N	Auckland	12 June 1992	Wilson M J	Christchurch	5 June 1992
McCoy T E	Auckland	12 June 1992	Wood A S	Christchurch	5 June 1992
MacKenzie S M	Auckland	12 June 1992	Wren J H	Christchurch	5 June 1992
Nannestad A G R L G	Auckland	12 June 1992	Wright F M	Auckland	12 June 1992

The mass media and the criminal process : A public service or a public circus?

By R E Harrison, Barrister of Auckland

This article was delivered as a paper at the Wellington District Law Society Seminar at the Chateau in June 1992. Dr Harrison considers there has been a change of approach in the way criminal investigations and alleged crimes are reported at the pre-trial stage. He expresses concern about four areas of pre-trial publicity; personal details about accused people, material or comment concerning guilt or innocence, a suspect being named between arrest and initial Court appearance, and photographs of people facing criminal charges. Dr Harrison concludes that something specific needs to be done in these pre-trial areas to ensure a fair trial and a minimum of respect for the rights of individual privacy when weighed against the rights of freedom of speech and information.

Introduction

That perceptive political philospher Alexis De Tocqueville once wrote:

> In order to enjoy the inestimable benefits that the liberty of the Press ensures, it is necessary to submit to the inevitable evils that it creates.

But are those words, in fact written in 1835, applicable to the present day mass media and journalistic standards? The antithesis propounded by De Tocqueville is nowhere more sharply delineated today, than in relation to media reporting of crime and the criminal process; but are the "evils" truly "inevitable"?

On the one side, there are the rights of the media to report on, and of the public to know of, issues and events of current interest and concern. Criminal offending, its nature and extent, go to the heart of the values of personal security and obedience to law which are crucial to our society. Equally central is the public's right to be informed of the way in which our Courts and system of criminal justice operate. On the other side, there is the right to a fair trial, which must be regarded as the cornerstone of our criminal justice system; coupled with issues of personal privacy and dignity which may arise in connection with criminal cases, involving not merely accused persons but also victims, informants and witnesses.

Some of these necessarily conflicting rights are expressly recognised in the New Zealand Bill of Rights Act 1990. What is commonly called "freedom of the Press" – more properly of the media – is clearly encompassed within s 14 of the Bill of Rights, which provides that everyone has "the right to freedom of expression, including freedom to seek, receive, and impart information and opinions of any kind in any form."

The importance of the right of an accused to a fair trial is underscored by its express recognition as the first of the "minimum rights" recognised by s 25 of the Bill of Rights, namely:

> The right to a fair and public hearing by an independent and impartial Court.

A further factor, not unrelated to issues of privacy, arises out of the inescapable fact that a person who is arrested or charged before a Court with a criminal offence has no choice in relation to attendance at the direction of the Police or Court. How our society permits such people to be treated, for example by the news media, can be seen as an issue of human rights, as indeed s 23(5) of the Bill of Rights recognises:

> Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

The traditional common law approach towards balancing the competing interests of unrestricted freedom of expression and of the right to a fair trial has been to resolve the conflict in favour of the latter. Indeed, this approach has been an all-embracing blanket one applying to pending cases generally: not only criminal but also civil; and not only criminal trial *by jury* but also criminal trial (and sentence) by *judge alone*. It is encapsuled in the words of Lord Reid in *Attorney-General v Times Newspapers Limited* [1973] 3 All ER 53, 60:

> [The law] is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be a real prejudice to the administration of justice.

It is a theme of this paper that, in contemporary New Zealand, this traditional balance has shifted significantly in favour of freedom of the media, both in law and most markedly in practice. The result is that the major participants – the

media, the Police, the legal profession and the Courts of first instance – no longer have any real guidance as to what is permissible and what impermissible. In particular, the law of criminal contempt of Court has quite plainly ceased to be effective, either to set meaningful standards, or as a deterrent. As a consequence, "anything goes".

Has the approach of the media to reporting crime and most especially violent crime changed over the last decade or so? Are there particular problem areas which now need addressing? From my own observations, there has most certainly been a change in approach. I am not here referring to the manner of reporting what goes on in Court, but to the way in which criminal investigations and alleged crimes themselves are reported in the pre-trial stage. In relatively quick succession, we appear to have passed through a number of stages.

As a first step, the media moved from merely reporting the bare facts of an alleged crime, along with details of the subsequent arrest, charge and appearance in Court of a particular defendant, to a considerably more expanded and detailed analysis, including publication of the contents of interviews with eye witnesses to events. Next there was introduced the reporting of additional subjective comment, reflecting on guilt or innocence or the gravity of the offending, frequently from the police officer in charge of the investigation. Then a new trend, the publishing of background "human interest" stories on the victim of an alleged crime, and on the accused him or herself. Finally and most recently, we now have the regular reporting in the media of information concerning an accused which has traditionally been regarded as highly prejudicial, namely the accused's previous convictions, and the nature of other charges concurrently faced. Along the way, and perhaps as a consequence of the insatiable demand of the television media for "visuals" to accompany a "voiceover" new item, we have seen the parallel development of the media waylaying and photographing a suspect or accused person, most commonly outside the Court at the time of first appearance, or even at the individual's place of residence.

These trends have been remarked on by the Public Issues Committee of the Auckland District Law Society in a number of papers – no less than four – published within the last decade or so.[1] The Committee's papers trace the escalating trend, and express ever increasing concerns. But I suggest that it is only necessary to recall to mind how the major criminal *causes celebres* of the last five to ten years have been reported, to think of instances where the pre-trial media behaviour has closely resembled piranha at mealtime. The trial of the two French agents in the "Rainbow Warrior" homicide; the leadup to the Harawira (or Whare Paia) trial; the Plumley-Walker homicide trials; and the Tamihere trial are all examples of this. But, importantly, these tactics are no longer reserved for the really sensational trials; they are becoming the norm in any criminal case that is at all newsworthy.

The Tamihere case illustrates many of the features of the contemporary approach to media coverage of pre-trial disclosures about which I believe we should all be seriously concerned. It will be recalled that there was a lengthy police investigation once the two Swedish tourists had been discovered missing, both aimed at locating them and at discovering who had perpetrated what, as time wore on, appeared more and more likely to have been a double homicide. During that initial period, the police involved the news media, and created considerable public interest in the investigation – quite properly, as they were still investigating an apparent crime and seeking information from the public which might lead them to a suspect. However, after Tamihere was arrested and ultimately convicted for unlawfully taking the Swedish tourists' car and other property, there were a number of further developments through the media. First, Tamihere was deliberately paraded in front of the media on the occasion of his Court appearances. Secondly, seriously prejudicial information concerning the details of Tamihere's previous convictions and the fact that he was at the time of the alleged killings on bail for a serious rape was disclosed in Parliament by the then Opposition MP John Banks, and on the "Holmes" television programme. Not surprisingly, this information was later repeated in the print media. Thereafter, much further information was provided to the media about details of the police investigations and the police case. When it came to Tamihere's trial, the jury would almost certainly therefore have known of his previous record for violence, including sexual violence, and in addition, would almost certainly have formed fairly strong views about the personal characteristics and character of both victims and accused.

But, it may be asked, does any of this matter? Did it really make a difference either to the end result or to the question of whether Tamihere received a fair trial? As Tamihere was ultimately convicted of the double murder, it could of course be said that the pre-trial publicity which suggested that he might well be the guilty party was merely proved subsequently to be correct. Equally if he had been acquitted, he could conceivably have sued for defamation of character.

Such an approach is I suggest unduly simplistic. First, it may have been that the prejudicial information revealed to the jury in the pre-trial period was the very thing which tipped the balance in favour of conviction. Equally, does not the concept of a fair trial apply equally as much to the "guilty" as to the "innocent"? Is that not what the presumption of innocence means?

By contrast, our Court of Appeal in recent times has taken a much more pragmatic, even robust, approach in this area.

In *Hamley v The Queen*, (CA 17/81, 15 April 1981), a change of venue case, McMullin J delivering the judgment of the Court commented on an argument that pre-trial publicity necessitated a change from the local venue in the following terms (at p 9):

> Such feeling as does exist against the applicant would arise from newspaper and other publicity by the media in reporting the evidence as it emerged in the District Court hearing. This, however, is not an uncommon feature of many cases today. But we do not take the view that any

> feelings of prejudice would survive through the calm and impartial atmosphere of a trial in the High Court. Crimes of a seemingly sensational kind involving murder, rape, and other forms of violence are not uncommon today, but it is a matter of common experience that in the dignified and dispassionate atmosphere of the courtroom any feelings of revulsion against the crimes themselves, sympathy to the victim, or prejudice against the accused, soon disappear. It is not to be lightly assumed that jurors will refrain from putting aside any prejudice which they might harbour against an accused from the nature of the crime when they are instructed to do so by the Judge.

In *R v Harawira* [1989] 2 NZLR 714, the issue of adverse pre-trial publicity was argued on an appeal against conviction on the grounds of miscarriage of justice. Richardson J delivering the judgment of the Court expressed some concern about the nature of the media publicity, in particular a *Dominion Sunday Times* article which "presented an overall picture of a family [of which the accused were members] committed to violence and confrontation [which] must have generated prejudice among Auckland readers from whom the jury would be drawn". However, His Honour stressed the timing of the article — six weeks before trial — and the strong warning in the summing up by the trial Judge. He stated:

> Our system of justice operates in an open society where public issues are freely exposed and debated. Experience shows that juries are quite capable of understanding and carrying out their role in this environment, notwithstanding that an accused may have been the subject of widespread debate and criticism. A ready example — far removed from this case factually — is the way charges of serious violence against gang members are dealt with. Undoubtedly there is widespread prejudice against them, yet juries still acquit or fail to agree on occasions, indicating that when confronted with an actual case, they can be expected to carry out their task responsibly in the light of the evidence (at p 729).

It can be seen that the Court of Appeal — based on its experience — reposes a good deal of faith in the "dignified and dispassionate atmosphere of the courtroom", and the ability of the jury to heed the customary judicial direction to disregard extraneous matters such as pre-trial publicity.[2]

However, I have a number of concerns about this approach. First, is the collective judicial experience of the occasional acquittal of an accused about whom prejudicial matters are known, sufficient to demonstrate that juries invariably or even as a matter of generality are capable of putting completely out of their minds adverse pre-trial publicity? To put it shortly, how can it be deduced from the fact that unpopular defendants are occasionally acquitted, that defendants the subject of adverse publicity are not being wrongly convicted? The plain fact of the matter is that we simply do not know the answer to these questions, and as the law stands at present, are not permitted to know. We are not permitted by law to ask the very people who would be able to tell us, that is, the members of the jury.[3] Another piece of collective wisdom, to be weighed on the other side of the balance, is that "if you throw enough mud, some of it is bound to stick".

Secondly, I suggest that the crucial issue here is not whether seriously adverse pre-trial publicity is, on the empirical experience of the judiciary, capable of being expunged by the formalism of a jury direction. Rather, it is whether the accused has demonstrably received (in the words of the Bill of Rights) "a *fair* and public hearing by an independent and *impartial* Court". In other words — invoking the classic formulation when questions of fairness and partiality are in issue — was justice not only done, but seen to be done?

Quite plainly, to Tamihere and his family, justice has not been seen to be done in relation to this aspect of his trial. And these are concerns which may well continue to be shared by others, despite the recent denial of Tamihere's appeal (not fought directly on this ground) by the Court of Appeal. (*The Queen v Tamihere*, CA 428/90, 21 May 1992.) Overall, this is a state of affairs which, I submit, does nothing to enhance public confidence in our criminal justice system.

The adequacy of the present law

What I have described as the robust approach of the Court of Appeal may be appropriate in the context of pre-trial applications for change of venue and post-conviction attempts to overturn a finding of guilt. However, this approach should not, I suggest, determine our thinking and approach when we consider whether the present law is adequate in practice as a means of regulation of the modern mass media. At that more fundamental level, we need to assess whether the law provides sufficient protection for the right to a fair trial and associated rights of those caught up in the criminal process.

Effectively, under the present law, the only safeguard in this area is the law of criminal contempt of Court.[4] In *Solicitor-General v BCNZ* [1987] 2 NZLR 100, 105, Davison CJ quoted with approval the following *Halsbury* definition of criminal contempt:

> In general terms, words spoken or otherwise published, or acts done, outside Court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempts of Court.

His Honour held that, to constitute a criminal contempt of Court, it must be shown beyond reasonable doubt that the material complained of relates to a particular accused, and that it has a tendnccy to interfere with the due administration of justice in the particular proceedings. If these two elements are shown to exist, it must then be further shown that as a matter of practical reality there is a "real risk" that the fair trial of the accused person is likely to be prejudiced. Even if all of this is established, the Court may nevertheless decide, on the grounds of public policy, that it should not punish the apparent contempt of Court.

The *BCNZ* case concerned statements made by (once again) the Member of Parliament for Whangarei, Mr John Banks, this time on a radio talkback show. Mr Banks had made reference to the previous convictions of two individuals, whom he did not name, then facing trial on separate charges of murder. The Solicitor-General alleged that this referred by implication to two particular accused, Holdem and Rae, then awaiting trial in Christchurch and Auckland respectively. After carefully analysing his remarks, the Chief Justice held that it had not been established beyond reasonable doubt that Mr Banks' statements necessarily implied that the criminal record which he had read out was that of either of the two named accused. He further held that it had not been shown that the broadcast material was likely to have prejudiced the fair trial of either accused.[5] In the result, contempt proceedings against the BCNZ and Mr Banks, and parallel proceedings against Wellington Newspapers Limited and Mr Banks over a press statement and newspaper article relating to a third accused, were dismissed.

From the point of view of the prosecution and accused as direct participants in a criminal trial, proceedings for contempt of Court are of course no more than an attempt to shut the proverbial stable door after the event. No doubt as a sign of the times, there have recently been at least two attempts at imposing a prior restraint.

Television New Zealand Limited v Solicitor-General [1989] 1 NZLR 1 involved an attempt to prevent Television New Zealand from publishing a news item which included expressions of opinion and comment by neighbours and friends of the prime suspect in a fatal shooting at Hastings, who was then wanted by the police. The police had issued a formal press release advising that they were trying to locate the suspect, who was thought to be armed, and warning the public not to approach him. The comments proposed to be published were generally supportive of the suspect, and indeed implied that he could conceivably have a defence of provocation.

The Court of Appeal allowed an appeal against the grant of an interim injunction to restrain publication of the item. The Court accepted that the jurisdiction to grant an injunction existed:

> In our opinion the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely the Court has inherent jurisdiction to prevent the risk of contempt of Court by granting an injunction. But the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial. (at p 3.)

The Court of Appeal concluded that no sufficient ground for an interim injunction had been made out. Their Honours stated:

> The script [of the proposed programme] . . . verges on a report of interviews with potential witnesses, which may amount to contempt . . ., but in our opinion is not so factual or detailed in its account as to be likely to prejudice a fair trial. We bear in mind also that considerable time is likely to elapse before a trial.

In *R v Chignell and Walker* (1990) 6 CRNZ 476, the Crown tried to invoke the inherent jurisdiction of the Court to restrain a threatened contempt of Court, by preventing further public comment concerning an unnamed witness known as "witness B", pending a retrial of the accused in the Plumley-Walker homicide. No news media were named as respondents.

Robertson J, after referring to *TVNZ Limited v Solicitor-General*, quoted the following words of Lord Scarman in *Attorney-General v BBC* [1981] AC 303, 362:

> But the prior restraint of publication, although occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice. I understand the test of "pressing social need" as being exactly that.

Accordingly, His Honour concluded:

> The Crown is properly expressing a concern that in the absence of responsible self-restraint and mature self-discipline (and there has been no evidence of that to date), there is a risk of activity which could undermine a fair trial. In my view, however, that mere risk is insufficient to outweigh the competing considerations. In the present case the applicant seeks what is effectively an injunction against all the world prohibiting publication of any material concerning "Witness B" . . .
>
> Section 14 New Zealand Bill of Rights Act 1990 reiterates the value of freedom of expression and freedom of information within our society. Although there is a need for responsibility and restraint to ensure that there can be a fair and proper retrial, it would be an unwarranted over-reaction by the Court to respond as is here suggested. However, there should be no doubt as to the willingness of the Court to act firmly and decisively if there is comment or activity which is in fact destructive of a fair trial.
>
> In 9 *Halsbury's Laws of England* (4th ed) para 11 it is noted that it is a contempt to publish an interview with a witness or a potential witness. It is also a contempt to comment on matters likely to be at issue in the trial or to prejudge matters in issue . . .
>
> Those responsible for the media in this country are required to adhere to the law on contempt and will face the consequences of a failure to do so.
>
> If any party has clear and decisive information that a particular part of the media is about to act in a way which it can be shown would constitute a contempt, then in a properly constituted proceeding (in which all affected parties are before the Court), some restraining action might be appropriate. However, there is no value in a general injunction against all the world purporting to prohibit any

> contempt of Court. The present application, though not to be belittled, is too vague to be an appropriate mechanism of resort in this case. (at pp 479-80.)

It is submitted that the law of criminal contempt is demonstrably inadequate to deal with the modern-day phenomenon of aggressive media reporting of crime and criminal investigations. As has been seen, while many of the more flagrant abuses already discussed are in theory prohibited by the law of contempt of Court, this is not determinative of the legal outcome. The further requirement that it be shown that there was a real likelihood of prejudice to the trial of a particular accused, when combined with the "robust approach" which lays great store on the efficacy of the jury direction to disregard previous media coverage and the ability of a jury to do so, and the fact that most alleged contempts occur at about the time of the initial arrest of an accused or even earlier, with trial taking place many months later, makes proof of a criminal contempt an impossibility in all but the most outrageous cases. These difficulties of proof are of course compounded by the fact that access to the most obvious source of knowledge about the effect of the alleged contempt on the outcome of the trial – the members of the jury concerned – is prohibited by law for policy reasons.

Small wonder, then, that the remedy of an application to commit for criminal contempt, usually brought by the Solicitor-General, appears in this country to have largely fallen into disuse in modern times. What is currently needed, I suggest, is an identification of the real problem areas in terms of modern media practice, and a more direct approach to prohibition of particular practices if this is considered necessary. Any prohibitions need to be reinforced by appropriate procedures and sanctions and a clear understanding that these sanctions will be invoked if the standards laid down are transgressed. Such an approach would provide the news media with clear guidelines and standards of behaviour, which the present law plainly has failed to do.

Reform of the present law

There are I suggest four areas of media practice in relation to the reporting of criminal investigations and prosecutions (being material not transacted in Court), in the period prior to conviction of an accused, which require scrutiny with a view to possible reform.

1 *Publication Prior to a Finding or Plea of Guilty, of Personal Details of Persons Involved in Criminal Proceedings*

The efforts of Mr John Banks (and indeed certain other Members of Parliament) aside, it is becoming a much more frequent practice for the media to publish either previous convictions of or charges presently faced by a person charged or likely to be charged with a serious offence. In some cases, the practice also extends to the publishing of adverse details concerning a victim or key defence or prosecution witness (as witness the Plumley-Walker homicide trials, where both the alleged victim and "witness B" received a thorough going over in the media).

It is submitted that, except in the most exceptional circumstances, there can be no justification for publishing, other than as part of an actual report of Court proceedings, background personal information concerning an accused, victim or other potential participant in a criminal prosecution, and most particularly details of previous convictions or other charges concurrently faced. The judicial "robust approach" notwithstanding, it is suggested that, if there is one matter which juries will find it difficult, if not impossible, to ignore, it is the knowledge that an accused (in particular) has previous serious convictions tending to show either predisposition or an absence of credibility. This is after all the premise of the law as to "similar fact" evidence and of the exclusion of evidence which tends merely to show predisposition to commit an offence.

The one proper exception to a prohibition of publication of evidence of this nature should be where the interests of public safety require the publication of background information, such as when a known suspect is considered dangerous to the public, and is unable to be located or is in hiding.[6] In such a case, if it is considered by a police officer of sufficient rank to be necessary in the public interest to release such background information, then publication of it should be permissible; but not otherwise.

2 *Publication Prior to Trial of Material or Comment Relevant to Guilt or Innocence*

This category covers material or comment directly relevant to guilt or innocence, other than information concerning the character or background of an accused, victim or other participant in criminal proceedings. It is accepted that a blanket prohibition on the publication of information within this category would not only be difficult to enforce in the present climate, but would also involve a substantial restriction on freedom of speech and of information. It is suggested that problems arising in this area can be tackled less directly.

First, the substantive law of contempt of Court should remain, to deal with the more serious instances of abuse. Secondly, it should be recognised that, when comment of this nature is published, the news media are not solely responsible. Such comment has to originate from somewhere, and frequently comes from one of three sources: the police, the legal profession, and (less often) Members of Parliament.

(i) The Police

Over the past few years, the Police Administration has become increasingly conscious of the need for clear guidelines in relation to police dealings with the media. The latest guidelines are contained in the New Zealand Police Gazette and dated 11 July 1990. They are reasonably detailed, and show an awareness of the need to avoid "trial by media" and comment on matters sub judice, while at the same time maintaining a co-operative relationship with the news media. The guidelines include the following:

> (1) Officers in charge of investigations and operations must avoid breaching sub judice rules in their communications with journalists.

(2) The sub judice rule begins when Court proceedings are pending, usually at the time of arrest of a suspect. Once a matter is sub judice, public comment that would interfere with a trial or the criminal justice system is forbidden.

(3) The police may and should provide the news media with details of crimes prior to an arrest. Publicity for the purpose of extracting additional information from the public is permitted after an arrest. However, statements must be carefully phrased with such terms as "suspected", "believed" or "alleged".

(4) Prejudgment of matters which may later be disputed in Court must be avoided. Comments that must be avoided are those that may:

- usurp the role of the Court by prejudging an issue;
- lead to suggestions of "trial by media";
- indicate the accused is of bad character;
- prejudice the fairness of any trial;
- prejudice a police investigation or subsequent prosecution.

(5) The news media shall not be used for the purpose of putting pressure on unco-operative people in order to have them supply body samples . . .

While there is little to find fault with in the guidelines themselves, one gains the impression that they are not necessarily always observed by individual officers in the context of particular, perhaps "difficult" investigations. Certainly, if the guidelines were strictly enforced, they would go a way towards ensuring that comment from police sources relevant to guilt or innocence of a suspect or accused was not available for the media to take up and publish. Furthermore, while the Serious Fraud Office as the other major prosecuting agency in high profile crime has shown to date an awareness of the need for restraint in this area, adoption by it of similar guidelines would also be a step in the right direction.

(ii) The Legal Profession

In recent years, the legal profession – in particular the criminal bar – has become noticeably less circumspect with the news media. Some practitioners have shown a willingness to comment publicly on the merits of their client's position or defence. In a small minority of cases, the comment has taken on aspects of self-promotion which have tended to bring the legal profession as a whole into disrepute. No doubt much of this comment has occurred as a reaction to adverse media publicity, and is done in good faith on behalf of the client in an attempt to redress the balance. But it is suggested that, that way, lie all of the excesses of the American criminal justice system, with its pre-trial press conferences and defence and prosecution posturing, so debasing not only of the public image of the legal profession itself, but also of the criminal justice system.

We have of course to recognise that there have been significant changes in the way that members of the legal profession are permitted to communicate with the public generally, including the news media. In particular, the provision in the former Code of Ethics which prohibited comment on a client's affairs without both the consent of the client and the consent of the President of the District Law Society or nominee no longer exists. That mechanical approach at least had the benefit of ensuring, in principle, that the more blatant efforts at self-promotion through statements on a client's behalf which are now occurring, did not occur. My personal view is that members of the legal profession should not be at liberty to comment, at least pre-trial, on the *merits* of a client's defence, claim, appeal or other application. If the client wishes there to be public comment along those lines, then that should be the direct responsibility of the client, after he or she has received appropriate advice. There should be clear detailed guidelines from the New Zealand Law Society, and if need be, an amendment to the Rules of Professional Conduct. If it is good enough for the police to have detailed guidelines, then it should be good enough for the legal profession.

(iii) Members of Parliament

The position and responsibilities of Members of Parliament in the present context were dealt with in depth in a 1988 Paper which I authored for the Public Issues Committee of the Auckland District Law Society, "Speaking Out: Members of Parliament and the Judicial Process". So far as statements to the media outside Parliament are concerned, Members of Parliament are bound by the general law, and there needs to be no special provision. However, the use of the cloak of Parliamentary privilege to "name names" remains in my view an area of concern. Standing Orders need to be amended to ensure that Members of Parliament do not abuse Parliamentary privilege by making statements which, outside Parliament, would breach the right to a fair trial.

3 *Publication of the Name of a Suspect or Accused, Prior to the Initial Court Appearance Following Arrest*

The emergence of a media trend towards publishing the names of persons charged but not yet brought before a Court was noted by the Auckland District Law Society's Public Issues Committee as long ago as 1981. The trend has continued unabated, and regularly results in expressions of concern by counsel or Judges at District Court level. Very recently, a proposal to publish the name of a South Auckland chemist currently undergoing investigation by the Serious Fraud Office resulted in ex parte interim orders being made in the High Court on the application of the suspect (and with the consent of the Serious Fraud Office), prohibiting publication of his name and identifying details. (*C v Wilson & Horton Limited and Another*, High Court, Auckland Registry, CP No 765/92.)

Except in the case of a suspect who is at large and a danger to the public canvassed above, it is submitted that the public has no proper interest in knowing the identity of persons under active investigation for a criminal offence, prior to the time when they first appear in Court. If the evidence against them is insufficient for a charge to be laid, then their

individual right to privacy should generally outweigh any right of the public to be aware that they are currently under investigation. If the evidence is sufficient, then the public will usually learn their identity, soon enough, when a formal charge is laid.

The result of publication by the media of the name of a person about to be charged prior to first appearance in Court is effectively to thwart the exercise by that person of the right to apply for name suppression. If that right, granted by statute, is to be a meaningful one, its exercise must be protected by a prior restraint on publication in the period immediately prior to the first Court appearance. Such restraint it is now submitted is clearly necessary, given the failure of the media to exercise self-restraint.

4 Photographing and Publication of Photographs of Persons facing Criminal Charges

Newspaper photographs and television news programmes now regularly and almost as a matter of course show photographs or film footage of persons who have been charged with some newsworthy crime. Frequently, defendants are photographed on the occasion of their first appearance in Court, or as they arrive to face a trial. Television camera crews now frequently lay siege to places where they consider such footage may be obtained, be it police stations or the precincts of our Court buildings. Sometimes, the appearances are that the media have been "tipped off" from within the police. This is, purely and simply, the modern version of the pillory.

Irrespective of guilt or innocence, a Court appearance on a serious criminal charge is necessarily a time of considerable personal tragedy and stress. Understandably, the responses of those the subject of this generally unwelcome attention range from embarrassment, to a regal wave at the camera, to rather pathetic attempts at self-concealment, even to attacks on the camera operator.

In the absence of consent, such attempts to photograph persons facing perhaps serious criminal charges and still, frequently, in a state of shock as a consequence of their having been arrested and charged, are in my view a gross violation of individual privacy. As already pointed out, a person who has been arrested or charged and who attends at a Police Station or a Court does so under compulsion of law. In terms of s 22(5) of the Bill of Rights, having been deprived of liberty, they are to be "treated with humanity and with respect for the inherent dignity of the person". If the news media are not willing so to treat them, then in my submission it becomes the responsibility of the Courts and the State to ensure this. A failure to do so, with consequent repeated publication of images of unseemly displays in the immediate vicinity of our Courts of law, can only bring the criminal justice system itself into disrepute.

In addition, there is a further, much more pragmatic reason why photographing and publication of photographs of defendants pre-trial should not occur. The publication of a photograph of an accused, particularly upon the occasion of first appearance in Court, may well prejudice a defence – or a prosecution – in those cases where identification is in issue; as in fact occurred in the Tamihere case.

For the foregoing reasons, it is submitted that there needs to be an express statutory prohibition on photographing accused persons attending Court without express written consent, and on publishing photographic images of an accused. The prohibition should enure from arrest until conviction or acquittal, and be subject to the exception based on potential danger to the public canvassed earlier.

Conclusions

One of the measures of a civilised society is how it treats those alleged to have committed crimes against it. The concepts of a fair trial by an impartial Court, of treatment with dignity and of respect for minimum rights of individual privacy are a crucial part of this assessment. While, as already acknowledged, these rights have to be weighed in the balance against the rights of freedom of speech and of information, it is, I submit, the former rights which should generally take precedence in the crucial period while a suspect is under active investigation and facing an as yet undisposed of criminal charge.

It needs to be stressed once again that this paper is concerned only with the pre-trial situation, and with a narrow band of media activity. There is no suggestion that additional constraints should be applied to media reporting of what actually occurs in the course of the criminal trial itself, or following conviction.

Current mass media practices in the reporting of news of crime and criminal investigations now need it is submitted to be the subject of more explicit and direct controls. This is, to a significantly greater extent than here, already the position in England.[7] It is submitted therefore that there needs to be a series of summary criminal offences dealing with specific situations and in particular with the four problem areas canvassed above. Exceptions to these constraints should be explicitly limited to necessary police appeals to the public for assistance in solving a crime, and situations where considerations of public safety arise. At the same time, it is submitted that Parliament, the police and the legal professional should separately address these issues from the viewpoint of their own professional standards and internal discipline, and should ensure by means of separate sanctions that the standards which bind the media and the public generally are complied with by their own members. □

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1 "Public Identification of an Arrested Person", 7 December 1981; "Reporting Criminal Inquiries – The Balance Between Freedom of Speech and the Interests of Justice", 25 March 1986; "Speaking Out: Members of Parliament and the Judicial Process", 1 August 1988; "The Mass Media and the Criminal Process", 4 May 1989.

2 See also Burrows, *News Media Law in New Zealand* (3rd ed 1990), pp 258-260.

3 Nor – a different but not unrelated issue – despite a steady descent towards an American-style pre-trial media circus, are we able to ascertain in advance the extent to which individual members of the jury have pre-judged the subject matter of the trial, as part of the jury selection process.

4 Very occasionally, other remedies may be available, such as the protection of rights of personal privacy: see *Tucker v News Media Ownership Limited* [1986] 2 NZLR 716 and Burrows, supra, pp 187-9.

5 This notwithstanding that Mr Banks' remarks were among the matters relied on in ordering a transfer of the trial of Holdem away from Christchurch; see *R v Holdem* (1987) 3 CRNZ 103.

6 See for example the police press release in *Television New Zealand Limited v Solicitor-General*, supra.

7 See A G V Rogers, [1989] NZLJ 282. See also the discussion in Burrows, supra, 291-3.

Freedom of the media and the criminal law

By Kim Hill, journalist and broadcaster

This article was prepared as a talk to be given at the Wellington District Law Society Seminar at the Chateau in June 1992. Kim Hill was invited, indeed expressly told, to take a position and state a case for journalists as a response to the preceding paper of Dr Harrison which is published at [1992] NZLJ 271. She delivered according to her brief, with her customary vigour and wit. Unfortunately, as it happened, Kim Hill did not manage to get to the Chateau to present her paper, but it was read out to those attending.

I'm charmed that you've invited me to your annual talk fest . . . . despite the fact that I feel a bit like Winston Peters at a National Party caucus meeting, with less of a support base and without his powers of oratory or righteous indignation.

In fact, thanks a million for getting me here to defend the indefensible. Still, you guys make a living out of that, and indeed, as a profession, are about as highly regarded these days as journalists, so we may have quite a lot in common.

I note that Dr Harrison, quoting de Tocqueville, addressed and questioned only the "inevitable evils" and ignored the "inestimable benefits" that the liberty of the press ensures. They are hard to identify, simply because the lack of them may be apparent only historically, with the wisdom of hindsight, and it's a bit late to worry about them then.

In the meantime, the media are great punchbags, and I accept that it's perhaps difficult to get high-minded about the liberty of the press, faced with the excesses that the electronic media in particular indulge in from time to time.

But I would suggest that the inestimable benefits lie in the very conflict Dr Harrison would like to do away with.

Section 14 of the Bill of Rights Act, guaranteeing the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form . . . is a section rich in irony if you consider our defamation laws, as well as the law of contempt. I stand before you, incidentally, as someone who has interviewed Bob Jones live on air with no delay button. I have teetered on the edge of the abysss, glimpsed the piles of writs littering the floor below.

I applaud section 14, and the seriousness with which it's apparently being taken by the Court. It's a good idea. A bit like democracy . . . . an ideal which we can approximate imperfectly, but for which we must continue to strive.

Section 25 — the right to a fair and public hearing by an independent and impartial Court — may in fact be equally unattainable in the real world. The trials cited by Dr Harrison . . . like the Rainbow Warrior trial, the Tamihere trial, do not exist in a vacuum. They are treated as . . . they *are* . . . events, phenomena.

Good Stories. It's naive to expect the media to decline to explore every aspect.

If Dr Harrison has doubts about the ability of juries to disregard pre-trial publicity, that raises more questions about the jury system than it does about the media. In a country like New Zealand, juries will always carry baggage — prejudice, gossip, innuendo — into the jury room with them. If those aspects of a trial have been canvassed by the media, they're on the table, can be dealt with if necessary by the defence and the prosecution.

David Tamihere's family have, I think, wider concerns about the justice accorded him than some pre-trial publicity.

I think we are on very dangerous ground when we start suggesting that it's the media's job to enhance public confidence in a criminal justice system that is not perfect or immune from criticism.

Equally, it is not the media's job to shore up the economy, protect New Zealand's image overseas, or present misinformation to enable the police to secure an arrest.

Against a horde of attacks on the media, I contend that the media have only one role. It's centred on section 14, and further, it entails questioning the status quo.

I had an interesting conversation with Radio New Zealand's news editor yesterday . . . he said the Herald has reported the imminent release of the so-called Parnell Panther. He said you know what's going to happen now . . . everyone and their dogs are going to stake out Ahipara, the parole plan will be jeopardised again, round and round we go. He said what do I do? If I don't write a story on it, everyone else will. I said I reckon you have to decide that a story is a story, and to hell with the consequences. What's the alternative, and where do you draw the line? It's the media's job to do the story, it's someone else's job to deal with the fall out. In the course of the first wave of reporting Stephen's parole, some interesting questions were raised about the way the parole board operates, who's eligible and why. That would not have been discussed if he hadn't been a story. Is his parole in the public interest? Is the public interest the same as his interest? . . . or the interests of the parole system?

Society must be robust enough to deal with the often unwelcome scrutiny of an overzealous, sometimes misguided, sometimes

plain stupid media, because the alternative, the erection of barricades, more rules and regulations, is no good. Simple as that.

It seems to be admirable, not lamentable, that rather than throwing a blanket of contempt at a very low threshold over the media, cases, alleged infringements, are being judged on their individual circumstances.

Some in the media *do* claim to find this lamentable. It leads to uncertainty about how much can be said, and to a feeling that someone else is scoring a news advantage by going that inch too far . . . a kind of professional envy. I get a bit irritated with this plaintiff posture. The media *is* a rat pack, but let's at least put up some pretence at being able to think for ourselves, and stop whingeing about grey areas when what we mean is — we don't know quite how to cover this story, we wish to hell someone else would tell us what to do.

I'm happy to see the media jump into grey areas. That's its job. To push the boundaries. Find out what they are and then go through them. My regret is that it's not done enough, in all sorts of areas. And it's a tragic fact that crime and Court cases offer an easy sensational way for the media to appear to be probing, scooping, bringing you the dirt in the comfort of your living room. The media is as a rule lazy and poor, and relies on the equivalent of ambulance chasing for a large proportion of its lead stories. I regret that, I'm embarrassed by that. But I don't believe regulation or the rule of law will fix it.

I'm certainly not, you see, about to be an apologist for the Holmes Show. But we should be clear about the issue. If it's a case of jeopardising a fair trial, let's investigate that. But if it's a vague feeling of unease about invasion of privacy, lack of taste, unfounded speculation . . . that, I'm afraid, is life.

You see, I believe the New Zealand public is both ill-served by, and provides a poor audience for, its media. A difficult position, I admit. What I mean is . . . yes, the media is often lazy, shallow, lacking in investigatory energy, and reactive to the point of passivity. At the very same time, New Zealand is full of people who believe the boat should not be rocked. That asking questions is a rather rude thing to do. That there's not enough *good* news about what the government is doing right. There's a formal complaint lodged this week against me, for having the temerity to ask Rod Deane whether he's on a bonus based on electricity sales. That's none of anyone's business, apparently!

I envy Dr Harrison's faith in the possibility of clear guidlines and standards of behaviour . . . bearing Section 14 in mind, of course!

Think about this, if Brian Schlaepfer had not died, but was lying critically ill, or uninjured but in custody, would the police still have offered that harrowing tape of Linda Schlaepfer talking to the police officer? If they'd offered it, should the media have declined it? Should they have declined it anyway? Was it in her interests, the public interest, the police interests . . . or simply a hot story.

The media's primary job is to judge that last one. Is it a story? If there's time, coming up to a bulletin, going live to air, there may be a question asked about taste, the law, even the facts!

Journalists will ask themselves whether saying something will prejudice a fair trial. And nine times out of ten they won't have a clue, and nor would you.

It's furthermore possibly very much in the public interest to know the name of a suspect or accused before they appear in Court. There are many things that can present a danger to the public, that the public should be warned about, and they don't have to involve sawn-off shotguns.

I would *like* to be able to say that the more aggressive approach by the media towards the limitations of the justice system signifies a tilting of the scales in favour of a concern for the individual, the victim, and away from unthinking respect for a system. But again, I think it's humbug to endow the media with a social conscience in that sense. A good story is a human story, a personalised drama, that's what the Courts have to offer. But . . . to stagger on in a fairly ambivalent fashion . . . . it's NOT only lawyers and the Courts who have professional standards and internal discipline. Ninety-nine percent of the media do too, and they're players in the system as much as anyone else, not a dispensable nuisance or a cuckoo in the nest of judicial rectitude. They have proven themselves to be part of the justice

Dawn raids by police

I thought at the time that the well-publicised early-morning arrest of the Maxwell brothers was shameful, and have been pleased to read damaging letters on the subject in *The Times*.

George Staple, director of the Serious Fraud Office, has pleaded that dawn arrests are made because (he has been advised) "it is the time of day when you are most likely to find people at home". The media circus outside the Maxwell home at the time of the arrest was unsurprising because the brothers "have been the subject of close media attention for some time".

If you believe that, you will believe anything. Cameramen were there because they knew that an arrest was about to be made. As Jonathan Goldberg QC observes in his letter, "the media circus which erupted outside the Maxwell house at 6.30 am must surely have occurred as a result of deliberate tactics by somebody on the prosecution team, setting out to embarrass the accused men and impress the watching public".

I find that obnoxious. Clearly it was supposed that public feeling about Robert Maxwell's affairs was such that people would be happy seeing the public humiliation of his sons.

This comes perilously close to the days when we put people in the stocks and encouraged others to pelt them with rubbish. Every now and again, America lapses into a blaze of pre-trial publicity against some unfortunate individual. This conditioning of public attitudes before a trial takes place is a disgrace to justice.

W F Deedes
The Weekly Telegraph
12 July 1992

system, for better and worse. Sure, prosecute those who clearly endanger justice, and let the rest get on with . . . ideally . . . *just* short of being sued.

There is something more than a little distasteful about lawyers lecturing the media on standards of justice and accuracy when it's become a truism that the adversarial system of justice leaves something to be desired. There is no better training ground for an aspiring reporter than to watch the defence lawyer at work on a jury. The manipulation, the theatre, the arguments of psychology and convenience have often very little to do with the truth or a fair trial, and a great deal to do with . . . selling a hot story to a group of consumers.

The media and the legal profession, in other words, are in a similar business at times. So let's not get too prissy about it. You fight for section 25. The media should fight for section 14. Somewhere between the two lies some justice, if we're lucky.

Dr Harrison made a good point when he said that the news media are not solely responsible for pre-trial comment . . . too damn right.

Educate the police, MPs and lawyers about contempt of Court. But don't expect a bunch of journalists to set higher standards than they have. □

Books

Crime and Deviance

By Greg Newbold

Oxford University Press (1992) 155pp plus Index, ISBN 0-19-558232-2. $19.95.

Reviewed by Don Mathias, Barrister, of Auckland

Reading this book may make you depressed and angry, but at least it will make you think. You will be invited to consider how public attention has been directed to the kind of property crime which is of least harm to society while little effort is put into bringing to justice those whose economic or environmental crimes affect thousands of people. You will be shown how a conservative culture has kept women's crime different in kind to men's, how women's sexual deviance is more manifest in prisons than men's, how prostitutes are among the least exploited workers of all, how rape is essentially social in nature and a reaction both to economic forces and to the departure of women from their traditional roles, how those who control power, money and culture determine which drug use is unacceptable so as to override the public health function of control, and how little effort is made to prevent crimes against the environment (the real biggies) because to do so would impinge upon the self-interests of the rich and powerful elite who define what is criminal.

Deviance inevitably arises from an assertion of control. It is inevitable because it is natural. Morality is relative, not absolute. Law-making and law enforcement are political processes, designed to protect the established interests of the powerful. From these assertions you get the flavour of mainstream deviance theory as it has developed since 1975. A masterly summary of the evolution of criminology is contained in Chapter One. For those who want more there are plenty of references. This Chapter concludes with a statement of the aim of the book:

> . . . an attempt to locate the phenomenon of deviance in New Zealand in the context of the nation's cultural and social structure.

Hard to get to grips with, that, but this is a rare lapse into the sort of fluffiness for which sociology is, perhaps wrongly, famous. Newbold forthrightly nails his colours to the mast at the beginning in a way which is, most importantly, interesting.

So already we have a sort of "them" and "us" division, with the addition of an "it". "We" are not deviants (criminals), "they" are, because "they" disobey the rules laid down by "it" (the power elite). I am sorry to say that this appears to be the bedrock of what is apparently called the New Criminology, aka radical, critical, analytical, and neo-Marxist criminology. Of course it's jollied up with academic curlicues and arabesques which are necessary to explain why "it" doesn't or more accurately can't do something to bring "them" into "our" camp and so end the strife. Three examples of these titivations are "labelling" by which a self-fulfilling prophecy is created by stigmatising a person as a "criminal" and an "outsider"; "differential association" by which criminality is learnt from one's associates; and "anomie" or loss in the power of norms which occurs when people are prevented by rules from achieving their potential and so lose their respect for authority. Whereas they each had their day as independent theories of criminogenesis, it now seems that these aspects of personality and power are part of the complex model which criminology has inherited.

The remaining six chapters are filled with fascinating statistics presented in an easily digested anecdotal manner. They combine to build a powerfully persuasive case which unfortunately bears out the promise of the last sentence of the first chapter: "We shall also see that

the types of activity we call "legitimate" and "illegitimate" are divided by a fine and shifting line which is designated by forces beyond our control." Each chapter is supplemented by a generous list of references. I have wondered whether Newbold is an optimist or a pessimist. In his Preface he narrates the comment of some Justice official, verifying that departmental statistics were too expensive to produce, saying "You know you're really in a third world country when you can no longer afford to record the progress of your own decline." Really? Or does it mean the topic isn't important enough? This suggests pessimism, but in Chapter Seven Newbold refers to this country as having a First World (capitals now, you see) status, so perhaps he's an optimist or, as optimists might say, a realist. In any event, to survive writing his book without becoming an incurable cynic would be an achievement worthy of applause, and I hope he has done so. At least his style is such that a brief browse easily becomes a lengthy read.

Lawyers who act for criminals would find it difficult to work material from this book into acceptable mitigation pleas. That this is so is sad, but it is a result of the Courts' attitude to precedent and their need to follow the dictates of the legislature. It would be all very well, for example, to cite Newbold (p 125) for the proposition that LSD is not as dangerous as tobacco and alcohol because there is no record of anyone having died from an overdose of it, but it's a little late for a departure from sentencing patterns on that score. Nor could one expect judicial sympathy for the proposition that in raping the complainant, one's client was simply disciplining a recalcitrant woman (p 96). More useful are the examples of apparent leniency extended to seemingly serious thefts, so that when representing your recidivist client at sentencing for stealing a few thousand dollars you might casually remind the Court that Raymer got one year for $786,000 (p 35); perhaps you will be startled at how harshly Courts can punish recidivists.

One leaves this book with the dark suspicion that there is something rotten in the State of New Zealand, but it would be most un-kiwi to accept that crime is designated by forces beyond our control. We are not a country of sociologists, are we? □

Australasian Mooting Championships

For the first time in the 16 year history of the Australasian Law Students' Association (ALSA) competition for the "Perpetual Mooting Trophy", it has been won by a New Zealand University. The three member team from Otago University (Andrew Horne, Amanda-Jane Riddell and James Palmer) won the competition over 20 other teams from Australia, Singapore, Malaysia and New Zealand. The New Zealand teams are all sponsored by Bell Gully Buddle Weir.

Otago were ranked third after the four preliminary rounds, and mooted against Monash University in the semi-finals. The other semi-finalists were Sydney University and the University of New South Wales. The topic for the semi-finals was the availability of damages for pure economic loss in negligence.

The final was held in the High Court of Australia in front of three Justices of the Supreme Court of the Australian Capital Territory. The problem revolved around liability for misleading pre-contractual statements under the Trade Practices Act (Commonwealth) and the Law Reform (Misrepresentations) Act (ACT). Despite having only a day to master the Australian law in this area, the Otago team were the unanimous winners over the team from the University of New South Wales.

Winning team, from left, Amanda-Jane Riddell, James Palmer, Andrew Horne.

As winners of the competition, Otago has also won the right to compete as the representative from Australia and New Zealand at the Commonwealth Law Conference, to be held next May in Cyprus.

The competition is run as part of the ALSA annual conference which was held in Canberra from the 4th to the 12th of July. Witness examination and paper presentation competitions are also held at the conference, as well as a large number of seminars. Next year's conference is to be held at Darwin. For further information please contact James Palmer (03) 477 3048 □

Nervous Shock: The Common Law; Accident Compensation?

By Rosemary Tobin, Lecturer in Law, University of Auckland

In this article Rosemary Tobin considers the situation that could now arise in nervous shock cases consequent on the drastic changes to the accident compensation scheme. She first considers three recent English decisions. She suggests that if such claims are now barred by legislation in New Zealand then a Common Law right has been taken away and nothing has replaced it. She argues however that if the "injury" is not covered by the Act then the person suffering falls outside the provisions of the statute and should therefore retain his or her Common Law rights to claim for nervous shock.

The decisions handed down in three recent English cases[1] are of more than passing interest to New Zealanders; specifically because it was unlikely that such cases would be heard by a New Zealand Court despite the more liberal attitude adopted by our Courts in the field of negligence law. This may not now be the situation. All three decisions were concerned with what has become known as "nervous shock", although the term itself is not appropriate to describe the injury incurred. The cases show that it is not the shock itself which attracts damages but any recognisable psychiatric illness or disorder sustained as a result of a tortfeasor's negligence.[2] Inevitable grief, sorrow, deprivation, anxiety about others who are affected by the accident to the primary victim, and the difficulty of adjusting to a new life are seen as factors which are not compensatable.[3] They are seen as ordinary and inevitable incidents of life which, regardless of any individual susceptibility, must be endured without compensation. Nervous shock is in another category altogether. This was an area in which the common law was slow to develop because of the cautious attitude the Courts adopted towards a psychiatric illness which did not, at first anyway, manifest itself in recognisable physical injury. The cases were concerned not with nervous shock suffered by an actual primary participant in a tortfeasor's negligence but with a secondary victim; someone who suffered that shock as result of being a passive and unwilling witness to the injury to the primary victim, and who was related to the primary victim[4].

The leading case in this area is *McLoughlin v O'Brien* [1983] 1 AC 410. There the plaintiff, although two miles from the scene of the accident which resulted in the death of her daughter and injuries to other members of her family, was held by the House of Lords entitled to succeed in a claim for damages for nervous shock against the negligent driver of the other vehicle. The House of Lords was not unanimous in the criteria to be applied in determining whether a secondary victim who suffered a nervous shock would be owed a duty of care by a defendant; although essentially it decided that once foreseeability of harm to such a plaintiff was established other factors to be taken into account in determining whether a duty of care was owed to him or her were:

(a) the close nature of their relationship with the injured party of the order of spouse or parent/child;
(b) the proximity of the plaintiff in time and space to the accident, or its aftermath, and;
(c) the means by which the shock was caused. Here Lord Wilberforce, who delivered the leading judgment, said obiter that someone who suffered the injury as a result of being told of the accident rather than experiencing sight or sound of the event itself or its aftermath could not recover.

Lord Wilberforce specifically left open the question of whether someone who observed the event on simultaneous television could recover. Lord Bridge, who considered that liability arose once there was foreseeability of nervous shock, on the other hand, did point out that anomalies and injustices could result from drawing arbitrary boundaries in cases of this kind. All of their Lordships appeared singularly unimpressed with the floodgates argument considering fears of virtually unlimited liability and possible fraudulent claims greatly exaggerated; but then they could not have foreseen the scale of the disaster that occurred on the occasion of the FA Cup semifinal between Liverpool and Nottingham Forest on 15 April 1989.

The Hillsborough disaster

The House had occasion to consider the position again after the Hillsborough Football Stadium disaster, in *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057. Here the plaintiffs sought to extend the *McLoughlin* boundaries by:

(a) changing the restrictions on the categories of persons who could sue;
(b) extending the means by which the shock was caused to include a simultaneous television broadcast; and
(c) extending the proximity in time

requirement from that of immediate aftermath to aftermath generally.

The Chief Constable of South Yorkshire admitted liability in negligence in respect of the 96 people killed and the over 400 physically injured. He did not admit liability in respect of the sixteen separate actions brought against him for nervous shock by persons who were not present in the area where the disaster occurred. Some were in other parts of the stadium, others were at home watching live telecasts and yet others again heard reports of the events but only later saw the recorded television pictures. Ten of the plaintiffs succeeded before Hidden J: [1991] 1 All ER 353. The six who failed appealed, and the defendant appealed in respect of nine of the successful plaintiffs. No appeal was made in respect of the plaintiff who although not actually inside the ground when the disaster occurred was in a coach parked outside and who was told of the tragedy while it was occurring, watched events on the coach television, searched for his son and ultimately identified his son's body some time later. The Chief Constable, or his advisors, obviously considered that this plaintiff fell clearly within the boundaries drawn by the House in *McLoughlin.*

The Hillsborough case finally reached the House of Lords. It acknowledged that a legal duty could be owed to a secondary victim of a tortfeasor's negligence, but did not find it as easy to explain why an exception such as this was made where the accident or its aftermath is witnessed by, for example, a mother, yet not made where the mother suffers an identical psychiatric illness due to nursing an injured child over a period of time. Their Lordships all agreed that foreseeability alone could not determine the ambit of the duty. Instead they referred to Lord Atkin's classic statement in *Donoghue v Stevenson* [1932] AC 562 whereby the legal duty imposed on a defendant was limited by the neighbourhood principle, or, in today's terms, a relationship of proximity. Lord Oliver who acknowledged the difficulty in explaining why a legal duty is owed in the one case and not in the other said (p 1113):

> The difficulty lies in identifying the features which, as between two persons who may suffer effectively identical psychiatric symptoms as a result of the impression left upon them by an accident, establish in the case of one who was present at or near the scene of the accident a duty in the defendant which does not exist in the case of one who was not . . . The answer has, as it seems to me, to be found in the existence of a combination of circumstances from which the necessary degree of "proximity" between the plaintiff and the defendant can be deduced. And, in the end, it has to be accepted that the concept of "proximity" is an artificial one which depends more upon the Court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.

The combination of circumstances which the Court analysed in order to determine whether a legal duty to the plaintiffs was owed by the Chief Constable were the factors identified by Lord Wilberforce and the other members of the House in *McLoughlin.*

The means by which the shock was caused

The House refused to extend the means by which the shock was caused to cover a live television broadcast of this kind, which did not depict the sufferings of recognisable individuals, this being excluded by the broadcasting code of ethics. Because the images transmitted were not of specific individuals the House accepted that the broadcast could do no more than give rise to "grave concern and worry" (Lord Oliver at p 119). The necessary immediate impact of the accident itself was thus lacking, and it was only over an extended period of time that growing consciousness of the consequences to a loved one would arise followed finally, at a later time again, by confirmation of death and identification of the body. The House did not consider policy favoured an extension to a broadcast of this kind. In the words of Lord Oliver (p 1119):

> The trauma is created in part by such confirmation and in part by the linking in the mind of the plaintiff of that confirmation to the previously absorbed image. To extend the notion of proximity in cases of immediately created nervous shock to this more elongated and, to some extent, retrospective process may seem a logical analogical development. But, as I shall endeavour to show, the law in this area is not wholly logical and whilst having every sympathy with the plaintiffs, whose suffering is not in doubt and is not to be underrated, I cannot for my part see any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability.

That is, the nervous shock did not arise as a result of the impact of direct visual or aural perception of the accident, or its immediate aftermath, to a loved one. The House did not, however, reject absolutely the proposition that a live television broadcast of an appropriate nature could give rise to liability. One example of when a duty of care would arise during a television broadcast was given by Lord Justice Nolan in the Court of Appeal, and approved by Lord Ackner (p 1108) and Lord Oliver (p 1119). If an organisation arranged for a party of children to go up in a balloon, and arranged further that the event should be televised for the parents to watch, Lord Justice Nolan considered the organisers would be under a duty of care to avoid mental injury to the parents as well as physical injury to the children. Thus, if the balloon crashed, the parents who watched the television broadcast would be able to sue the organisers for any nervous shock suffered. Another such situation could arise with a disaster like the Challenger spaceshuttle. A simultaneous telecast of an explosion on board leading to the inevitable loss of life of all present in the shuttle would almost certainly bring a relative having the necessary close relationship with a crew member within the ambit of a duty of care in the event that the explosion was due to negligence. But the secondary victims of the Hillsborough disaster were not within that scenario.

The class of persons

Their Lordships considered that reasonable foreseeability could be a guide in determining the class of persons to whom a duty of this kind was owed. In their view that class could be extended beyond that of parent or spouse provided that the necessary close relationship of love and affection could be demonstrated. That is it extended to those who would naturally go immediately to the scene of the accident or to the hospital for the purpose of giving comfort to the injured. Thus the way is still open for a fiance, or a brother or sister, or even a foster parent, to make a successful claim as long as the other necessary conditions of proximity are met; in particular that of proximity in time to the accident. Indeed three of their Lordships thought that there could be circumstances which were sufficiently traumatic that the duty could be owed to a bystander (Lord Keith p 1100, Lord Ackner p 1106 and Lord Oliver p 1118). It is not clear however on what basis the duty would be owed by the defendant to him or her, and it seems certain that the bystander would have to observe the accident itself, rather than be affected by the immediate aftermath.

Proximity to the accident

While proximity to the accident must be close in terms of time and space their Lordships acknowledge that to insist on direct and immediate sight and hearing would be both impractical and unjust and pointed out that it was because of this that the aftermath doctrine had been developed. There were however limits to just what the aftermath of an accident could entail. In *McLoughlin* it had covered the scene at the hospital witnessed by the mother some two hours after the accident. That scene included members of the secondary victim's family still covered in mud and oil from the accident. In *Jaensch v Coffey* (1984) 55 CLR 549 the aftermath had also extended to the hospital and Dean J pointed out that (p 607):

> The facts constituting a road accident and its aftermath are not, however, necessarily confined to the immediate point of impact. They may extend to wherever sound may carry and to wherever flying debris may land. The aftermath of an accident encompasses events at the scene after its occurrence, including the extraction and treatment of the injured. In a modern society, the aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment.

In considering these and other cases the House confined the aftermath of the accident to its *immediate* aftermath, and rejected an extension to aftermath generally. This meant that the eight hours which was the earliest time before a body was seen and identified in the Hillsborough case could not be considered as part of it.

The case began as a test case, the actions being representative of some 150 similar claims. And although Lord Bridge in *McLoughlin* expressed himself as unimpressed with the floodgates argument there is no doubt that policy considerations of one kind or another, in particular the vista of limitless liability, were responsible for the refusal of the House to extend the boundaries of the earlier case; although notwithstanding the "legal conservatism" which characterises the current House of Lords it approved *McLoughlin*, and the door is by no means closed to some widening of the boundaries at a future date.

Two other cases were decided just before the House handed down its decision in *Alcock*. Their Lordships did indicate in *Alcock*, although without considering the facts of each case in detail, that they might not be prepared to uphold the verdict of the lower Court when the cases come before them.

Hevican* and *Ravenscroft

Both decisions sought an extension of the doctrine as espoused by the House in *McLoughlin*, and neither Judge who decided the two cases had the advantage of *Alcock*. They are nonetheless worth considering if only because they do indicate some of the possible permutations which abound in the nervous shock cases, and which will need judicial consideration some time in the future.

In *Hevican v Ruane* the plaintiff's favourite son was killed when the school minibus in which the son was travelling collided with a lorry. The collision was a result of the negligence of the driver of the minibus. The plaintiff was told of the accident shortly after it happened by a schoolfriend of the son who came upon its aftermath. Approximately two hours after the accident the police confirmed the son's death and and hour later again the plaintiff saw his son's body in the mortuary. The body was not disfigured in any way. About two months later the father asked to be made redundant from his job because he could no longer cope with it due to "reactive depression". The medical report accepted that the acute emotional trauma suffered by the plaintiff was attributable to both the news that his son had been killed (in the plaintiff's own words "the world stopped") and the continuing loss of the boy. The doctor noted morever that while he could not attribute exact percentages to the two aspects of the shock he could conclude that it was possible that had the plaintiff been given the news that his son was dead and later discovered this was not so he would still have suffered a nervous shock.

It should be noted that in *Alcock* Lord Oliver considered that the fact that the primary victim was not injured may not be a bar to a nervous shock claim. A legal duty may still be imposed on a defendant. He thought it readily conceivable that a parent could suffer injury through witnessing a negligent act that placed their child in jeopardy even though the child was not in fact harmed. In his view *King v Phillips* [1953] 1 QB 429, where the Court rejected a mother's claim for nervous shock sustained through hearing a scream and seeing her son's tricycle under the wheels of a taxi cab on the basis that the child was not injured, would not be decided the same way today (p 1114). A fortiori the fact that the primary victim recovers will not bar a claim by the secondary victim.[5]

Mantell J, while acknowledging that the facts of *Hevican* were further removed from those assumed in *McLoughlin*, considered that the plaintiff was sufficiently proximate to succeed in his claim. One of the difficulties which the plaintiff will face when the case goes on appeal are the words of Lord

Wilberforce, cited with approval in *Alcock*, who doubted that the law would compensate shock brought about through communication by a third party. Not only that the father did not visit a hospital for the purposes of giving comfort to a loved one, instead he received the news of his son's death at a police station and saw the body at a mortuary. Lord Wilberforce stressed that the mental injury must come through sight or hearing of the event or of its immediate aftermath. Thus while the injury to the plaintiff here was foreseeable he may not be sufficiently proximate to succeed in his claim at the end of the day. It would seem clear that pursuant to both *Alcock* and *Jaensch v Coffey* the father never experienced the immediate aftermath of the accident, although he saw its result. A further difficulty relates to the fact that at least part of the shock was due to a sense of continuing loss. Again their Lordships were adamant that damages for psychiatric illness due to deprivation consequent upon loss of a loved one were not available. Thus for that sense of loss the plaintiff cannot be compensated.

Ravenscroft v Rederiaktiebolaget Transatlantic was also a step further removed from *McLoughlin v O'Brien*, although perhaps not quite as far from it as *Hevican*. The plaintiff there was a mother who alleged nervous shock after her son was crushed by a shuttle wagon. The accident happened because the defendants, who admitted their negligence, failed to prevent a forklift truck running out of control. Two hours after the accident the son died and 15 to 20 minutes later the mother arrived at the hospital and was given the news. Because of the nature of the injuries suffered, she, unlike the plaintiff in *McLoughlin*, was not allowed by her husband to see the body. The plaintiff suffered a prolonged depressive reaction and the psychiatrists agreed that not only was she likely to remain profoundly depressed and debilitated for at least another two or three years, but that it was doubtful that she would ever come to terms with her son's death. Ward J decided that the defendant owed the mother a duty of care and that policy considerations should not preclude the defendant's liability. He said:

> She suffered even though she did not see the accident and even though she did not see her son in hospital. She would have suffered even if communication of that terrible news was made elsewhere than in the hospital. Because Michael's death was unexpected and because the manner of his dying as perceived by her imagination was so horrific, the suddenness of her perception of the event and its consequences was in common parlance a shock to her.

In these words lie one part of the problem the plaintiff will have to overcome on appeal. In *Alcock* the House made its position clear. What was needed was the impact of either a visual or aural perception of the event itself, or its aftermath. Damages for being "merely informed of, or reading or hearing about the accident" were not recoverable, as this does not equate with either the visual or the aural impact of the accident (Lord Ackner in *Alcock* at 1104). Had the plaintiff rushed to the hospital after being told of the accident and seen the body itself, the time frame was such that she would have been within the immediate aftermath of the accident. All the indications are that this failure will be fatal to her case when the matter progresses to a higher Court. Yet Lord Bridge in *McLoughlin* queried why the law should deny a plaintiff damages on the grounds that an important link in the chain of causation was supplied by imagination of the agonies of body and mind suffered by the primary victim rather than by direct perception of it. And Lord Oliver himself in *Alcock* that the result achieved by applying hard and fast rules of proximity in such cases was difficult to justify.

Perhaps Ward J achieved the more just and reasonable result in this plaintiff's case when he adopted the incremental approach currently approved by the House, and decided that here foreseeability of harm, the proximity of the relationship and all concepts of reasonableness, justice and fairness compelled him to "add to this category of negligence that increment of liability which may arise when the psychiatric illness is caused by being told of the disaster though not witnessing it or its aftermath"(p 87).

Accident Compensation

How then would these plaintiffs fare under our Accident Compensation scheme? No claim under the Accident Compensation Act 1982 for a secondary victim of the *McLoughlin* type has yet been heard by the High Court, although cases involving a secondary victim are pending.[6] Nonetheless a paragraph in a booklet issued by the Corporation after the *McLoughlin* decision advised that "[a] claim may also stand for 'mental consequences' as a result of witnessing an accident, or as a result of being advised of the accident shortly thereafter". (*Unintentional Injury: New Zealand's Accident Compensation Scheme* at 16.) The Claims Manual instructions issued by the Corporation went even further. It indicated that a person subsequently told of the accident and the injuries suffered and who later suffered a mental disorder might be awarded cover (para 4.1.2) although it was stressed that all factors must be taken into account and each case determined on its facts.

Matters changed abruptly with the decision of the High Court in *ACC v F* [1991] 1 NZLR 234. *F* involved a claim brought by a secondary victim of medical misadventure, and is discussed in "Personal Injury by Accident: Some problems of interpretation" [1991] NZLJ 239. Although the claimant in *F* was claiming for reactive depression suffered as a result of his wife's medical misadventure it would seem that his psychiatric illness was due, not so much to the impact of the medical misadventure, but to the realisation over a period of time of its effects on his marital relationship. This is more truly analogous to a claim for nervous shock, or rather a psychiatric illness, resulting from prolonged nursing of an accident victim for which there is no common law action. The necessary immediacy of impact is missing, and as a result the experience of the secondary victim is outside both the *McLoughlin* boundaries and the boundaries of a personal injury by accident. In deciding *F* however Holland J. expressed the view that before there could be any compensation for mental consequences of an accident there had to be some physical injury suffered by the claimant (pp 240-241). The Corporation's

policy changed and claims for mental injury unaccompanied by physical injury were declined. (See the report in *New Zealand Herald*, 16 January 1991.)

This doubt raised by *F* was very recently set to rest by the Court of Appeal in *ACC v E* [1992] NZAR 182 where it approved the decision of Greig J in the High Court who had decided that mental consequences alone were sufficient personal injury to give cover under the Act provided the claimant had suffered an accident. Gault J in the Court of Appeal thought it would be a "strange situation" indeed if cover for serious mental consequences caused by an accident was to depend upon whether or not the claimant also suffered some physical injury however slight. He commented:

> To the extent that [Holland J] referred to the need for there to be physical injury we consider that if he is to be understood as saying more than that the claimant must himself suffer an accident before he can be compensated for mental consequences he is in error.

Since then there have been two reported decisions where the Appeal Authority has allowed cover for mental consequences suffered by the primary victim who sustained no physical injury. It is appropriate to take a brief look at one of these. In *ACC v Kennedy* [1992] NZAR 107 the claimant sought cover for the mental effects suffered as a result of having a double barrelled shotgun pointed at him during an armed robbery. The Review Officer concluded that the claimant had suffered an accident but rejected the claim because there was insufficient medical evidence to support the alleged mental injury. It was left open for the claimant to come back at a later date with the requisite evidence. This was upheld by the Appeal authority. The case involves a simple application of what was said by Cooke P in *Re Chase* [1989] 1 NZLR 325 at 329.

> I think however, that an assault falling short of physical harm is nevertheless an accident from the point of view of the victim; and that mental consequences of the assault such as fear are "personal injury by accident" within para (a)(i) of the non-exhaustive definition of that term in s 2 of the Act (p 329).

Like Paul Chase there is little doubt that Mr Kennedy experienced the apprehension of imminent harm when the shotgun was presented in his direction. On the reasoning in *Chase* this was an accident from his point of view; he suffered a tortious assault. And to take a more recent example still there is no doubt that if Linda Schlaepfer is to suffer some mental injury as a result of the horrific events she experienced on the Schlaepfer farm on Wednesday 20 May 1992 the Corporation would have to treat her claim sympathetically, as being mental injury as a consequence of an accident to her.

What of the position of a secondary victim? Before a secondary victim can claim under the 1982 Act that secondary victim must suffer their own accident. It would seem that witnessing an accident to a loved one, or coming upon the immediate aftermath of the accident falls within the holistic phrase personal injury by accident as the phrase has been interpreted by the Courts, and as first thought by the Corporation itself. It is certainly an "unlooked for mishap or untoward event which is not expected or designed"[7] and which "causes harm to the person".[8] To add weight to this argument it is only necessary to look at the way the Courts describe the experience, starting with the phrase "nervous shock" itself. In *McLoughlin* Lord Wilberforce spoke of the "impact" to the senses (p 418) while Lord Bridge talked of "acute emotional trauma" (p 433). In *Alcock* Lord Ackner refers to shock in the context of being something which "violently agitates the mind" (p 1104). And Lord Oliver uses the term "an assault upon the nervous system" (p 1110). All of these terms tend to indicate that the secondary victim suffered his or her own accident in witnessing that of the primary victim and it was this accident that led to his subsequent psychiatric condition. It is apposite here to quote further from Lord Oliver as, although he is discussing a common law action in negligence, the words used are equally applicable to a comprehensive accident compensation scheme (p 1109).

> There is, to begin with, nothing unusual or peculiar in the recognition by the law that compensatable injury may be caused just as much by a direct assault upon the mind or the nervous system as by direct physical contact with the body. This is no more than the natural and inevitable result of the growing appreciation by modern medical science of recognisable causal connections between shock to the nervous system and physical or psychiatric illness.

Another point of relevance. We are here considering common law claims in negligence. In *Willis v AG* [1989] 3 NZLR 574 Cooke P pointed out that the 1982 Act, and its predecessor, were designed "fundamentally to supplant the vagaries of actions for damages for negligence at common law" (p 576). He warned that interpretations taking the bar in the Act beyond that field had to be carefully scrutinised, but a *McLoughlin* claimant is not doing that; their action would have been in negligence. That is their claim falls squarely within the mischief the Act was designed to prevent. The way must now be open for such a claimant to succeed.

But for Linda Schlaepfer, Mr Nelson and those who suffer nervous shock as a result either of a tortfeasor's negligence towards a loved one or of a criminal act against a loved one after 1 July 1992, the situation is very different. If there were a claim it would need to be lodged under the Accident Rehabilitation and Compensation Insurance Act 1992, an Act designed to "establish an insurance-based scheme to rehabilitate and compensate in an equitable and financially affordable manner those persons who suffer personal injury". A claimant therefore needs to prove a personal injury. Section 4(1) states:

> For the purposes of this Act, "personal injury" means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by section 8(3) of this Act.

This clearly rules out not only *E* which had a line of authority under the workers compensation statutes behind it[9] but also any other primary victim such as *Nelson* who does not suffer a physical injury. Section 8(3) does provide cover for a very limited class of mental injury not attendant on physical injury. It is as follows:

> Cover under this Act shall also extend to personal injury which is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person) which is within the description of any offence listed in the first Schedule to this Act.

The offences in the First Schedule cover various sexual offences found in the Crimes Act 1961 and the Mental Health Act 1969.

What this indicates is that the legislature, obviously concerned by the generous interpretation the Courts had given the phrase "personal injury by accident", was determined to reduce the number of claims faced by the Corporation. As a result it approved the restrictive interpretation of the phrase given by Holland J in *F*, and rejected the interpretation of the Court of Appeal in *E*. "Accident" itself is also restrictively defined as "a specific event or series of events that involves the application of a force or resistance external to the body and that results in personal injury," (s 3) and to make absolutely sure that an accident as such is suffered the definition continues "and the fact that a personal injury has occurred shall not of itself be construed as an indication or presumption that it was caused by any such event". This definition ensures the separation of the injury and the accident which had not been required under either the workers' compensation statutes or under the previous Accident Compensation Act. The result is that none of the nervous shock claimants, excluding those covered under s 8(3), will be able to pursue a claim under the Accident Rehabilitation and Compensation Insurance Act 1992.

The primary victims of a *McLoughlin* type accident will get cover as they suffer personal injury in terms of physical injury, and that injury is caused by an accident as defined in s 3. Where then does this leave claimants whose nervous shock is a result of a tortfeasor's negligent act in respect of a primary victim? They do not have cover but will they be able to sue the tortfeasor? This was certainly the, qualified, view of Holland J in *F* when he decided that the indirect consequences on the mental health of those who were merely observers of accidents to another made it unlikely that Parliament intended such persons to be compensated. He added that where the mental injury was as a result of a wrongdoer "it was possible that in some circumstances a right of action might exist at common law" (p 40). The other alternative is that they are left without any remedy at all. There is a major obstacle they will need to overcome before an action at common law can be commenced; namely s 14(1) of the Act which excludes other rights and had as its predecessor s 27 of the 1982 Act. That section is as follows:

> S 14(1) No proceedings for damages arising directly or indirectly out of personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

Is the action by the secondary victim then barred by the above words of the section? On one argument the answer is no. The secondary victim has suffered a personal injury which is not covered by the Act. Moreover the accident which they have suffered, because of that word's restrictive definition, is not an accident pursuant to the Act. This means that the bar does not apply and the secondary victim is free to pursue their claim.

The alternative argument is that the claim for mental shock by the secondary victim is a claim for personal injury which arises almost certainly directly, as indicated by the words used by the Law Lords in the case law, but if not, indirectly, out of the personal injury incurred by the primary victim. In *McLoughlin* the mental injury suffered by the mother certainly arose out of the personal injuries suffered by her family; it was the impact on her mind of those injuries that led directly to her own trauma. The personal injuries suffered by her family were all personal injuries within the definition of the 1992 Act; that is they were physical injuries incurred through an accident to the person concerned, namely a car crash involving the application of a force external to the human body. The argument continues that as a matter of statutory interpretation on a plain reading of the words of the section the action is barred; the secondary victim is caught by the words "any person" and the phrase "whether by that person or any other person".

If however the action is barred by the Act this means that a Common Law right has been taken away from citizens, with absolutely nothing put in its place. With respect very clear words should be required before such an interpretation is eschewed by the Courts. Even if at first this argument seems attractive to the Court it must be prepared, as with the 1982 Act, to consider the intention of Parliament in enacting the replacement statute. The Act is, as its long title indicates, designed to rehabilitate and compensate those who suffer personal injury. As personal injury is defined, and in some considerable detail, then where injury falls outside that definition the argument must be that that person falls outside the provisions of the 1992 Act. This means that words of qualification must, of necessity be read into s 14(1) so that it is only the person who has suffered the primary injury or any person claiming on his or her behalf who is bound by the bar in s 14(1), thus leaving secondary victims to their common law remedy.

This raises a further anomaly. If the Courts agree that the bar does not apply in the first place or can be persuaded to qualify s 14(1) so that a secondary victim can sue their tortfeasor, that secondary victim may be better off in terms of their remedy than the primary victim. The lump sum payments pursuant to ss 78 and 79 of the 1982 Act have

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Enlivening the law

By Hon Mr Justice Williams

On Friday 8 May a Bar dinner was held in Auckland to mark the appointment of Mr Justice Williams to the Bench. The toast to the new Judge was moved by Mr Brad Giles. His Honour replied in an appropriately light-hearted manner, but with some pointed remarks as well. On request His Honour has agreed to publication of part of his speech. An edited version of His Honour's remarks is published accordingly.

I have two distinct but inter-related messages to put before you before I descend into frivolity. The first is to lament the decline in civility in our society generally and to record, with dismay, the way in which this is affecting relations between lawyers. The cataclysmic effects on moral restraint and civilised behaviour brought about by television are all too evident. The shallow egotists who inhabit the so-called "television news shows" have long since abandoned courteous but incisive discussion as a means of eliciting information. To be newsworthy, these interviewers believe, one has to be confrontational. The tone of voice must be aggressive and negative.

Unhappily the disease is spreading to the law. In my last five years in practice, I saw more and more of it in letters between solicitors and even between counsel. Even allowing for the fact that we have been going through times which are unusually difficult and increasingly tough, the aggressive and discourteous tone of some of these letters would have been unthinkable 25 years ago or even 10 years ago and I have to say that the larger firms often provide the worst examples.

The increasing emphasis on written submissions in litigation is an aggravating factor. Especially with younger lawyers, raised on *LA Law*, there is the temptation to be personally critical of opposing counsel in a written brief. Somehow it seems to be easy in a written brief to move away from general propositions of law into direct and explicit criticism of opposing counsel.

Such an approach overlooks, of course, the extreme importance of an impersonal approach to advocacy which is at the very heart of the adversary system. It also ignores the inherent uselessness of personal attacks as an element of forensic argument. Here I quote from one of my heroes John W Davis in his famous article "The Argument of an Appeal". Rule 8 in his ten fundamental propositions was as follows:

> (8) Avoid personalities.
> This is a hard saying, especially when one's feelings are ruffled by opposing counsel, but none the less it is worthy of all acceptation, both in oral argument and in brief. I am not speaking merely of the laws of courtesy that must always govern an honourable profession, but rather of the sheer inutility of personalities as a method of argument in a judicial forum. Nor am I excluding proper comment on things that deserve reprobation. I am thinking psychologically again. It is all a question of keeping the mind of the Court on the issues in

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been abolished and in their place is an independence allowance (s 54) of up to a maximum of $40 per week if the claimant is 100% disabled (dead?), and provided that the personal injury has resulted in a degree of disability of 10% or more. Even though that allowance is payable quarterly in advance it is, notwithstanding the Corporation's claims that there has been no change in the guiding principles behind the legislation, hardly the real compensation contemplated by the Woodhouse Report. A secondary victim may be far better off left to his or her common law remedy than the primary victim who receives cover under the Act. And a defendant who pays no compensation to his or her primary victim is liable in respect of a secondary victim. □

1 *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057(HL); *Hevican v Ruane* [1991] 3 All ER 65 (QB); *Ravenscroft v Rederiaktiebolaget Transatlantic* [1991] 3 All ER 73 (QB).

2 See the explanation by Parker LJ in *Jones v Wright* [1991] 3 All ER 89 at 91 (CA); *McLoughlin v O'Brien* [1983] 1 AC 410 at 431 per Lord Bridge; and *Alcock v Chief Constable of South Yorkshire Police* supra, at fn 1 at 1096 per Lord Keith and 1109 per Lord Oliver.

3 See the discussion of Lord Pearson in *Hinz v Berry* [1970] 2 QB 40 (CA) at 44.

4 This article is not concerned with the "rescuer" cases. It has long been established that a defendant is liable not only to those who are directly injured by his or her careless acts but also to those, who as a result go to the rescue and suffer injury in doing so. See *Chadwick v British Railways Board* [1967] 1 WLR 912.

5 *Jaensch v Coffey* (1984) 55 CLR 549 was itself a claim for nervous shock incurred by a wife when her husband, who recovered, suffered a road accident as a result of another's negligence.

6 *Cochrane v ACC* (unreported ACA 342/91 Middleton J). Mrs Cochrane claimed for severe emotional trauma suffered when her son was murdered. She maintained a vigil beside her son as he lay dying from the brutal injuries he received. The claim was declined by the Appeal Authority, Judge Middleton citing *F* with approval. There are other claims for mental consequences which have been deferred by the Appeal Authority pending the High Court decision in *Cochrane*.

7 *Fenton v Thorely & Co Ltd* [1903] AC 443 at 448 per Lord McNaghten approved by the Court of Appeal in *Green v Matheson* [1989] 3 NZLR 564 at 571.

8 *Green v Matheson* [1989] 3 NZLR 571.

9 *Pugh v London, Brighton & South Coast Railway Co Ltd* [1896] 2 QB 248 and *Yates v South Kirby Collieries Ltd* [1910] 2 QB 538.

hand without distraction from without.

Rhetorical denunciation of opposing counsel, litigants or witnesses may arouse a measure of sympathy for the persons so denounced. Controversies between counsel impose on the Court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate; they can never persuade.

While I support the attempt to achieve greater efficiency by increased emphasis on written submissions the inherent dangers I have mentioned will have to be carefully guarded against. The worst manifestations of this practice can be seen in some of the purple prose used in American written briefs which I am sure are partially responsible for the strident and discourteous exchanges between the majority and minority Judges on the United States Supreme Court. I will give you a couple of typical examples.

1 *United Steelworkers of America v Weber* 443 US 193, 222 (1979) (dissenting opinion in the US Supreme Court by Justice Rehnquist, joined by Chief Justice Burger).

> . . . by a *tour de force* reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, . . . legislative history and uniform precedent . . .

2 *Florida v Royer* 460 US 491, 519-20 (1983) (another dissenting opinion of Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor):

> The plurality's meandering opinion contains in it a little something for everyone . . . Indeed, in both manner and tone, the opinion brings to mind the old nursery rhyme: "The King of France/With forty thousand men/Marched up the hill/And then marked back again". The opinion none the less, in my view, betrays a mind-set more useful to those who officiate at shuffle-board games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice . . . .

I am sure that life in the law has become more stressful and demanding in recent times. That is what leads me to the second observation in the serious part of my address and one which I like to think has been part of my own philosophy over the years. It is simply this; although the law is a serious business, try, when you can, to enliven it with a little wit or humour either of your own making or by disseminating to other lawyers amusing things you have read or heard.

For all its seriousness there are often occasions in the law when a light-hearted approach will bring relief and amusement. It is also surprising how often beneath the turgid surface of legal writing one can find occasional whimsy. Here are a few samples I have collected from judgments, law reviews and other legal material over the years.

Law Review articles

I start for no particular reason with law review articles. Some would suggest that there is no need to look for humour *within* the law review articles because their very titles will often induce amusement or even ridicule. There was a recent article in the Harvard Law Review on this very subject. The title will give you the drift: Lasson, *Scholarship Amok: Excesses in Pursuit of Truth and Tenure* (1990) 103 Harv L Rev 926.

Here are some of the titles mentioned in the article:

> Why Study Pacific Salmon Law?
> The Unrecognised Uses of Legal Education in Papua New Guinea;
> Epistemological Foundations and Meta-Hermeneutic Methods: The Search for a Theoretical Justification of the Coercive Force of Legal Interpretations;
> If Spot Bites the Neighbour, Should Dick and Jane Go to Jail?
> What's Love Got to do With It? Critical Legal Studies, Feminist Discourse, and the Ethic of Solidarity;
> Toward an Economic Theory of Voluntary Resignation by Dictators;
> The Differentiation of Francophone Rapists and Nonrapists Using Penile Circumferential Measures;

As to the content of Law Reviews there was a famous article written some years ago by Professor Fred Rodell of Yale in 1936 23 Virgina Law Review at 38. It was called *Goodbye to Law Reviews*. At the beginning of the article Professor Rodell says:

> There are two things wrong with almost all legal writing. One is its style. The other is its content . . . The average Law Review writer is peculiarly able to say nothing with an air of great importance . . . It seems to be a cardinal principle of Law Review writing and editing that nothing may be said forcefully and nothing may be said amusingly.
>
> This I take it is in the interests of something called dignity. It does not matter that most people — and even lawyers come into this category — read either to be convinced or to be entertained. It does not matter that even in the comparatively rare instances where people read to be informed, they like a dash of pepper or a dash of salt along with their information. They won't get any seasoning if the Law Reviews can help it. The Law Reviews would rather be dignified and ignored.
>
> Moreover, the explosive touch of humour is considered just as bad taste as the hard sock of condemnation . . . Law Review editors knit their brows overtime to purge their publications of every crack that might produce a real laugh . . . The best way to get a laugh out of a Law Review article is to take a couple of stiff drinks and then read an article, any article, aloud. That can be really funny.

In the main the straitjacket of Law Review styling has killed what might have been a lively literature. It has maimed even those few pieces of legal writing that actually have something to say. I am the last one to suppose that a piece about the law could be made to read like a juicy sex novel or a detective story but I cannot see why it has to resemble a cross between a 19th century sermon and a treatise on higher mathematics.

Professor Rodell would be full of admiration for Donald Dugdale and

for a classic illustration of humour in a Law Review article I would give the prize to his *The Absurd Pretensions of the Law of Torts* (1982) NZ Recent Law Review at 260. If there was time I would like to read the whole article. Here are some extracts.

> Unhappily, however, for the power-hungry occupant of the Judicial Bench the days have long since vanished when the law was thought to reside in the bosoms of the Judges . . . today by far the greatest majority of judicial decisions on points of law are essentially decisions on the construction of statutes and by and large the role of the Judge has been downgraded from that of law-maker to that of interpreter. Few would regard this as other than a welcome development.
>
> Now it is an observable fact that if you take a bladder of hot air and compress parts of it the remaining parts will swell outwards. In much the same way the effect of obstructing in most fields of law the exercise of the judicial power imperative has been a gross expansion of judicial activism in the few areas remaining of which the principal ones are administrative law and the law of tort. There we have seen the Judiciary strike back.

Donald Dugdale then develops this theme and deals first with administrative law and then he touches on contract and refers to the

> unfortunate urge of some Judges to interfere with the orderly development of the law of contract . . . The ridiculous view that there can be concurrent liability in both contract and tort is a consequence of, I suggest, the identical judicial itch to mess around with men's bargains by imposing a standard fixed not by the contracting parties but by the Court. It is equally heretical and should be dealt with equally firmly.

Then comes a sentence which must make recent events particularly painful to Donald. He says:

> It is a tragedy that on this point the New Zealand Court of Appeal shows every sign of wobbling from the stand taken by Richmond J in *McLaren v Maycroft*.

He continues:

> But the most outstandingly bizarre and deplorable example of the conjuring into existence of some sort of new tort regardless of the effect on the law of contract is a 1976 New Zealand Court of Appeal decision in *Bowen v Paramount Homes* . . . My theme therefore is the current alarming judicial propensity for the reckless creation of novel duties of care . . .

The article then concludes:

> We must not be too unkind to the Judges. Reading the entrails of an Act of Parliament, pondering the inner meaning of the blood alcohol legislation for example is an occupation that no doubt soon begins to pall and one can readily understand the operation of the power imperative, the mad urge to push someone around in the administrative division or the insane temptation to rush out and invent a brand new tort. But Judges seized with a yen for creativity really would be far better advised to enrol for night classes in macrame or cake decoration and leave the reform of the law to the Parliamentarians and those who advise them.

Textbooks and treatises

Then we can pass to legal treatises. The preface can often reveal a rich vein of ironic wit. The author who has struggled to finish his work often "cuts loose" in a preface. I give you for example the Preface to the Second Edition of *Dugdale on Hire Purchase*.

> I apologise to my professional brethren for the fact that this edition has not followed more swiftly on the heels of the enactment of the 1971 statute. I confess that when at 25 years of age I shunned delights and lived laborious days in order to write the first edition of this book I did not clearly foresee that the moral obligation to keep it up to date would remain slung around my neck forever like a putrescent albatross.

Here is an amusing section from the preface to Meagher Gummow and Lehane *Equity*:

> The law stated is that obtaining on 1 January 1975. Our views are our own. Our liability is joint and several. We have little doubt but that we can rely on the charity of our friends to draw to our attention any mistakes we might have made; if not, the malice of others will supplement that deficiency. We hope that this book will not be considered, in the phrase attributed to Lord Westbury, difficult to read disgusting to touch and impossible to understand.

In the preface it is obligatory to thank those who have assisted in the production. This is sometimes taken to ridiculous lengths where scores of other lawyers, students, typists, editors, and family are dutifully listed so. There is much to admire when that posturing is itself parodied as it was so effectively in Mr Justice Fisher's admirable book on *Matrimonial Property* where the following well known passage appears:

> I am grateful for the many judicial references to the first edition. With that background, I can scarcely bring myself to mention those occasions where the Courts insisted on going off on courageous frolics of their own, albeit temporarily. Resisting the temptation to say "I told you so", I will instead turn to the part played by others in producing the second edition. In this regard, so many people were of no help whatsoever that it would be impossible to name them all and invidious to select a few, although Drs R S Chambers and N W Ingram do spring to mind.

Book reviews

In the article I have already cited from Professor Rodell he says that:

> When it comes to the book reviews, company manners are not so strictly enforced and it is occasionally possible to talk out loud or crack a joke. As a result

> the book reviews are stuck way in the back like country cousins and anyone who wants to take off his shoes and feel at home in the Law Review will do well to come in by way of the kitchen.

It is probably for this reason that humour in book reviews has a long history particularly when it is of the biting or sarcastic kind. Undoubtedly all authors have despised their critics. Dr Johnson in his dictionary defined "critic" as follows:

> "A snarler, a carper, a caviller".

Here is an example of a full blooded review by the legendary R P Meagher QC now of the NSW Court of Appeal. He is of course an outstanding expert on the law of trusts and was given the task of reviewing a book by Simon Gardiner called *An Introduction to the Law of Trusts* and here are some extracts from the review:

> This book, by an author who has been a fellow of Lincoln College, Oxford, since 1978, is one of the Clarendon Law Series, a series which has produced masterpieces such as H L A Hart's *The Concept of the Law* and Barry Nicholas' *Introduction to Roman Law*. Alas, it is not of like quality . . .

(The review was printed in 1991 — as we shall see as I read on the reference to the author having been at Oxford since 1978 is, I suspect, Meagher's way of excusing him for the quality of his writing).

For whom was the book intended? Obviously not Chancery practitioners. Perhaps common lawyers in a hurry? No. The preface makes it plain it is aimed at two groups; students and those engaged in other disciplines, especially historians, economists and students of literature. It assumes that the student, while low in intelligence, is high in moral feeling rather like an evangelical devotee. One is therefore treated to such profundities as —

> It is also to be queried whether, even if a free market does make everyone as rich as possible, that is necessarily tantamount to delivering maximum happiness.

The tone is ideologically correct and irreproachably progressive. The author is almost quiveringly aware. He nearly squeals with displeasure at the thought that now that company shares are an authorised investment in Great Britain a trustee may find that he has invested in a company which derives some of its profits from South Africa.

And so the review proceeds and concludes with the following:

> Nobody should yield to the temptation to buy this book, and the author, the publisher, and the editors of the Clarendon Law Series, ought all to be ashamed of themselves and of each other.

Judgments

There are some who suggest that humour has no place at all in judgment-writing, the issues between the parties being too serious. The primary purpose of judgments is to decide issues between parties, not to add to the gaiety of nations or the public stock of harmless pleasure. Thus Professor Prosser in his work *Judicial Humour* says:

> Judicial humour is a dreadful thing. In the first place, the jokes are usually bad; I have seldom heard a Judge utter a good one. There seems to be something about the judicial ermine which puts its wearer in the same general class with the ordinary radio comedian. He is just not funny. In the second place, the Bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.

Gilbert & Sullivan put it more simply in *The Mikado*:

> And that Nisi Prius nuisance, who is just now rather rife,
> The Judicial Humorist — I've got him on the list!
> All funny fellows, comic men, and clowns of private life —
> They'd none of 'em be missed — they'd none of 'em be missed.

The Americans, predictably, can go right over the top. Thus, in *Fisher v Low*, (1983) 122 Mich App 418; 333 NW 2d 67, a three bench State Court of Appeals in Michigan, had to deal with an appeal over a claim by the owner of a tree who sued the driver, an owner of a car who had crashed into it. The trial Judge dismissed the action. The Court of Appeal delivered its judgment in verse:

> We thought that we would never see
> A suit to compensate a tree
> A suit whose claim in tort is press'd
> Upon a mangled tree's behest;
> A tree whose battered trunk was pressed
> Against a Chevy's crumpled chest;
> A tree that faces each new day
> With bark and limb in disarray;
> A tree that may forever bear
> A lasting need for tender care
> Flora lovers though we three,
> We must uphold the Court's decree.

Writings of judgments:

As Justice Michael Kirby has pointed out in an article in (1990) 64 ALJ 691 on writing judgments:

> Irony is more common in judgment-writing of our tradition than other forms of humour. Perhaps irony, a more restrained form of humour, is thought to be more in keeping with the sober purposes of the judiciary.

He cites as the classic illustration of judicial irony the dissenting judgment of Lord Atkin in *Liversidge v Anderson*.

Mr Justice Peter Mahon plainly holds the title as the best exponent of judicial irony. His judgments in this vein include of course the famous "Mouse in the Milk Bottle" case which I think will be familiar to many of you. It has to be read in full to be properly appreciated.

The essence of the case was a prosecution by the Health Department against the Auckland Milk Corporation for selling a bottle of milk with a mouse in it. Once again Donald Dugdale features. He lost in the District

Court but succeeded on appeal. One of the key points in the prosecution's case was that the mouse was in the bottle at the time it left the milk station. The following passage gives you an idea of the tone of this delightful judgment:

> Mr Dugdale's argument for the appellant proceeded in this way. He first relied upon the fact, accepted by the prosecution and therefore conclusive, that the mouse had not been in the empty bottle before it was washed at the appellant's milk treatment station. Once this fact was established then the appellant could only be liable if it were proved beyond reasonable doubt that the mouse entered the bottle of milk in the appellant's factory in the short space of time between the completing of the cleansing of the bottle and its being capped with the aluminium foil seal. He relied upon the evidence of the Technical Manager as demonstrating the improbability of this having occurred. If the case for the Department was established, as the learned Magistrate held it was, then one had to postulate the mouse having fallen vertically and accidentally into a waiting receptacle, as in the case of Alice's mouse. Mr Dugdale was strongly critical of this suggestion which meant, in his submission, that immediately prior to its involuntary descent the mouse must have been located somewhere among the moving parts and conveyor belts of the bottle-filling plant. Mr Dugdale alluded to the timorous and cowering nature of a mouse, as poetically defined, and stressed the essential improbability that a small animal of retiring and nervous disposition would take refuge in the noisy and moving machinery which the Technical Manager had described. However, this submission, impressive though it was, did not answer the critical fact that if the submission was correct then the mouse had somehow entered the bottle after it had been sealed . . .

Then Donald put up the hypothesis that this mouse had been placed in a bottle by one of the workmen on a construction site where the milk bottle ended up. The judgment proceeds:

> It appeared from the evidence that there had been some measure of amusement on the part of the workers on the site where the mouse was discovered, and it will be recalled that it was a workmate of Mr Paniora who detected the mysterious dark shadow in the milk bottle as Mr Paniora commenced to drink from the bottle. Mr Paniora's colleague appeared to have had the bottle under attentive observation at the relevant time. Then, when the mouse was discovered, it was evidently buried with some measure of formality, as Mr Paniora's trench-digger was used in order to excavate a grave. Mr Dugdale relied upon these circumstances as evidencing the possibility that among the grave-diggers there was a fellow of infinite jest, a man undeterred by qualms of delicacy from detaching the cap of the milk bottle, inserting a corpse of a mouse discovered on the building site, and then replacing the cap undamaged.

In the end Mr Dugdale won his appeal.

This judgment is probably the only one that has ever been used for purposes of public entertainment. I have in my possession copy of a letter written by A K Grant to Justice Mahon in August 1979 which records the latter's thanks for sending the judgment which was used by the actors of the Court Theatre in Christchurch at one of their lunch time presentations. Mr Grant said that the reading of the judgment was a very great success and he concluded his letter by saying:

> Among the other readings were works by T S Eliot, John Betjeman, Groucho Marx, James Thurber, and A G MacDonnell. Your excellent under-stated comic prose, if I may say so with respect, more than held its own in this company, and was indeed one of the higher spots of the occasion.

So be of good cheer and even in the toughest situations, try to smile and keep the humour going.

Remember the remark attributed to Sir David Beattie when served with a writ in *Nakhla v McCarthy* [1978] 1 NZLR 291. He had been the junior Judge on the Court of Appeal when Sir Thaddeus McCarthy delivered the judgment of the Court with the inadvertently omitted page.

> I shall have to issue a cross notice against my brother Judges claiming contribution and indemnity.

Remember also the inspirational example of the lawyer who acted in the famous Penzoil case where, acting for the defendant, he elected not to call any evidence on damages in a breach of contract trial before a Texas jury. The consequence was that his client was lumbered with a judgment for US$2 billion – a judgment which, in spite of extraordinary efforts through the State and Federal Appeals system, was never overturned. There was a settlement for over US$1 billion. The very same lawyer was once on a panel discussing trial tactics and methods at an American Bar Association meeting. Someone in the audience could not resist asking him how he could sleep at night after such a truly horrendous outcome.

He smiled and said he had got over the case and now he slept like a baby. He would sleep for an hour, wake up and cry for an hour and then go back to sleep again for an hour and then wake up and cry some more until morning came. □

Laughter in Court

The penalty for laughing in a courtroom is six months in jail; if it were not for this penalty, the jury would never hear the evidence.

H L Mencken

Human rights: An agenda for the future

By Hon Mr Justice Kirby AC, CMG, President of the Court of Appeal of New South Wales

In January this year Mr Justice Kirby became Chairman of the Executive Committee of the International Commission of Jurists. In this article he surveys the present position in the field of human rights and gives his personal views on possible future developments. He sees many challenges that are difficult and perplexing. He sees a vital role for ICJ as a defender of the rule of law and constitutionalism, a proponent of the practical implementation of basic human rights, and a champion of the independence of Judges and lawyers in every land.

Changing world: Changing agenda

Human rights in context

If you want to see the agenda for human rights in the decades ahead, look around. Look at the world: its problems and changes. Reflect upon the issues of today. Many of these issues will be with us for the indefinite future. Others point towards the problems which will engage human rights activists for the foreseeable future.

Prediction is a chancy thing. Who would have predicted five years ago the dissolution of the Union of Soviet Socialist Republics – with the opportunities and problems for human rights which that unpredicted event has caused, not only for the Soviet peoples but for those who formerly lived in the shadow of their power? Who would have predicted the release of Mr Nelson Mandela by the government of South Africa and the dialogue which is proceeding in that country, as it abandons at least the legal vestiges of apartheid? Who would have predicted the near unanimity of the leaders of the world community at the Earth Summit in Rio de Janeiro? It seemed too much to hope that reason and a common concern about our blue planet would intrude in the selfishness of domestic and international politics. Who, a decade ago, would have predicted the global challenge of AIDS which now threatens to take such a toll in human lives and human rights on the six continents?

Who, twenty years ago, would have foreseen the rapid rise of the prosperous States of Asia, the Confucian Renaissance with its own special implications for basic human rights? The power these societies will wield in the 21st century is beyond question. The Confucian ideals lay emphasis upon duties not rights; the community not individuals; and the rule of powerful men of virtue, not the rule of law. How will the ideals of the International Commission of Jurists (ICJ) adapt and change to a world dominated by nations of these traditions, whose enthusiasm for the human rights and rule of law notions of western Europe will often be muted at best?

The shift in world politics following the collapse of the USSR has enhanced the dominance of the United States of America as the now one undisputed superpower. Germany and Japan, its potential rivals, seem content with a more modest posture in world affairs. The history of the United States, its legalism and constitutionalism and the attitudes of its ordinary people are in tune with the objectives of the ICJ. These include a commitment to the rule of law; to the protection of basic human rights and to the defence of independence of the judiciary and of lawyers in every land. The practice of the United States has sometimes faltered in the pursuit of these high ideals. But they are so close to the ideals of the United States itself that optimists would draw comfort from the undisputed victory of that country in the Cold War. "We won", the banners outside the White House proclaimed. But the real battles for the attainment of our ideals lie ahead. They involve turning the shibboleths and cliches into actuality.

Rule of just laws

When President Bush visited Los Angeles in the wake of the worst urban riots in the United States since the 1960s, he called for a restoration of the "rule of law". But the slogans being shouted in Los Angeles were "No justice, no peace". The law, and its institutions, had produced a result which shocked observers outside the United States and within. The San Francisco *Examiner* declared:

> Any way you look at it, the verdicts in the Rodney King beating case are wrong. Legally: police are now free to use excessive force to subdue suspects. Morally: poor blacks cannot get a fair trial. Ethically: the cops got away with it. Rodney King was beaten beyond any reason by four Los Angeles cops. That is the fact of the case. [The] verdict is an outrage.

Against this sense of outrage a call by the President for observance of the "rule of law" seemed to ring hollow. The rule of law is a high ideal. But it must not be a cloak for enforcing unjust laws. In the Rodney King case, a Judge was persuaded to transfer the hearing of the trial to a venue from which the jurors would not truly be the peers of the

accused. Not a single Afro-American juror participated in the trial. The legal system was, to that extent, manipulated.

A Presidential appeal to the "rule of law" is therefore unconvincing in such a case. The rule of law is only as good as the law which then rules. In the decades ahead it will be vital, both in the domestic and international context, to extend the notion of the rule of law. It should no longer be the rule of law, whatever that law may be. Supporters of basic rights should nail their flag to the mast of just laws. Reformed laws. So that the rule is a rule of just law. There were few more legalistic states than Germany under the Nazis. The authorities were often scrupulous in observing the most minor regulation whilst horrendous acts were done under the cover of law. So the lesson of recent, and not so recent, events is that the rule of law is not, alone, enough. A dedication to just laws is required. This notion must be included in the ideals of the ICJ and in the future of the global human rights movement.

Extending global standards

In the human rights movement sustained attention has been paid to the prescription of basic rights. Lately, that attention has spread to economic and social rights and to the rights of peoples. But securing agreement to fine international instruments is not enough. We must redouble our effort to secure the subscription by our countries to the international treaties on human rights. It is imperative to notice that such treaties emanate from a variety of international and regional bodies. For example, the International Labour Organisation, one of the oldest organs of the United Nations, has a developed jurisprudence within its specialised area which protects the basic rights of workers and defends their freedom of association, the right to collective bargaining and the privilege to withdraw their labour! Other agencies of the United Nations have made like contributions to the development of human rights principles, within their areas of competence.

In Europe, the *Convention on Human Rights* provides outstandingly effective machinery. It is now essential to extend its influence to the countries of central and eastern Europe. In Africa, the Commission on Human and Peoples' Rights has a generally disappointing record on standing up to the dictators and militarists and vigorously pursuing individual human rights. There is no apparent reason why Africa should not, like Europe and the Americas, enjoy an independent Court with the power to receive individual complaints of abuse. It is not as if Africa has been blessed with exemption from departures from basic rights.

In Asia and the Pacific, there is neither treaty nor commission. There is no Court. Yet in this part of the world, some of the worst abuses of human rights have occurred. In Cambodia, the most intensive genocide of the century took place. In Tibet, forces of the Peoples' Republic of China suppress the desire of an ancient people for self-determination. In Burma, the military ignore the verdict of the people at the ballot box. In China itself, the world witnessed a brave individual attempting to stop the tanks which rolled over the peoples' aspirations for democratic self-government as promised by the *International Bill of Rights*. In Hong Kong, the basic rights of the people to decide their own future have been ignored as the population of the colony was traded between two imperial powers.[2] In the Philippines, the promise of Mrs Acquino's reformist government appears to have failed.[3] In Thailand, the recent riots saw attacks by the military on the proponents and defenders of democracy and human rights.[4] In Fiji, a racist constitution was imposed and the colonel who led two coups against the constitution which he was sworn to defend, has now been appointed Prime Minister. The need, in Asia and the Pacific, for a convention on basic rights and machinery to enforce such a convention, must be made a high priority for those concerned about basic rights in that most populous part of the world.

Domestic implementation

Of equal importance, everywhere, is the object of bringing the principles of fundamental rights and the tablets in which they are enshrined in international instruments, down to application in ordinary cases in the Courts in all parts of the world. The domestic application of international human rights norms strikes a problem in many legal systems, which adhere to the view that international treaties are not self-executing and only operate as part of municipal law if they are specifically enacted to be such by valid local legislation. But now, in England,[5] Australia[6] and other countries, Courts of high authority are increasingly accepting the view that international statements of human rights may be used by Judges and Magistrates in resolving ambiguities of legislation and in filling gaps in the common law. In Anglophone common law countries this is a very important breakthrough. It promises greater attention to the international statements of human rights in the day to day work of the Courts of law.

In Australia, the approach to which I refer was recently explained by reference to Australia's adherence in 1991 to the First Optional Protocol to the International Covenant on Civil and Political Rights. Justice Brennan, of the High Court of Australia, observed:

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol . . . brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule . . .[7]

It was with the use of this principle that the High Court of Australia struck down a long-standing legal rule that the aboriginal people of Australia enjoyed no title to land before the arrival of white settlers on the continent. A more dramatic

impact of the standards of basic human rights would be hard to imagine in the Australian context.

Judicial independence

In the defence of the independence of the judiciary and of lawyers, the Centre established for that purpose by the ICJ has played a most useful role in calling cases of abuse to notice. But it is not only in violence that the independence of practitioners of the law is threatened. In many countries, there is a need for vigilance against more subtle forms of interference. Examples include the effective removal of judicial officers from office by the expedient of reconstituting Courts;[8] by the chilling effect which accompanies government retaliation against Judges whose views are unwelcome;[9] by the misuse of the powers of promotion, patronage, titles and pension rights; and by the erosion of judicial salaries and conditions so that only lawyers of mediocre talent are attracted to positions requiring great courage and ability. In some countries judicial officers have fallen victim to temptation, corruption and partiality. Then, principles defensive of judicial independence of the just can be manipulated to protect the venal. Yet this fact can itself be used as an excuse to attack and remove the corrupt but also the honest and vigilant Judge. This has happened in Peru during the latest coup.

So in the fields of the ICJ's special areas of interest — the rule of law, human rights, and the independence of Judges and lawyers — there is much to do in the years ahead. The ICJ must look upon its *troika* of interests in a fresh light. I suggest below a number of new aspects which will merit its particular attention.

New perceptions

Rights of peoples

In virtually every region of the world, evidence of the assertion of the peoples' right to self-determination can be seen. Peoples' rights, and their definition, are still controversial. But the peoples' right to self-determination, at least, is enshrined in the United Nations *Charter.* (Article 1. See also Article 56.) In Punjab, Assam, Kashmir and elsewhere in India, the force of fission is evident. It blew apart Pakistan, as that country was originally conceived. It has threatened the peace of Sri Lanka for two decades.

In Tibet, a people with a distinct language, culture and tradition valiantly maintain their assertion of the demand for self-determination. The same force is at work along the spine of the former Soviet Union: in Azerbaijan, in Armenia and in the Moldovian Republic. The shattering break-up of Yugoslavia demonstrates the abiding force of enduring linguistic, religious and cultural differences. Seventy years of Yugoslavia was not long enough to stamp out ancient enmities. In South Africa, racial and tribal differences continue to mark that society, notwithstanding the improvements which have lately occurred.[10] So this is clearly a force of the future to be reckoned with. Its significance for the nation state and for the development of international politics and basic rights in the century ahead will need to be considered. The application of the principle of self-determination to indigenous peoples (such as the Australian Aboriginals, the Canadian Inuit and United States indigenes) will require consideration sensitive to their separate histories and legitimate demands.[11] If they are still a distinct "people" what does the UN *Charter* promise of self-determination mean to them?

Populist politics:

In the wake of the break-up of the Soviet Union, the hopes for a new golden age of human rights have been muted by a reversion to the enmities of the past. Intolerance and historical hatreds have re-surfaced: all too often whipped up by "democractic" politicians, playing upon popular sentiment. The danger of this misuse of democracy was called to attention by the present Secretary-General of the United Nations on the eve of his appointment to that office. He warned of tyranny in the name of democracy. Much that has happened since January 1992 bears out his warning. A redefinition of "democracy" is needed: one which respects the legitimate rights of minorities.[12] Our contemporary concern with the misuse of democracy requires us to reflect anew upon the meaning of this idea. In many western countries, it means little more than a triennial visit to a polling station. Thereafter, there are all too often few checks which the people can hold over elected politicians. Legislatures in this century have lost much of their power to the Executive Government. The Executive has lost much of its power to the head of government: the Prime Minister or President. And the head of government has often lost power to the bureaucracy. None of us should forget President Eisenhower's warning in his farewell speech as President about the dangers of the industrial-military complex. The notion of what it is to live in a democracy requires redefinition. The promise of the *International Bill of Rights* must be given contemporary content in this regard.

Military regimes

In many parts of the world, the military play a manipulative role in stifling the aspirations of the people. Sometimes the military secures the support of the population because of the memories of the greed and corruption of elected politicians. Nigeria and Indonesia may illustrate this fact. Elsewhere, as in Burma and Thailand, the military are turned against their people, particularly those who stand up for the protection of basic human rights. In some countries, dictators invoke the military to seize power. Fiji and Peru spring to mind as recent examples. The problem of restoring viable democracy, and the means of applying international pressure to that end, require attention. So does the inter-action of the military establishments in neighbouring military dictatorships. So too does the protection of basic human rights and freedoms under military dictatorships.

Religious extremism

A phenomenon of recent times has been an increase in religious fanaticism. The history of earlier centuries was blighted by the fanatical wars and crusades of Christian extremists. Such intolerant adherence to Christianity still exists. Many of them are securing new converts in the troubled areas of the world where the demise of the philosophy of communism has left a spiritual void. But Christianity is not alone. In India, extremist Hinduism confronts extremist Islam. Intolerant messages of some fundamentalist Islamic groups reach

from Afghanistan to Morocco. Reconciling fundamental human rights with religious faith and conviction will be a major task in the decades ahead. This will be so because the spread of religious fundamentalism seems assured in many of the former republics of the Soviet Union. There may be no basic conflict between the messages of the Bible, the Torah and the Koran and basic human rights. But, as practised, extremist religious fanaticism will be difficult to reconcile with fundamental human rights. The demand for the death of Salman Rushdie illustrates the clash between unswerving faith in a perceived religious dogma (on the one hand) and the assertion of the basic right to freedom of expression (on the other). It should never be forgotten that the guarantee of religious freedom includes a guarantee of freedom from religion![13] This is now recognised in most western communities, which have generally passed through the phase of religious intolerance. But is is not always recognised in other parts of the world where poor, and often hungry people look for simple verities to ease their passage through this world to a better one yet to come.

Environmental freedoms

The World Summit in Rio de Janeiro has focused attention on the exploitation of the environment and the danger which is presented to the human race by the depletion of resources and the excessive growth of population. Industry in the wealthy countries emits carbon dioxide in billions of tonnes to the peril of the world's climate and ecology. The right to live on the planet, to breathe fresh air and to enjoy its environment may need the imposition on developed countries of rules designed to protect people in every country from the destruction of the common environment.

To these man-made challenges must now be added a new peril of nuclear proliferation. The break-up of the Soviet Union presents humanity with opportunities: but also with dangers. Amongst the most acute of these derives from the fact that the fine balance which was achieved amongst the nuclear powers in the Cold War may be lost as nuclear weapons from the Soviet arsenal are sold and as its nuclear facilities run down. These developments present risks to the whole world community. It will be in the interests of all creatures in the world that the world community should adopt the most effective controls against nuclear proliferation. It would be the ultimate tragedy of the demise of the Soviet autocracy if its result were a heightened risk of nuclear catastrophe and local nuclear conflicts. Yet such prospects cannot be ruled out. The most basal human right is to existence for without it the other rights mean nothing. Concerted efforts for the protection of the world environment, including against nuclear proliferation, must remain at the top of the agenda of those concerned with the protection of basic human rights.

Economic and social rights

The Secretary-General of the United Nations said shortly before his election that the international community must beware that:

> A single state or handful of states should monopolise the decision-making processes affecting the organisation of all international affairs.

Noting that the International Monetary Fund and other aid agencies are making loans and grants dependent on increased democracy and freer economies as "a basic condition for participation in the new world order", Boutros Boutros Ghali warned that this:

> . . . should not serve as a pretext for the intervention by major powers in the internal affairs of the state under the guise of protecting democracy.

Economic rights go hand in hand with civil and political rights. They are part of the same international *Bill of Rights*. Knowledge and enjoyment of civil rights depends upon the other basic rights to life, education, health services and an opportunity to flourish, in happiness, as an individual human being.

In many developed countries, there are new challenges presented by rapid social changes. Thus, the breakdown of the nuclear family which has been such a feature of social conditions in the past forty years in most developed countries necessitates an urgent rethinking of the application of economic and social rights. Many of the groups in developed societies, which are asserting their basic rights, represent individuals who have long been stereotyped, catalogued and oppressed. I refer to women, to homosexual and bisexual people, people with disabilities and the elderly. These are the new "suspect classes"![14]

In developed countries the battles against racial intolerance and religious persecution have not been won. But, at least, in most such countries, laws and institutions have been provided to combat such forms of oppression. Often, the ethos of society condemns it. But there is still much oppression against people on the grounds of gender, disability and sexual orientation. The ICJ, looking to the future of human rights, will be in the forefront of international efforts to combat such stereotyping and discrimination. There are new suspect classes which will require new international standards. It is important for human rights activists to extrapolate from the experience of particular groups (such as those discriminated against on the ground of race, colour or gender) to see these forms of discrimination as species of a wider *genus*. People should never suffer disadvantage by reason of attributes over which they have no control. Extending this basic principle to the campaign for human rights throughout the world will be an important mission for the ICJ in the decades ahead. Seeing particular categories of discrimination in the context of the wider problem of stereotyping should be our cause. The enemy is stereotyping. The objective is equal opportunity for all. Learning which techniques, amongst the many adopted, are most effective most quickly to turn the tide of discrimination will be an essential task for human rights campaigners. It should not be assumed that passing a law works a miracle. For most, attitudes of hatred and fear are learned from the cradle. Yet the law undoubtedly has a role in providing redress and in establishing acceptable standards.

Health issues

The advent of the Human Immunodeficiency Virus (HIV) which causes AIDS illustrates once again the unpredictability of human life and its human rights problems. AIDS presents new and different human rights issues to different societies. In developed communities it presents the danger of enlarged discrimination, fear and hatred of homosexual and bisexual men, intravenous drug users and prostitutes. In developing countries the rapid spread of HIV enlivens fear and prejudice against mainly heterosexual people who are ill. In all societies, the basis of discrimination and abuse of human rights is generally ignorance — of the nature of AIDS and of its modes of transmission. The World Health Organisation (WHO) has taken important initiatives to promote strategies for the protection of the basic rights of people living with AIDS. This strategy is essential if the educational messages, necessary to the containment of this perilous epidemic, are to reach individuals in the communities most at risk. There is, at present, no cure and no vaccine against this dangerous new virus. It is therefore necessary to rely upon behaviour modification to contain its spread. This, in turn, depends upon the effectiveness of education. Getting into people's minds requires an attentive mind to listen to the message. That is why WHO has recognised from the start of the epidemic that the protection of basic rights and the prevention of the spread of the epidemic go hand in hand. Human rights agencies throughout the world must reinforce this important message. There is no human right to spread a life-threatening virus. But strategies of containment, as well as basic principle, require the respect for the rights of people who are infected and people at risk of infection.

Technology

The new technology of this age presents many challenges to basic human rights. Such challenges arise from computers which alter the perceptions of reality and provide the bases for invading individual privacy in a way that would have been impossible even in the recent past. Because the technology is global many principles for the protection of the basic right to privacy have been developed by international agencies.[15] Such agencies are still working on other aspects of information technology relevant to human rights: such as the protection of the security of information systems, especially where they are vulnerable to destruction, deletion or distortion.

Biotechnology also presents many challenges to human rights.[16] Nuclear technology presents the gravest peril, as the world witnessed at Hiroshima. After that flash, brighter than a thousand suns, the world could never be the same again. Yet recent events show how endemic are the prejudices and attitudes of humanity. Science and technology leap ahead. They convey frail men and women into outer space. They plunge the depths of the oceans and explore the tiniest forms of life. They help shape the world we live in. Yet people inhabit that world, all too often carrying messages perilous to human rights. We must ensure that the future is shaped by messages optimistic for humanity.

An agenda for action

The foregoing represents only a small part of the agenda for bodies such as the ICJ. Amongst the first of the agencies for the protection of human rights, the ICJ has had a magnificent record. It has helped shape the international instruments which state the rights fundamental to the freedom of the individual. It has been vigilant in protection of the rule of law. It has established the international centre for the defence of the independence of Judges and lawyers. Now, the ICJ has been joined by many other agencies which performed invaluable work in harmony with its efforts. The ICJ is itself taking new directions. it must reach out to a greater number of lawyers and their supporters in all parts of the world. The pursuit of justice ought to be the motivation of the lawyer in every land. The defence of just laws and of independent Judges is a responsibility of lawyers but also of other citizens who hope to live in a community governed by laws not brute power. There are many other tasks which could be added to the agenda of the ICJ beyond those which I have collected above. Doubtless my agenda is influenced by my own experience. Yours will be different.

To those who fondly believe that the great battles of human rights have been won: that the basic instruments have been fashioned and that the future looks rosy, I say look around. The world presents many challenges. In some ways these challenges are even more difficult and perplexing than those which faced the world on the brink of its new world order in 1945. In the decades ahead, I have no doubt that the ICJ has a vital role to play. A defender of the rule of just laws and constitutionalism. A proponent of the practical implementation of basic human rights everywhere. A champion for the independence of Judges and lawyers in every land. And always a body charting the agenda for human rights in the decades ahead. The ICJ's work has not finished. Indeed, it has only just begun. □

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1 A body of jurisprudence has been developed, in respect of the Conventions of the International Labour Organisation, by the Freedom of Association Committee of the Governing Body and by the Committee of Experts on the Application of Conventions and Recommendations. See ILO, *Freedom of Association; Digest of Decisions and Principles* (3rd ed), Geneva, 1985; ILO, *Freedom of Association and Collective Bargaining,* General Survey of the Committee of Experts on the Application of Conventions and Recommendations, Geneva, 1983.

2 International Commission of Jurists, *Countdown to 1997: Report of a Mission to Hong Kong,* Geneva, 1992, 40ff.

3 International Commission of Jurists, *The Failed Promise, Human Rights in the Philippines Since the Revolution of 1986,* Geneva, 1991, 31ff.

4 *International Commission of Jurists, Report of the Mission to Thailand,* Geneva, 1992 (forthcoming).

5 See *R v Secretary of State for the Home Department; ex parte Brind* [1991] 1 AC 696 (HL); *Derbyshire County Council v Times Newspapers Limited* [1992] 2 WLR 000 (CA), noted (1992) 66 *Australian Law Journal* 382.

6 *Eddie Mabo & Ors v The State of Queensland,* unreported decision of the High Court of Australia, 3 June 1992.

7 Ibid, Justice Brennan, p 30.

8 *Attorney General for New South Wales v Quin* (1990) 170 *Commonwealth Law Reports 1;* (1990) 64 *Australian Law Journal Reports 327* (HC).

9 See Tun Saleh Abas & K Das, *Mayday for Justice,* Magnus, Kuala Lumpur, 1989.

10 International Labour Organisation, *Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa,* Geneva, 1992.

continued on p 300

No mere trappings

By Bernard Brown, Faculty of Law, University of Auckland

The question of wigs and gowns is a perennial one. The new Chief Justice of England has raised the issue for discussion there. Murphy J when he was on the Bench of the High Court of Australia declined to wear a wig although his judicial brethren and counsel did. And in the Privy Council while the members of the board are in plain street clothes, counsel are robed and gowned. Technically of course it might be said the Law Lords there do not sit as a Court but as Counsellors to the Queen. In New Zealand Judges of the Court of Appeal now wear gowns but not wigs — just like District Court Judges! Mr Dugdale has campaigned in New Zealand against wigs and gowns for many years. See, for example, his article at [1987] NZLJ 287. In this present article Professor Brown puts an alternative argument. He is in favour of maintaining a distinctive form of judicial dress. He makes the point strongly that the public take the law in its Court manifestation very seriously, and expect counsel and Judges to show that they do too. It is not like popping in to see a clerk in the Social Welfare department.

Perhaps I, the discarder of academic gown for seersucker suit, am the least qualified person to discourage Judges and counsel from abandoning the traditional wigs and robes. For reasons which follow, and which may reflect more faithfully the burden of popular rather than lawyerly belief, I would wish to see the High Court requirements of wig and robe retained, the bewigging of District Court Judges introduced to most of their functions, and the robing of advocates before that Court. (No thought is offered on the Court of Appeal, with whose actual proceedings the public barely identifies.)

I cannot claim the support of a sophisticated public opinion poll. But I have spoken with a variety of lay-persons in New Zealand and elsewhere, and my representation of their view-points will be fair! That opinion, which happens to concur with mine, arguably is no more important than any view expressed by lawyers. But it is a significant one and ought to be borne in mind when, if ever, decisions on this matter of dress come to be taken.

"Let's get rid of such anachronistic, inconvenient, 'mystical' paraphernalia", may be the cry of a majority of practising lawyers. Anachronism is a janus-word: one person's anachronism is another's harmonic or, dare one say, his concorde. The inconvenience may be admitted, especially on a sultry afternoon. So far as "mysticism" is concerned, let us not be taken to root for retention of judicial and barristerial uniforms simply because they are steeped in "tradition" or "history". A claim for real utility must be pressed. As Judge Thurman Arnold observed in 1935[2] some legal symbolism is worth preserving if it is currently valued for good reason by the public. Even if people do not understand the symbols perfectly, they may still be shown to perform a function, eg to induce litigants' "confidence" in institutions or in process, or, in the case of wigs and robes, to remind those who wear them that they should strive to live up to exemplars of probity, expertise and courtesy developed over centuries of professional practice.

Arnold himself, and others have stressed that the function of useful custom or legal symbolism is not exclusively to *guide* people: it may perform the equally valuable role of serving to *reassure* or *comfort* them. In that sense, if none other, the litigant, surrounded with all the High Court symbolism of justice, might "expect" to get a fairer, fuller and more legally expert hearing than he would anticipate from, say, a District Court-Martial or an overworked Small Claims Court. Not unreasonably, she or he would interpret that heavy symbolism, including the "legal dress", as ensuring the wholly decorous conduct of proceedings (which, as a complainant last year to the Egg Distributors Disciplinary Tribunal, she found disconcertingly absent).[3]

Wigs and robes, especially when worn by judicial officers, perform two or three important utile functions which tend to be glossed or underrated by lawyer commentators.

Depersonalisation

First, where trials are conducted in the adversarial mode, many lay-people as well as lawyers still value the depersonalisation of the process. Robes and wigs play an essential part in that. While it is painful to a party to lose his or her case, and for a witness to be disbelieved, salt may be rubbed in the injury when those things are learned from an adjudicator whose appearance does not approximate the party's perception of "a Judge".[4] She, or he, in mufti, may look "past it" (or "over the hill"), "harassed", "less 'the part' than the jury foreman", or even "a bit unsophisticated" or "too young". Although a small minority of my communicants thought judicial wigs and robes were "out of place [in 1992]", none had anything derogatory to say about the physical appearance of their wearer. Jurors thought "the uniform" lent an air of greater credibility to counsel as well as Judge.

Of course, simply dressing up the Judge is no compensation for want of judicial qualities and certainly it does not make all Judges look alike. But it seems preferable that Judges resemble the traditional image of "the Judge" and be seen foremost as such — rather than as the possessor of a very shiny pate or of an equally effulgent stand of silvern hair.[5] Over a dozen generations the judicial dress has been synonymous with the impartiality and the presumed oracular wisdom of the wearer. Litigants, witnesses and jurors may not always identify sympathetically with the figure but they will find him or her judicially credible, and less distracting than, say, the grey man or woman with dandruff on the dark suit.

The depersonalisation of counsel too is a useful in-Court commodity: even the rugged forensic punch and counter-punch are less unseemly when the contestants are dressed for the lists. Wig and robe can be great levellers by misting factors such as age and gender differences between counsel as well as the disparity in their tailors' skill. And English lawyers have told me that the client who is disappointed by the trial's outcome tends to be less directly critical of his or her barrister's performance than, at the lower Court level, of the non-robed solicitor's.

Like many readers, this writer is acquainted with a number of High Court Judges. I recognise them on the street. Yet when, as a spectator, I enter their Courtroom it usually takes me several minutes to determine which Judge it is beneath the wig and robe. That underlines my point. Clearly it is different in the District Court. Why should it be different? Do those Judges belong to and administer a different legal system?

There may have been some excuse for a non-lawyer asking that question about the former Stipendiary Magistrates, in mufti, because their salaries — like their physical environs and their jurisdiction — were dramatically inferior to those of the higher Courts. (One remembers many SMs of notable learning and juristic vision that far outran the depressed sights set for them.) But their gowned successors enjoy much higher status and enormously enlarged criminal and civil jurisdiction, and now do a lot of the work of the former Supreme Court. Some of their function, eg in the Youth or Family Courts might not be enhanced by their sitting as wigged eminences, but the bulk of it would. And it might put to rest such remarks as "the one with red hair has really got it in for maintenance defaulters" or ". . . is very light on first offenders". Juries, one gathers from jurors, can become preoccupied by the same kind of personal trifles of style or fashion about Judges or counsel in the District Court.

As indicated (above) my plea would be different if our legal system were characterised as a wholly or largely instrumental-welfare one. Then the Judge, like Njal or a commune law-person, could roll up his sleeves and get down into the arena of therapy (by mediation, conciliation or whatever form of Alternative Dispute Resolution) with the various "clients". Then his or her personality could well prove to be relevant to the issues before the Court.

Judicial anonymity

The second major advantage of traditional legal uniform is its contribution to maintaining judicial social anonymity and, more important, Judges' physical safety. One suspects that most Judges crave anonymity away from the workplace. If they serve in London or New York it is most unlikely they will be recognised let alone embarrassed in a recreational situation. New Zealand cities, even

Court formality and dress standards

"Open Court, you say?" "That's right. The lawyers in red suits are barristers and the lawyers in yellow suits are solicitors. It's done like that to help TV audiences."

"And over there, is that man suffocating himself?" "Oh, don't worry. It's a lip mike he's got. He's the presenter of the channel 5 prime time 'Johnnie Caplan hour'. Highlights of the big cases of the day and on-the-testament comment from Mike Zander. Mind you, the ratings have been tumbling. In the old days, what with the wig, the robes and the rest, it was exciting theatre but now the people prefer to go down the pub."

"Where is the judge?" "That was the man in the suit. Look, he's sitting at the desk in the corner below floor level. They've had strict guidelines that they must be user friendly and blend in with the grey walls. Bowing has stopped. The court language is chatty. You can be struck out for using a Latin maxim now."

What's all this nonsense about wigs? Can't a professional wear a uniform? I fancy that in truth most judges want to retain theirs. If it gets too hot, the wig can be removed temporarily or the waistcoat unbuttoned. They could even have some decent air conditioning installed.

Joe Public wants his judge to look like a judge and behave like a judge. And he wants good law dispensed fairly. Retain the formality and the tradition. They and justice inspire respect. And if solicitors are to earn respect and flourish in the future of extended rights of audience, they had better turn over a new leaf. This is not a plea for fewer mortgage frauds and more restrained claims against the legal aid fund. It is to smarten up. . . .

Clare Price who teaches public speaking and other communication to lawyers (30% of her clients are solicitors — "a different breed from the barristers") looks at it from another viewpoint. Advocates, she asserts, should dress as plainly as possible so that their appearance does not detract from what they have to say and they should go for formality in dress because this gives authority.

Stephen Gold
The Law Society's Gazette
20 May 1992 p 2

Auckland, and certainly the smaller centres, pose real problems for the comfort, if not yet the security, of Judges. They, and their families, ought to feel relaxed (and safe) while enjoying the same range of reputable social opportunities as the rest of us. The risk of casual, in-the-street identification as "that bastard who sent down our little Billie" must be significantly lower for the High Court Judge than for his District Court counterpart who sentences without benefit of wig. I am not talking here about risk, tragically realised in rare instances of attack launched by the disturbed defendant against a Judge in Court, or about the calculated political Bogota-style assassination attempt. Rather, I refer to insult and jostling in, say, theatre foyer or airport lounge. (I was witness to that some years ago in a Sydney restaurant when a magistrate friend was sufficiently "hassled" to have to beat an *undignified retreat.*)

The wig will not bear social anonymity to the District Court Judge who resides and presides at a smaller provincial city Court, and one commiserates with him or her, and the family, for having to put up with the inevitable social self-circumscription that goes with the job. But an element of relief could attend the introduction of wigs to many of the District Court judicial functions exercised in the larger population countries. For the benefits contingent on that, there would seem to be only a miniscule price to pay.

Identification

Last, and least, I am told that ready identification of the professional participants in the drama of going to trial can be reassuring to litigants and witnesses anxiously waiting in the foyer of the High Court. Plainly that is best done by maintaining such "servicers" in uniform. (One hesitates to draw the analogy with airports and hospitals, let alone supermarkets, but their staff do dress up in order to be recognised as assistants to the consumer-public.) Lawyers, like courtroom officials, are officers of the Court. If, on their way to or from the courtroom, lawyers are asked by nervous inquirers simple questions about the location of courtrooms or of Court-personnel, it is earnestly hoped they respond with the same courtesy expected of a registry official.

Such easy identification eludes the would-be inquirer at the busy city District Court. Lawyers tend to dress in conservative suits but so do detective constables, expert witnesses and business entrepreneurs en route to their deposition-hearing for fraud. The bustle of the District Court can induce mild anomie (or alienation) in the very people the system needs to service in a "human" way. Lawyers, robed, may be more than merely ornamental at the threshold of local justice: if asked they may be moved to answer that "Freda Jones, your solicitor, probably is delayed in courtroom 1" or "The Registrar's office is over there". (One knows that ushers and volunteer helpers are usually "on duty" but quite often their time is monopolised by one or two cases of severe language difficulty.)

Again, a small investment by way of the donning of a robe could lead to an improvement in lawyer-public relations.

Summary

As will be gathered, I argue for extension of the requirement of the wearing of traditional legal dress. When public opinion is considered (and my examination of that unwieldy mass is merely impressionistic) it may appear that wigs and robes remain as part of currently important popular legal symbolism. It would dangerously undermine public confidence in the administration of law to discard that symbolism without first erecting convincing arguments against the several practical reasons for extension, or at least retention, given in this paper. The public opinion factor may not be crucial, but it would be imprudent to do away with traditional legal dress without taking account of some scientific measurement of lay people's views. After all, they are the customers. □

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1 This is an impressionistic, informal survey based on discussions with about thirty women and men from different walks of life, including some persons who have served on juries, some litigants, including three convicted persons, and half a dozen women and men, excluding litigants, who have given evidence in civil or criminal trials.

2 *The Symbols of Government*, Yale University Press, 1935.

3 Fictitious of course. But for an illustration of what can, and did, happen at hearings of a comparable "trade" agency *Brit Jnl of Admin Law*, vol 3 [1956-57], *Administrative Law Reports*, 237-8 – proceedings of the Disciplinary Committee of the Tomato and Cucumber Marketing Board. In three separate hearings, growers called to account for failure to make annual production returns subjected the Committee members to fierce personal abuse. Eventually, the Chairman, a solicitor, called in two policemen to help control the proceedings.

4 That was this writer's experience, shared by the losing party and other witnesses, of the decisions of a Public Referee of a Commonwealth Court in Melbourne in the late 1960s.

5 One notes that the late Sir John Kerr, blessed with the latter, attracted widespread, quite unjust, criticism for vanity on that score while serving as Governor-General of Australia – then before the period of constitutional crisis. Yet, in earlier times as a wigged Judge, he received none at all.

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11 G B Kutkjian and A Pisca *Rights of Peoples*, SEDAM/UNESCO, Padova, 1991; G R Hall, *The Quest for Native Self-Government: The Challenge of Territorial Sovereignty*, (1992) 50 *Uni Toronto Law Review* 39.

12 For a recent note on the work of the United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities see (1991) 47 *ICJ Review*, 43.

13 For Australian cases see *The Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 *Commonwealth Law Reports* 116; *Attorney-General for the State of Victoria (at the relation of Black) and Others v The Commonwealth of Australia and Others* (1981) 146 *Commonwealth Law Reports* 559. See esp Justice Murphy (diss) 624; for United States cases see eg *Reynolds v The United States* 98 US 145 (1878); *Everson v Board of Education* 330 US 1 (1947).

14 See generally discussion T R Holroyd, "Homosexuals and the Military: Integration or Discrimination?" 8 *Journal Contemporary Health Law & Policy* 429, 445 (1992). For a discussion of approaches in the United States see *Massachusetts Board of Retirement v Murgia* 427 US 307, 312f (1976).

15 See eg Organisation for Economic Co-operation and Development (OECD) *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, OECD, Paris, 1981.

16 Cf M D Kirby, "Law, Technology and the Future" (1988) 21 *Aust Journal Forensic Sciences* 112; see also R J Ravetz and D Dobson, *Science and the Law* (1991) 47 *ICJ Review* 69.