THE NEW ZEALAND
LAW JOURNAL
21 SEPTEMBER 1994

Copyright Bill

Some years ago I had occasion to write to an academic lawyer regarding a copyright issue. I granted permission to reproduce an article from *The New Zealand Law Journal*, subject to the agreement of the author and with due acknowledgment and so forth. He wrote back and asked for a general agreement to take whatever he wanted at any time from *The New Zealand Law Journal*. I declined this and said he had to ask each time. My reason was twofold. First I wanted to know what use was being made of material from the *Journal*, and secondly I wanted to make the point that the material there was property that belonged to the publisher and the author.

I then went on to say that I was astonished at the general attitude to copyright of academics, and of academic lawyers in particular. I said that I would have expected academic lawyers to have been particularly conscious of the word "property" in the term "intellectual property". After all property is one of the most basic of legal concepts. I said I was astonished at the naive attitude of so many legal academics.

He replied that academics were particularly concerned for their students who were really not financially in a good position to buy textbooks especially in view of the heavy fees they had to pay. He considered students were entitled, *as of right,* to the information contained in books and journals in order to pass their examinations.

I wrote back and asked two questions. The first was did he consider, on his principle, that students were entitled, *as of right,* to take a book from a bookshop without paying for it, and if not why not? I suspected that the unstated and indeed unformulated reason was that a book was a corporeal thing, something you could see and touch, irrespective of what was in it, and in this sense being like a packet of cornflakes or a bottle of beer. The value of the intellectual property contained in the concepts and verbal expression in the text was something he seemed to me to ignore or overlook. For an academic, for one with a real interest in ideas and their expression, in the inherent *value* of information, this seemed extraordinary – to put it politely.

The second question was whether he was prepared to acknowledge the relevance of his argument to the salary he received? He, after all, lived off his intellectual property, his knowledge and the dissemination of it through his lectures. The students had to pay the very fees, for his benefit as salary, that he saw as justifying them in taking someone else's knowledge, someone else's intellectual property, for nothing!

The somewhat lame, and I would like to think rather chastened reply I got was that he, and other members of the staff he had discussed it with, had never thought of it like that. He certainly did not indicate any happy willingness to reduce or forgo his salary in order to make the academic life of impecunious, but beer-drinking students, easier; nor suggest that shop-lifting by students to assist them in their studies should be especially exempted from the criminal law about theft.

Now we have had a Copyright Bill introduced into Parliament that explicitly authorises the taking of at least 10% of any work, by an educational establishment and by libraries (any public library) and by archives. In many, perhaps most cases the Bill allows any quantity up to the full book to be taken. It might seem that the 10% referred to in clauses 42 and 43 is only a small amount. It does not look too significant. But in an 800 page book, or perhaps more if the index and introduction and preliminary pages are also counted, then 80 pages plus can be taken. And they do not have to be consecutive pages. If there are two or three texts on the same topic, as is notoriously the case in the law, then 160 or 240 pages can be taken. The irony is that students can be charged for the compilation, including an allowance as "a reasonable contribution to the general expenses of the establishment" (clause 43(2)(c))!

From magazines or journals complete articles can be taken within the 10% provision. That means that one author can lose the entire property right in his or her article because several others have had articles of little or no value, or at least of little interest published in the same issue. Alternatively different academics for different courses might well finish up taking every article. That is to say the intellectual property of every author can seemingly be taken for use by the very people for whom it was written and to whom it is of value – that is by the anticipated purchasers. Who else is going to buy it?

Part III of the Copyright Bill purports to be based on the United Kingdom Copyright, Designs and Patents Act 1988, but this is misleading. There are similarities it is true, but it is the differences that are significant. It is not surprising that authors and publishers are loud in expressing their concerns. Many academics of course are also authors with, one would have expected, a vested

interest in protecting the copyright in their work, from which they receive royalties or a lump sum from a publisher to purchase their property interest in the copyright.

Part III of the Bill is clearly wrong in principle. This is ironic in that clause 14 expressly states that copyright is a property right, and Part IV, which is new to New Zealand legislation deals with what are called moral rights. Part III however shows a lack of a moral attitude by the policy-makers behind the Bill to the property rights of authors and publishers. To set out all the objections to Part III would require a lengthy essay.

There is, for instance, a problem about clause 44. This may be intended to be of very limited application, but as worded it is, understandably, a cause for serious concern. The reason is that it appears to permit for teaching purposes, to an unlimited extent, the use of published material. Authors, it can be easily appreciated, are concerned about this in terms of modern technology. Years ago when blackboards were the standard way of providing examples the situation may have been different. Lawmakers should be aware of modern developments when reshaping the law so as to preserve intended property protections. There are numerous infelicities, and unnecessary and confusing complexities in the drafting of this Part of the Bill. The English (and the Australian) legislation, which is quite recent, is much clearer and altogether to be preferred in principle and expression.

The English reference given for clause 44 is to section 32. A cursory look at s 32 shows it makes a similar provision for copying to be done "in the course of instruction". But, and the but is very important, the Bill leaves out a very significant restriction. After providing that either a teacher or a pupil can copy something in the course of instruction the English section requires in subs (1)(b) that this copying "is not done by means of a reprographic process", that is, the copy cannot be made by photocopying.

There is no such restriction, limitation or qualification in the New Zealand Bill. The Explanatory Note does not mention this crucial difference. The New Zealand clause simply ignores this issue and thereby pretends there has been no technological development. Whether this is a botched piece of drafting, or simply dishonest in pretending to be the same provision as in England one cannot tell without cross-examining the Minister. But in this day and age naturally, and whether rightly or wrongly, one is suspicious. Politicians are plaintive in expressing their surprise at how the public despises them; but really, as this example illustrates, they have no one to blame but themselves for the perception the public has of them.

The differences between the detail of the United Kingdom legislation and its pretended New Zealand equivalent are important. The first thing the Select Committee should do is have someone go through Part III, indeed probably the whole Bill, and note the changes, the alterations, and the omissions, by comparison with the United Kingdom sections on which our sections purport to be based. Then too the drafting of Part III leaves a lot to be desired. Just by way of example clause 42 is made subject to clause 43. Clause 43 then expressly includes part of clause 42 in clause 43. Consequently this part of clause 43 thus appears to be subject to itself! The provision is circular in its effect.

Copyright has international significance, and for us as a trading nation our reputation for fair dealing is very important. Clauses 18, 19 and 20 make foreign books and broadcasts qualify for copyright protection in terms of the Bill. This seems fine, but it also means they thus become subject to substantial pirating without payment of a fee. Do we want to see overseas books marked "Not for sale in New Zealand for copyright reasons"? We have an international trading reputation to preserve. The Copyright Bill does not do this, but effectively does the opposite. It is to be hoped and expected that the Commerce Select Committee will totally rewrite Part III of the Bill to ensure the continued protection of copyright, as a property right, in New Zealand.

P J Downey

Parliamentary reform and constitutional issues

In his article on Parliament and privilege on p 325, Sir Geoffrey Palmer considers the winebox issue and some historical developments in relation to possible Parliamentary reform. He has recommendations to make about defining contempt of Parliament; the power of Parliament to fine or imprison; the procedure in respect of contempt allegations; defining the term "proceedings of Parliament"; safeguards for individual citizens against what he calls abuse of Parliamentary debate; select committees having to follow the rules of natural justice; abolishing the power of Parliament to expel members; abolishing MPs' present narrow freedom from arrest; and repealing the Legislature Act 1908. It is a programme that – at least on the face of it – would be seen, and probably welcomed, by many as substantially reducing the power and status of Parliament as an institution to being an even less significant cog in the constitutional scheme of things than it has already become. In so far as any of this is done by statute then of course Parliament, in those areas, would be subject to judicial proceedings by way of interpretation, application and enforcement. Some interesting, some very interesting questions can easily be envisaged. Who will want to be Speaker then and be subject to imprisonment for failure to control Members who misbehave in terms of a statutory provision, to push the point to the extreme? Sir Geoffrey has raised issues and thrown out a challenge that now call for fundamental consideration by Parliament, by lawyers and by the population at large. At issue really is the nature of Parliament itself, the form of our constitution and the inter-relationship of its parts. American experience of formal constitutional provisions, as against our more flexible approach of mere constitutional conventions concerning the legislature and its behaviour does not seem very reassuring.

P J Downey

Case and Comment

An ecological triumph

David Terence McKnight v NZ Biogas Industries Ltd [1994] BCL 951

On the first occasion when it was required to consider the Act, the Court of Appeal, in a judgment delivered by Gault J, supplies an answer to the conundrum posed by Professor Fisher as to the interpretation that the Courts will impose on s 5(2) of the Resource Management Act 1991. This subsection provides:

> In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

According to Professor Fisher, the answer would be dependent on the interpretation to be given to the word "while" in that section. Read, as a co-ordinating conjunction, as "and", ecological and non-ecological considerations are of equal importance; read, as a subordinate conjunction, as "if", ecological considerations override non-ecological considerations: D E Fisher, "The Resource Management Legislation of 1991: A Juridical Analysis of Its Objectives" in *Resource Management* (1991) Vol 1. The answer given by the Court of Appeal unequivocally favours ecological considerations.

> The statutory structure enacts strict liability subject to the statutory defences which reflect the absence of fault defence . . . It is entirely consistent with the importance attached to the *protection of the nation's national and physical resources* in the Resource Management Act. (Supra, 14-15). [Emphasis added]

The respondent was charged with two offences under s 338 of the Resource Management Act. The charge pursuant to s 15(1)(a) was discharging a contaminant into water, to s 15(1)(b), discharging a contaminant on to land in circumstances which may have resulted in the contaminant entering water. In neither case was the discharge expressly allowed by a rule of a regional plan, a resource consent or regulations.

In the District Court, Judge Shepherd found that there was not a discharge into the water though the contaminant did ultimately enter a stream. The appeal focused on s 15(1)(b).

The facts and the strict liability finding

The respondent was responsible for the installation and operation of a waste treatment plant for a factory in which a company processed vegetables. The treatment involved reducing the biological oxygen demand of the water in a digester. The digester was formed by a 450,000 litre capacity elastic bladder of rubber material (Butynol) contained in a three metre deep excavation. The excavation was in the factory grounds. After treatment, the waste was to be passed to the sewer. Water that might seep outside the bladder into the excavation was drained through the wall of the excavation into the stream.

The bladder ruptured early on 28 April 1992 and about 300 cubic metres of waste and back filled earth discharged into the tributary of the stream. The rupture was due to the failure to compact the backfill sufficiently to retain the pressure of the filled bladder.

The issue on appeal by way of case stated to the High Court was the mental element of the offences pursuant to which the respondent was charged. The penalties prescribed by s 339 of the Act are imprisonment for up to two years or a fine not exceeding $200,000 with further fines of up to $10,000 per day for continuing offences.

Section 341(1) of the Act provides that proof that the defendant intended to commit an offence is not necessary. Subsection 2 sets out the "no fault" defences.

A strict liability finding was consistent with:

> The statutory defences which could occur without either the knowledge or control of the defendant: (supra, 8);
>
> The irrelevance of the defendant's intention: (above);
>
> The extended definition of the word "discharge" in section 2(1) to include "emit" and "allow to escape" neither of which imply the direct action of a person: (supra, 8);
>
> The necessity to prove only a causal connection between the person and the discharge: (idem).

The minimal mental element: (passive) control and (objective) knowledge

The causal connection would be supplied in a common sense way: supra, 13. A discharge is an emission resulting from engaging in an activity: ibid, 11. The present case was indistinguishable from *Alphacell v Woodward* [1972] 2 All ER 475. In that case, the failure of pumps to prevent overflow led to the discharge of polluted water into the

river; in this, the failure of the excavation to contain the bladder led to the contaminant flowing by way of the drain into the stream. The respondent's installation of the bladder, or its supervision thereof, ultimately led to the discharge. The operations –

> which the respondent was in a position to control caused the discharge.

The word "allow", the Court reasoned, imports elements of knowledge (or awareness) and control. The element of awareness, like the element of control (supra, 9-13), can be inferred from the defendant's passive lack of interference in circumstances, this time, where the defendant is aware that the reasonable person would recognise that escape would occur. Failing to obtain engineering advice in the design, construction and testing of the digester,

> the respondent discharged the contaminant by allowing its escape. (supra, 14.)

Unwavering in its holding that the strict liability approach was –

> consistent with the broad and carefully drawn purpose and principles in Part II of the Resource Management Act. (idem),

the Court of Appeal rejected the view of Justice Temm in the High Court that –

> every farmer and orchardist in New Zealand would be at risk. (idem)

The negligent or reckless farmer and orchardist are quite clearly at risk. The Court of Appeal's decision is welcome in so far as it demonstrates the rigour with which it intends New Zealand to achieve sustainable management: s 5(1) of the Act. Social, economic and cultural goals (s 5(2) are subservient to the ecological goals established in s 5(2)(a)(b) and (c). Refer to Bruce Pardy, "Sustainability: An Ecological Definition for the Resource Management Act 1991" [1993] 15 *New Zealand Universities Law Review* 351, 353.

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Another arbitration trap

Although the members in the Court of Appeal in *New Zealand Refining Company Limited v Attorney-General* [1993] BCL 258 were unanimous in the end result, their difference in reasoning on one aspect is of critical importance to practitioners in the field of arbitration.

It involves the application of the well established rule that if only a question of law is referred to arbitration then the arbitrator's decision cannot be reviewed unless the parties have agreed otherwise.

It is also well established that if a number of issues are referred to arbitration, some of which are only points of law and others which are a mix of fact and law, then the "law only" issues similarly cannot be reviewed.

In the context of the *New Zealand Refining Company* case these rules were summarised by McKay J as follows:

> It may seem somewhat illogical to accept the decision of the arbitrator as final as to the law on two of the alternative grounds on which the claim has been brought, but as subject to review as to the law on the remaining two. That, however, is the effect of the normal rule and reflects the anomalous nature of the Court's power to review an award for error of law.

So far so good.

However, a significant difference of opinion emerges between Cooke P and McKay J (with Gault J siding with McKay J). This is in respect of the question as to whether or not the referral of a question only of law must be contained in the formal reference (Cooke P) or whether it is sufficient if, in respect of a general reference, the question of law emerges only in the subsequent pleadings and as one or more alternative causes of action (McKay and Gault JJ).

In the case in question the formal reference defined the matters referred to arbitration as "those appearing from the pleadings" which, of course, do not normally exist when the reference is entered into. The points of claim set out four grounds of claim namely construction of the contract (question of law), rectification (mixture of fact and law), contractual mistakes (mixture of fact and law) and implied term (question of law).

Cooke P expressed the dissenting view (on this issue) that while a submission or reference may be framed as to amount, in respect of some major issues, to a submission or reference of specific questions of law with other issues not in that category, it would be going too far to hold that the same necessarily applies when points of claim or defence under a general reference happen to bring out certain issues ultimately of law. He considered that in the present case, what emerged in the pleadings was not intended to override the plain implications of reviewability.

As the law appears to stand (on the majority view), parties to a dispute could sign a formal reference referring, in general terms, a wide range of disputes to arbitration (thinking that the award on all issues would be reviewable for error of law) but, as a result of the way the pleadings end up being framed, the final award on some issues, identified through the pleadings as being only questions of law, will be unimpeachable.

There is much to be said for the view of Cooke P who thinks that some people could be trapped into an unintended result through the pleadings. He said:

> I cannot help thinking that it would be dangerous and unjust and unreal to hold that, by pleading a certain interpretation and a certain implied term, a claimant in an arbitration turns what would otherwise be a general reference into a specific one.

One could add to that that the parties jointly control the wording of the formal reference because it only comes into existence by agreement; they do not control each other's pleadings, a point not addressed by McKay or Gault JJ. If for example one side pleads an implied term, should the other side, in addition to denying the implied term, go on to say "It is also denied that this is only a question of law"; or, "Even though this is only a question of law we are only pleading to it on the basis that the generality of the formal reference is not disturbed and the award on this point is reviewable for error of law". Or what? The reasoning of Cooke P becomes quite attractive when one endeavours to figure out what to do

in practice to avoid being visited by the McKay/Gault JJ principle.

[For any reader who chooses to read the judgments it should be added for the sake of completion that two other matters arose which are basically red herrings and can be ignored when considering the issues discussed above. One is that the pleadings were actually finalised before the formal reference was signed but this arose from a quirk of circumstances resulting from the lack of availability of the first nominated arbitrator and the need to prepare a new reference in identical terms for a new arbitrator after the pleadings had been prepared. The other relates to the fact that the formal reference required the arbitrator to give reasons and incorporate them in his award. It was argued that this demonstrated an intention that all findings should be reviewable for error of law. Neither point is relevant to the reasoning of the Court on the specific issue addressed in this note.]

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Indecent assault — Withholding consent defence

R v B [1994] BCL 1139

The extent to which consent may be a defence to sexual offences is a matter of some complexity. The general principle at common law is that if a person agrees to physical contact there is no offence of assault, sexual or otherwise. However, consent is a defence only to the extent that the act constituting the alleged offence falls within that which is freely permitted by the other. Consent obtained by threats and mere submission is no consent although it has been held that consent is not negatived merely because the victim would not have agreed to the act had she known all the facts: *R v Clarence* (1888) 22 QBD 23, CCR.

In some cases consent is expressly or impliedly excluded by statute, particularly where the victim is young or otherwise vulnerable to sexual exploitation. (See eg Crimes Act 1961, s 132 — Sexual intercourse with a girl under 12 and s 138 — Sexual intercourse with severely subnormal woman or girl.) In other instances the Courts have limited a victim's ability to consent to what would otherwise be the lawful infliction of bodily harm by considerations of public policy. (See *R v Donovan* [1934] 2 KB 498; *R v Brown* [1993] 2 All ER 75.)

In the *R v B* decision, the Court of Appeal was called upon to consider the case for a further limitation upon the consent defence. The issue was whether the trial Judge was correct to withdraw the defence from the jury in relation to two counts of indecent assault on the grounds that the victim, a 17-year-old girl with a mental age of about 12, was effectively incompetent to consent. The withdrawal of consent was based, however, on public policy grounds. The decision highlights some important substantive issues in New Zealand criminal law.

The grounds for appeal

The accused had been tried on three counts each of sexual violation and indecent assault. He was found guilty on two counts of sexual violation by digital penetration. Verdicts were not taken on two alternative lesser charges of indecent assault on the same occasions. He was found not guilty on one count each of sexual violation and indecent assault.

The appeal against the convictions for sexual violation arose from the Judge's accession to a pre-trial Crown application that he withdraw the defence of consent from the jury in respect of the indecent assault counts. The application and ruling were confined to the indecent assault counts evidently because the Crown had conceded that it was not possible to withdraw the consent defence in respect of the sexual violation charges because of the specific statutory provisions in s 128 relating to consent. On this point their Honours intimated that had the theory upon which the withdrawal of consent was based been sound (they did not think it was), it would have seemed to be more applicable to the more serious sexual violation charges. This is an important point to which I shall return.

The facts

The complainant was the 17-year-old granddaughter of the accused. She suffered from epilepsy and hydrocephalus. At the trial a clinical psychologist gave evidence that her general cognitive abilities were impaired and that she was in a twilight zone or borderline between people of normal intellect and people of intellectual disability. Although she was said to have a mental age of twelve, she had been able to attend high school, leaving in the fifth form, and had subsequently attended a training centre for impaired persons. The complainant had returned to live in her grandparents' house, despite the fact that on an earlier occasions she had been sexually violated by her grandfather in the same house. The grandfather had been sentenced to a term of imprisonment in respect of that matter, the complainant being under 12 at the time.

The incidents now complained of occurred three to four months after the complainant returned to her grandparents' house. On the first occasion while in a shed adjoining the house the accused had allegedly sexually violated the complainant by making her pull up her dress, putting his hand down her knickers and digitally penetrating her. She said nothing and returned to the house.

Later the same evening, while sitting on a sofa with the accused watching TV in the lounge he allegedly again put his hand down her knickers and digitally penetrated her. She protested and he desisted.

Other incidents of touching, though not testified to by the complainant were referred to in a statement made by the accused to the police, and provided the basis of two counts.

The defence argument was that in relation to the s 128 sexual violation counts, the complainant consented or the accused had reasonable grounds for believing she did. In relation to the indecent assault counts it was contended that she either consented or the accused honestly believed she had.

The law

In considering the indecent assault counts, the trial Judge had noted the decisions in *R v Norris* [1988] 3 CRNZ 527, and *R v Nazif* [1987] 2 NZLR 122 (CA) and had placed some emphasis on the fact that in the latter case the Court of Appeal had observed that "other more dominant public interest features" might, in an

appropriate case, provide a justification for withdrawing the defence of consent. In the Judge's view this was such a case because the complainant, as a handicapped person, was notoriously at risk of the sort of behaviour complained of and, on account of her special vulnerability, was entitled to the paternalistic protection of the criminal law. His Honour said:

> . . . if it is right to protect young men – of full mental capacity – from the common predations of each other in some circumstances, and the House of Lords has said it is, then it is surely right to protect perhaps the most vulnerable of all members of society from sexual predation by indecent assaults, at least in the close family circle and where there is clear evidence of disability. It is precisely in a twilight zone such as this complainant occupies – the world of the adult who is really still a child – that protection is most needed.

As a matter of background to the issues dealt with in *R v B*, it should be noted that the Court of Appeal in *R v Nazif*, supra, excluded a charge of indecent assault under s 135 of the Crimes Act 1961 from the 1985 law change which established an objective test for belief in consent on a charge of sexual violation (see Crimes Amendment Act (No 3) 1985, s 2). The effect of this law change, as Hammond J found at the trial, was that for a charge under s 135 the reasonableness of the grounds of the accused's belief does not fall for examination by the jury. Furthermore, in *Nazif* the Court of Appeal had held, at least by implication, that consent was a defence to a charge under s 135, even though consent is not part of the express definition of that crime.

However, on the present appeal their "passing reference" in *Nazif* to the possibility of consent being held not to be a defence, had very little, if any, bearing on the the present case. Cooke P, delivering the judgement of the Court said:

> generally speaking, a bona fide belief in consent is a defence to indecent assault, at least if the person is believed to be capable of consenting. And there is no doubt that a bona fide belief in consent by such a person is a defence to unlawful sexual connection, provided however in New Zealand that the belief is on reasonable grounds: Crimes Act 1961, s 128(3)(b).

The Court observed that where there is an evidential foundation for such defences, the onus is on the prosecution to prove beyond reasonable doubt that there was no lawful consent and (in the case of indecent assault) that the accused did not believe that there was or (in the case of unlawful sexual connection) that the accused either did not so believe or, if he did so believe, did not do so on reasonable grounds.

The Court held that where in prosecutions for indecent assault or unlawful sexual connection, a defence based on consent and a relevant belief in consent "is probably the only real issue", as in the present case, and provided there is an evidential foundation for the defence, it is wrong for the Judge to withdraw the defence from the injury. This would amount, in the Court's view, to directing the jury to convict, "a course rarely if ever permissible."

This statement of the law represents the clearest indication that absence of honest and reasonable belief in consent is to be regarded as an *unquestionable* element within the definition of the offence of sexual violation which, by implication, may *never* be withdrawn from a jury. Although the Court's attitude to indecent assault seems somewhat more equivocal, nevertheless the strength of the Court's assertion as to the normative inappropriateness of withdrawing consent from the jury in such cases, leads one to speculate that belief in consent may be regarded as an *implied* or *presumptive* element within the definition of the crime of indecent assault, the presumption in favour of consent as an element only being rebuttable in the most exceptional case and for the most powerful of reasons. Evidently, this was not such a case.

It is nevertheless regrettable that the Court did not attempt to elaborate on the circumstances in which the defence of consent might legitimately be withdrawn from the jury on public policy grounds, effectively leaving the issue at the heart of the present appeal at large. The Court held that it was for the jury as the judges of the facts to assess the girl and the accused's appreciation of her ability or otherwise to give true consent and (on the sexual violation charges) the reasonableness of any belief in consent that he may have had. The Judge went too far in directing the jury in relation to the indecent assault charges, that consent was not a defence. However, because the jury gave no verdict on those counts it was held that the misdirection was a harmless error and the appeal was dismissed.

Discussion

Whether the consent of some person may be a defence to a criminal charge is a matter that needs to be considered in relation to the particular offence charged. In New Zealand, as in most criminal code jurisdictions, consent is not a general defence and its availability must be judged by reference to any relevant common law authorities applicable to the particular charge. While the defence is not often expressly provided for by statute, it is nevertheless expressly excluded from certain offences, in relation to which consent can never be a defence (see Crimes Act 1961, ss 63, 131, 132, 133, 139, 140, 209, 210).

Not surprisingly, most of these examples involve offences of a sexual nature, in which the victim, because of age or particular vulnerability in a "power" relationship, has been statutorily deemed incapable of consenting to the criminal conduct. However, the fact that consent may be a defence to other offences, including sexual violation, does produce some surprising outcomes, and, I would venture, inconsistencies.

A case in point is *R v Leonard* (CA 179/90 6 June 1991) noted in [1991] *NZ Recent Law Review* 394, which involved an application for leave to appeal against a conviction of sexual violation and a sentence of three years' imprisonment. The age of the complainant is not given, but a reference to her being in Form I may suggest that she was probably aged 11. The alleged sexual violation had occurred when the applicant kissed the complainant on the vagina, but over her underclothing, which was not removed, and in such a way that neither the tongue nor mouth of the applicant touched any part of the

genitalia of the complainant, as required by the statute (see s 128(5) Crimes Act 1961). The Crown conceded that, on the complainant's own evidence, there was an "informed and freely given consent, and because there was no other evidence to support the sexual violation charge, he considered that a real doubt existed that the offence of sexual violation was committed. The Court agreed concluding that it was an "exceptional" case in which the applicant on the admitted facts could not *in law* have been convicted of the offence charged. Nevertheless, that decision highlighted an anomaly in the law. The Court concluded that there was no doubt that the particular conduct upon which the sexual violation charge was based amounted to an indecent assault, in respect of which, granted the girl's age, consent could not as a matter of law have been a defence (see Crimes Act 1961, s 132(3)). Yet, to the charge of sexual violation consent remained a good defence. Under present law age is not one of the matters which are to be considered in determining whether there has been consent to sexual connection (see Crimes Act 1961, s 128A).

It is curious, to say the least, that the legislature has taken pains to protect children who are clearly vulnerable to exploitation in sexual relationships in respect of some offences, yet in respect of what is, arguably the most grave of the sexual crimes children remain unprotected against their own ill-informed consent.

It was a similar concern which clearly motivated Hammond J in the present case to withdraw the defence of consent from the jury in respect of three counts of indecent assault.

Nevertheless, s 135 is not an offence in which the defence of consent has been generally statutorily withdrawn except to the extent that it is obtained "by a false and fraudulent representation as to the nature and quality of the act" (s 135(b)). The facts of the present case did not disclose any such false or fraudulent representation. The Court of Appeal has clearly ruled that the Judge wrongly withheld the defence from the jury.

However, the question of whether a person is *competent* to consent raises other considerations which were not addressed in this case even though they were clearly apposite. Obviously, there are cases where there may be awareness of the act and physical ability to resist, and acquiescence or conscious submission, but the circumstances negate or vitiate consent, although there is uncertainty as to when this will be the case. In this regard it has been held that the extent to which mental incapacity as a result of mental disability precludes consent is a matter of degree (see *R v Barratt* [1873] LR 2 CCR) and for such a person to consent he or she must have had sufficient intelligence to understand the nature of the act and to "decide whether to consent or resist". (*Adams on Criminal Law,* J B Robertson (ed) 1992 para CA 63.0.6.05).

In *R v Morgan* [1970] VR 337, 341 the Supreme Court of Victoria accepted as a proposition of law the statement that "once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape". The Court held that where capacity to consent is in issue in order to establish that a girl does not have that capacity – which would negate consent – it must be proved that she has not sufficient knowledge or understanding to comprehend (a) that what is proposed to be done is the physical fact of penetration of her body by the male organ or, if that is not proved, (b) that the act of penetration proposed is one of sexual connection as distinct from an act of a totally different character. Importantly, for the present discussion, the Court went on to hold that capacity to consent does not involve, as a matter of law, knowledge or understanding of "rudimentary concepts", identified as lack of understanding of the concept of virginity, lack of understanding that intercourse may cause pregnancy, lack of understanding that there is a difference in quality between the act of intercourse and other acts of intimacy, an understanding that the act of intercourse might be regarded as naughty and lack of understanding that penetration is likely to produce rupture of the hymen (340).

Rather, the Court concluded that provided the complainant had knowledge or understanding of what the act comprises, ie the fact of penetration and its character, then that is all the law requires for capacity to consent.

> That knowledge or understanding need not, of course, be a complete or sophisticated one. It is enough that she has sufficient "rudimentary knowledge" of what the act comprises and its character to enable her to decide whether to give or withhold consent.

It is of interest that although the complainant in that case was a young woman aged 19 who was "mentally retarded to a marked degree" (compare with the complainant in *R v B* whose capacity to look after herself was "diminished") who had been taken advantage of sexually in a domestic setting, the Court at no stage appears to have contemplated that the defence of consent should have been withheld from the jury as a matter of public policy.

While the fact of grandpaternal sexual exploitation is an appalling social evil, particularly in a case such as the present one where the victim is a mentally disabled young woman, on the basis of the dicta in both *Leonard* and *Morgan* it is difficult to discern any clear or principled reason why consent should not have been allowed to go to the jury. In other contexts, disability per se has never been an absolute bar to a criminal prosecution or sentencing. It should not be assumed that simply because a person is intellectually disabled he or she is presumptively incompetent to make decisions affecting social relations or is otherwise incapable of consent. There is no doubt that the degree of disability will be an important factor bearing on the appellant's claim that he "honestly" believed the complainant consented to the conduct. But as defence counsel cautioned in the present case, the Courts should tread very cautiously in making law in an area where Parliament itself has refrained from legislating, a view which is evidently shared by the Court of Appeal.

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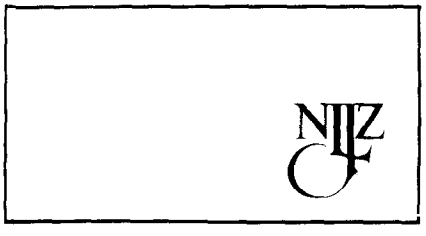

Negligence a resurgence? *Spring v Guardian Assurance* in the House of Lords

By Rosemary Tobin of the University of Auckland

Cases on the duty of care in negligence claims have been many over a long period of years. Anns, *since 1978, has become as much a part of the mythology of the law as* Donoghue v Stevenson *has been since 1932. More recently* Anns *has been in eclipse in England, and indeed after the decision in* Murphy *it was commonly understood that the sun had set there as in Australia on the two-stage test enunciated by Lord Wilberforce. The recent decision in* Spring *has however revived the issue. This article considers the decision of the House of Lords in* Spring *particularly in relation to the New Zealand Court of Appeal cases referred to in the judgments of the Law Lords. As the author notes the subsequent case of* Arbuthnott v Fagan *again referred to New Zealand jurisprudence with Lord Goff referring, approvingly, to the decision of Thomas J in* Rowlands v Collow *and to the article by Christine French of Invercargill on concurrent liability in contract and tort that was published in the* Otago Law Review *in 1982.*

The author emphasises that the views expressed in these three cases decided in a jurisdiction which is well known to be tender in its approach to claims in negligence involving pure economic loss are of great importance. The process of reasoning which they contain is in her opinion entirely sound and apt to be followed and applied in the present case.[1]

Introduction

In recent years the law of negligence has been in retreat – at least in terms of finding a duty of care in a novel fact situation. That retreat can be traced back primarily to two decisions of the House of Lords, in the same way that one decision of the House of Lords led to its dramatic expansion in the late 1970s and early 1980s. The expansion began with *Anns v Merton London Borough Council* [1978] AC 728 where Lord Wilberforce proposed his now perhaps infamous two stage test as being one of general application when deciding if a duty of care arose in a particular situation (p 751). The test was received with enthusiasm by the New Zealand Court of Appeal and regularly invoked by other Courts, particularly for cases involving economic loss. (See for example *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 and the long line of building cases following *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234). However the House of Lords after the high water mark of *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 began to sound a note of caution which later developed into a clarion call first with *D & F Estates Ltd v Church Commissioners for England* [1988] AC 177 and later with *Murphy v Brentford District Council* [1991] 1 AC where the House of Lords overruled *Anns* and all decisions subsequent to it and which purported to follow it. Editorials in this journal have charted the progress of the *Anns* test. (See Downey "Intellectual Property and the Entertainment Industry" [1988] NZLJ 181; "Closing the Books" [1988] NZLJ 192; "Professional Duty of Care [1990] NZLJ 73; *Anns* Overruled [1990] NZLJ 257; "Incrementalism in Tort" [1992] NZLJ 113 and "The Duty of Care Again" [1994] NZLJ 273).

This lay in part in the fact that some of the earlier decisions had interpreted the first stage of the *Anns* test as requiring only foreseeability of harm before, prima facie, a duty of care arose. Of importance also was the type of loss for which *Anns* had permitted recovery: originally, and wrongly, classified as physical damage their Lordships, in overruling *Anns*, correctly explained the loss as economic loss, liability for which in the context of *Anns* was impossible to reconcile with any previously accepted principles of the tort of negligence.

When determining liability in negligence when a novel fact situation arose the Law Lords expressed a clear preference for the incremental approach, also favoured in Australia, rather than the two stage test propounded by Lord Wilberforce in *Anns*. The real concern of the House of Lords in overruling *Anns* was the fear that negligence as it was developing was an "all devouring monster consuming all other torts, contractual and statutory duties, and equitable principles." (See Manning "Torts" [1993] NZ Recent Law Review 84, 85).

Murphy was not received with enthusiasm by the New Zealand Courts. The Court of Appeal took the first opportunity offered to express the unanimous view that it should lead to no change in the approach to the determination of a duty in the tort of negligence. The Court of Appeal has been careful, however, to distance itself from any suggestion that the first part of the modified *Anns* test which it favoured should be limited to issues of foreseeability.

> We have taken the view that the two broad fields of inquiry are the degree of proximity or

> relationship between the alleged wrongdoer and the person who has suffered damage – which is not of course a simple question of foreseeability of harm as between the parties and involves the degree of analogy with cases in which duties are already established – and whether there are other policy considerations tending to negative or restrict the duty in that class of case. And . . . we have warned against laying down hard and fast rules as to when a duty of care arises, and have stressed the importance of a step by step application to the facts of particular cases. (Per Richardson J in *Downsview Nominees v First City Corporation* approved in *South Pacific Manufacturing Company Ltd v New Zealand Security Consultants & Investigators Ltd* [1992] 2 NZLR 282).

Cooke P, both judicially (*South Pacific*, above, 294-296) and extra-judicially,[2] opined that the difference between the incremental approach and the two stage test was little more than a matter of semantics. Either was a methodical way of approaching a situation that was without precedent, and both involved a close analysis of the whole of the relationship between the parties, and analogy with previous cases. His Honour was careful also to acknowledge the fact that any loss suffered was economic might tell against a duty, but said that of itself this was not decisive. Nonetheless, although the Court of Appeal remained intractable in their approach to the question of duty there has been since *Murphy* a cautious retreat from finding liability in negligence. *Balfour v AG* [1991] 1 NZLR 519 is a case in point.

Balfour

Balfour gave the Court an opportunity to reconsider the broad statements of principle made by Cooke P in *Bell Booth Group Ltd v AG* [1989] 3 NZLR 148. There His Honour had stressed that a claim for mere loss of reputation was the proper subject for an action in defamation and could not ordinarily be sustained by any other action such as negligence. In *Bell Booth* the plaintiff's main claim was for defamation. This failed because the High Court Judge found the defamatory statements true. The plaintiffs had attempted to circumscribe this result by arguing that notwithstanding the statements were true they should first have been disclosed to them for comment before any other release, and that the failure to disclose was negligent. This was understandably rejected by the Court, but in the course of doing so Cooke P made certain broad statements of principle which appeared to rule out a possibility of an action in negligence if there was also a possible action in defamation. He said (p 156):

> The important point for the present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.

In *Balfour* the defamatory statement was not true. Balfour was a school teacher who had over a few years applied for over 100 teaching positions before obtaining a permanent appointment. During that time he had been the subject of "improper, unjust and perhaps malicious conduct on the part of persons involved in teaching and educational administration" (Hardie Boys J citing Greig J in the High Court at p 521). He brought an action in breach of statutory duty and negligence. The action was based on a note on his personal file in the Department of Education stating that he was a "long-practising and blatant homosexual." Hardie Boys J accepted that the allegation was groundless, and based on nothing more than unsubstantiated rumour.

The action was not framed in defamation because it undoubtedly would have been met by the defence of qualified privilege. Instead Balfour argued that there was the necessary relationship of proximity arising from the fact that the Department was the principal repository of personal information about teachers, and that a teacher was necessarily dependent on references, recommendations and advice to prospective employers. That being so the Department was under a duty to exercise care as to the accuracy of the information held in its records because the teacher concerned had little control over the information which could profoundly affect his or her future career. That is he relied upon the Department of Education to record only information on his file which was factually correct. Although the plaintiff failed largely on the issue of causation the Court of Appeal, in what one commentator referred to as an unpalatable decision Manning "Torts" (1992) NZ Recent Law Review 65, 70) followed their earlier decision of *Bell Booth* and decided that policy militated against a duty. In particular the Court was concerned that a finding of duty would merge the law of defamation and negligence (p 529):

> Any attempt to merge the law of defamation and negligence is to be resisted. Both these branches of the law represent the result of much endeavour to reconcile competing interests in ways appropriate to the quite distinct areas with which they are concerned, but not necessarily appropriate to each other. An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame.

Similar sentiments were expressed in *South Pacific Manufacturing Company Ltd v New Zealand Security Consultants & Investigators Ltd* [1992] 2 NZLR 282, where Cooke P, while acknowledging there were weighty considerations in favour of a duty, pointed to the formidable objections which arose because the duty asserted would cut across established principles in other fields of law. His Honour thought that to cut down the practical scope of the protection of qualified privilege by allowing an action in negligence would run counter to public policy (p 302). (See also Richardson J (p 309), Hardie Boys J (p 319) and Sir Gordon Bisson (p 326).

And here the matter rested, that is until *Spring v Guardian Insurance plc* [1994] 3 All ER 129 revived matters again. Here a differently constituted House of Lords[3] from that of *Murphy* has allowed an expansion in the law of negligence, in the same area where the New Zealand Court of Appeal had

refused to find in favour of a duty in *Balfour*.

Spring

Spring was employed as a sales director and office manager by the third defendants, Corinium, who were, among other things, agents for the sale of insurance policies issued by Guardian Assurance which Spring was authorised to sell. Corinium was sold. A new chief executive who did not get on with Spring was appointed. Shortly after Spring was dismissed without explanation. He then attempted to set up business elsewhere selling policies of another insurance company, Scottish Amicable. Both insurance companies were members of the Life Assurance and Unit Trust Regulatory organsiation whose code of conduct required that before he could do this Scottish Amicable had to seek, and Guardian Assurance had to supply, a reference. The code also required that when a member company was approached for a reference full and frank disclosure was required. Guardian Assurance was asked for a reference, and gave one, in the words of the High Court Judge who first heard the case, so strikingly bad as to amount to "the kiss of death". It stated that Spring was "a man of little or no integrity and could not be regarded as honest." Not surprisingly Spring was unable to find employment selling insurance. He commenced an action alleging malicious falsehood, breach of contract and negligence and seeking damages for the economic loss suffered as a result of the negligently prepared reference.

The trial Judge found that Spring was not guilty of dishonesty and nor did he lack integrity. The action in malicious falsehood failed as none of the defendant's employees had acted maliciously. The action in breach of contract also failed, but the trial Judge did find that the defendants owed Spring a duty to take reasonable care that what they wrote about him was true, and that there had been a breach of the duty. The English Court of Appeal cited with approval comments of Cooke P from *Bell Booth*[4] and agreed that these represented the law of England. They upheld the defendant's appeal. The House of Lords, by a majority, restored the finding of the trial Judge.

Duty/interest — qualified privilege

If Spring had brought an action in defamation it would have been defeated by qualified privilege.

> A privileged occasion is in reference to qualified privilege an occasion when the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. (*Adam v Ward* [1917] AC 309, 334 per Lord Atkinson).

Here the reciprocity of interest/duty was obvious. An employer or ex-employer will have a duty to provide a frank and honest reference about an employee or ex-employee to a possible employer. The prospective employer has a corresponding duty or interest in receiving a reference about some who who may enter their employment. Spring's claim was based upon such a reference. This meant the House of Lords had to decide whether it could allow the action in negligence to proceed where the action in defamation would have been defeated by the defence.

For Lord Keith the defence to an action for defamation by the defendants was decisive. Somewhat surprisingly he applied the second stage of the *Anns* test (p 136) which he had said in an earlier case (*Yeun Kun-yeu v Attorney General of Hong Kong* [1988] AC 175) would rarely have to be used. Here he thought, policy considerations negatived any question of duty. The policy behind the protection accorded the qualified privilege defence lay in "the public interest in permitting men [and women] to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so." Lord Keith thought the same grounds of public policy applied where the claim was based on negligence associated with the publication of an untrue statement which would have been protected by qualified privilege in a defamation action. If it was not then this would inhibit the giver of the reference from speaking frankly, and any reference given would defeat the reason for it as it would be bland and unhelpful.

In deciding this way he placed great weight on the three New Zealand decisions referred to earlier: *Bell Booth, Balfour* and *South Pacific*. And he referred to the warning issued by Lord Templeman, against extending the ambit of negligence as to supplant or supplement other torts, statutory duties or equitable rules in relation to every kind of economic loss, in *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 398, 316 when the House had overturned yet another decision on appeal from the New Zealand Court of Appeal.

An assumption of responsibility

The defence to an action for defamation by the defendants was not decisive for the other members of the House although they too referred to the New Zealand decisions. Lord Goff referred to the same matters troubling Lord Keith but reached a different conclusion based on his reason for finding that the employer owed a duty to an employee in giving a reference – the assumption of responsibility. Moreover it was on this basis that he explained the New Zealand decisions for he observed that in neither *Bell Booth* nor *South Pacific* was there any question of an assumption of responsibility by the defendants to the relevant plaintiffs before the Court. *Balfour* he considered failed primarily on the issue of causation although he observed again that the issue of responsibility did not appear to have been considered by the Court.

Lord Goff phrased the central issue in the case as being subdivided into two questions (which bore no small resemblance to an application of the aforementioned two stage test):

> (1) Whether the person who provided the reference prima facie owes a duty of care, in contract or tort, to the other in relation to the preparation of the reference. (2) If so, whether the existence of such a duty of care will nevertheless be negatived because it would, if recognised, pro tanto undermine the policy underlying the defence of qualified privilege in the law of defamation.

In reaching his decision he amalgamated these with the gradual case by case approach to the

development of the law of negligence advanced by the incremental approach, and looking at the facts in issue His Lordship came to the conclusion that Spring was owed a duty of care in the preparation of the reference.

His Lordship founded liability on the two inter-relating principles of an assumption of responsibility coupled with reliance derived from the seminal decision of *Hedley Byrne v Heller* [1962] AC 465. He thought that when the defendants investigated and wrote the reference they assumed responsibility towards the plaintiff to exercise due skill and care in ensuring the accuracy of any facts which were communicated to the recipient of the reference, and from which the recipient might form an adverse inference, or which were the basis for an adverse opinion expressed in the reference itself. In turn he considered Spring relied upon the defendants to exercise that skill and care in the provision of a reference which was "part of the currency of the modern employment market" and which was a service regularly provided by employers. The *Hedley Byrne* doctrine is further circumscribed by the requirement that the person who undertakes the provision of information or advice must be possessed of a "special skill". In this context Lord Goff thought the special skill required was broad enough to encompass the special knowledge an employer had in respect of their employees, derived from the employer's experience of the employees' character, skill and diligence in the performance of their duties for the employer.

Lord Goff then turned to his second question and looked at the policy behind the defence of qualified privilege. He accepted that a claim for mere loss of reputation could not ordinarily be sustained by means of any action other than defamation. But here the plaintiff had lost more than reputation. As a matter of principle Lord Goff did not think that where the defendant had assumed responsibility towards the plaintiff this should be negated simply because if the plaintiff had brought his action in defamation it would have been met by the defence of qualified privilege. And while agreeing that this might lead to an inhibiting effect on the manner in which references were expressed he suspected that this inhibition was there anyway. The majority of employers would, he said, continue to provide careful references for their employees. Those who did not would now have to compensate employees or ex-employees who suffered damage as a result.

Fair just and reasonable

The other Law Lords who found in favour of a duty did so on a broader basis. Lord Slynn acknowledged the long established rule in defamation as to issues of privilege but said that it had been established before modern developments in the law of negligence. As these days duties of care exist where previously none have been contemplated, and because there was no previous authority of the House it was therefore open to it to decide the matter as one of principle. First where the claim was one for economic loss their Lordships stressed the importance of showing foreseeability of that loss coupled with the necessary degree of proximity between the parties.[5] Then it had to be established that, in all the circumstances of the case and balancing all of the factors, it was "fair, just and reasonable for a duty to be imposed." In the circumstances of *this* case it was clearly foreseeable that an inaccurate reference, speaking of a lack of integrity and dishonesty, to a prospective employer, could cause its subject to suffer financial harm. The reference itself related to a time, and was based upon events, which occurred while Spring was working for Corinium and selling policies issued by Guardian. Both Lord Woolf and Lord Slynn drew a distinction between a reference issued in this situation, and a reference issued in a social context which had never been contractual. In the latter case the proximity required to found liability under *Hedley Byrne* might, subject to the facts of the particular case, well be lacking. Here however where there had been an employer/employee relationship the necessary proximity was clearly met. Lord Keith too agreed that on this approach, were it not for policy reasons, there was much to be said in favour of a duty.

In deciding that under the circumstances it was fair just and reasonable that a duty be imposed Lord Woolf noted that the employer did get an indirect benefit from giving the reference. He observed that in the contemporary employment context recruitment of staff was dependent on the reciprocity which existed among employers as to the giving and receiving of references on prospective recruits. Lord Slynn observed that far greater duties were now imposed on employers than had been in the past, whether it was by statute or by judicial decision, to care for the physical, financial and even psychological welfare of their employees. Not only that but his Lordship found it unacceptable that the person to whom the reference was given should be able to sue where he or she relied upon the reference and suffered loss,[6] but the subject of the reference should have no recourse unless he or she could prove express malice. Lord Woolf considered that making a careless employer liable for an inaccurate reference would be wholly fair and "would amount to a development of the law of negligence which accords with the principles which should control its development" (p 172).

Nature of the torts of defamation and injurious falsehood

As their Lordships noted the historical development of the torts of negligence, defamation and injurious falsehood has been different and all cover different ground. They require the plaintiff to allege and prove different facts, and have different defences. Neither injurious falsehood nor defamation involve the concept of a duty of care. An action for defamation would be founded upon the inaccurate terms of the reference but the action for negligence would be founded upon the lack of care of the author of the reference. The only way the plaintiff could have succeeded in defeating the defence of qualified privilege was if he could show malice, and "malice is extremely difficult to establish" (Lord Woolf p 172). The essence of defamation is damage to reputation; but the negligently prepared reference is based on a claim for a lost employment opportunity. The fact that this all took place in the context of an employment contract was a matter of grave concern for their Lordships. As Lord Woolf said the action for defamation provided a wholly inadequate remedy for an employee who suffered economic loss as a result of a negligently prepared reference, for without the action for negligence the employee could be left with no practical prospect of redress. Lord Lowry pointed out the damage could even be irreparable.

So far as *Balfour* was concerned Lord Slynn thought it "extraordinary" that there could be no possibility of a claim for negligence where the remarks were untrue although written without malice but the plaintiff lost a job through them (p 162). Lord Goff thought the comments of Cooke P in *Bell Booth* correct but only in so far as they applied to statements that were, as in *Bell Booth*, true; to his mind they would not apply were the statements untrue. Lord Woolf too accepted that the outcome of *Bell Booth* was correct, but did not agree that to allow a remedy in a case such as the present would be to distort the law of defamation. Any intrusion into the law of defamation would be minimised by the requirement that the necessary ingredient of proximity had to be established. Proximity was not present in *Bell Booth* or in *South Pacific*.

Nor was the argument as to freedom of speech persuasive for, while of great importance it had to be balanced against the freedom that an individual should not be deprived of the opportunity of earning his or her livelihood in his or her chosen occupation. "Freedom of speech rightly prized in all civilised societies, is not to be identified with freedom to defame maliciously or to damage negligently" (Lord Lowry p 153). And their Lordships did not agree with the comments of Cooke P in *Bell Booth* that to recognise the existence of a duty of care would mean the law of defamation was changed. Lord Slynn stated (p 163):

> I do not for my part consider that to recognise the existence of a duty of care in some situations when a reference is given necessarily means that the law of defamation has to be changed or that a substantial section of the law relating to defamation and malicious falsehood is "emasculated" . . . They remain distinct torts. It may be that there will be less resort to these torts because a more realistic approach on the basis of a duty of care is adopted. If to recognise that such a duty of care exists means that there have to be such changes – either by excluding the defence of qualified privilege from the master-servant situation or by withdrawing the privilege where negligence as opposed to express malice is shown – then I would in the interests of recognising a fair, just and reasonable result in the master-servant situation accept such change.

Further expansion in New Zealand?

It is ironic that this "measured expansion" to the ambit of the law of negligence should come from the House of Lords. It is even more ironic that three New Zealand Court of Appeal decisions should be referred to, and the general principles there discussed be found in the circumstances of *this* case to be too narrow. It has been far more usual for the Privy Council to "dismantle hitherto fairly settled categories of liability and turn away new candidates for liability as they present themselves." (Manning "Recent Developments in Tort" Legal Update Series, The University of Auckland, May 1994, 1, discussing how this was done in *Deloitte Haskins & Sells v National Mutual Life Nominees Ltd* [1993] 2 All ER 1015 and *Clark Boyce v Mouat* [1993] 4 All ER 268.) And it has generally been New Zealand decisions where this has been done.

Indeed what the decision does do is illustrate one of the points made in Sir Robin Cooke's extra-judicial article. In his reply to Lord Keith's designation of liability under *Anns* as an unacceptable "jump" Sir Robin pointed out that "what is a jump to one person may be a small and quite necessary step to another." The New Zealand Court of Appeal obviously regarded the expansion of liability in negligence into a field previously the province of an action of defamation as an unacceptable jump whereas to the House of Lords it was a small and necessary step.

Where then does this leave New Zealand? Certainly it seems clear that the New Zealand two-stage approach to novel fact situations will not be disturbed. But what happens when another *Balfour* or a *Spring* reaches the Courts? The Defamation Act 1992 provides little assistance. The defence of qualified privilege is confirmed, but fails where the plaintiff can prove the defendant was predominantly motivated by ill will towards the plaintiff (s 19(1)). Subject to this the defence will not fail because the defendant was motivated by malice (s 19(2)). Ill will was not present in *Spring*, and again it is difficult for the plaintiff to prove. It is agreed mere loss of reputation is the proper subject of an action in defamation, but where careless words negligently used in a reference cause loss of livelihood, as in the employment context, then the plaintiff should not be prevented from pursuing an action in negligence simply because an action in defamation would be met by the defence of qualified privilege. It is suggested that the reasoning of the majority of the House is persuasive and it would be unfortunate if the law of negligence in New Zealand were not to expand and encompass *Spring*. This would ensure that plaintiffs, who stand to lose their livelihood, are not left without a remedy where a reference is carelessly prepared.

And, what is even more interesting is that some expansion continues. *Arbuthnott v Fagan* decided on 25 July 1994 again referred to New Zealand case law. Lord Goff delivered the decision which finally approved of concurrent claims arising from a breach of duty in tort and contract. His Lordship said that unless the tortious duty is inconsistent with the applicable contract the claimant is entitled to take advantage of the remedy which is the most advantageous to him or her. In doing so he referred to Thomas J's decision of *Rowlands v Collow* [1992] 1 NZLR 178 and to Christine French's article on concurrent liability ("The Contract Tort Dilemma" (1982) 5 Otago LR 236) with approval. The decision dispelled the cautionary note of *Tai Hing Cotton Mill v Liu Chong Hing Bank Ltd* [1986] AC 90, 107. This too has implications for New Zealand law. For example in *Simms Jones Ltd v Petrochem Trading NZ Ltd* [1993] 3 NZLR 369[7] Tipping J relied upon *Tai Hing* and the words of Lord Templeman in *Downsview Nominees* and declined to follow *Rowlands v Collow* and allow the plaintiff to argue for concurrent liability in tort where there was a contract, absent very special circumstances. However the Court of Appeal has indicated in the past that it tends to favour concurrent liability[8] so there is unlikely to be disharmony in this aspect of the law of negligence. □

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1 Lord Keith the dissenting Judge in *Spring v Guardian Assurance plc* [1994] 1 All ER 129,141, referring to three decisions of the New Zealand Court of Appeal: *Bell Booth v AG* [1989] 3 NZLR 148, *Balfour v AG*

continued on p 325

Parliament and privilege: Whose justice?

By Rt Hon Sir Geoffrey Palmer

This article is based on a talk given by Sir Geoffrey Palmer in Auckland in July 1994. He argues that there should be a reform of Parliamentary privilege by the introduction of some checks or balances against possible injustice to what he calls ordinary citizens. He refers to the winebox of documents concerning the Cook Islands tax haven. At the time Sir Geoffrey spoke this issue was being examined by Parliament's Finance and Expenditure Committee. A separate Commission of Inquiry into some aspects of this question has more recently been established. For a further introductory editorial comment see p 314; and for the relationship of Parliament and the Courts arising from the "winebox" issue see [1994] NZLJ 292.

Justice is one of the eternal issues of government. The provision of it is a core responsibility of the state. In a democracy, debate about its qualities never ends. The theme of my remarks today is justice – Justice in Parliament. Let me state my conclusion at the beginning. Parliament has the capacity to cause substantial injustice to individuals. They have no redress. The time has come to engage in further reform of Parliament and limit the capacity of Parliament to act as an engine of oppression.

In a book I published in 1992 I wrote:

> The law relating to parliamentary privilege is long overdue for reform. The topic has been on the agenda of the Privileges Committee for years and little progress is evident. Real safeguards need to be put in place to reduce the capacity for abuse which exists. Parliament can imprison. It ought not to be able to. A statute should be passed defining the protection needed and making trial of offences the task of the ordinary Courts. (*New Zealand's Constitution in Crisis* (1992), 117.)

There are many other problems as well. The issues need to be addressed and remedied and that can only be done by passing a statute. If it is not done New Zealanders will continue to suffer from unfairness at the hands of their own Parliament.

Consider some of the serious allegations which have been made in recent times in the New Zealand Parliament:

- that a businessman attempted to buy political support by offering donations; (525 NZPD 8701-2 (1992)).
- that a named solicitor systematically fleeced a Friendly Society; (537 NZPD 17548-51 (1993)).
- that well-known business figures have been guilty of tax evasion and conspiracy to defraud. That they have perpetrated crimes; (5 NZPD 570-1, 745-6 (Weekly Series, 1994)).
- that named legal and consulting firms have approved and participated in criminal fraud; (5 NZPD 570-1 (Weekly Series, 1994)).
- that the Commissioner of Inland Revenue should be charged with conspiracy to pervert the course of justice; (5 NZPD 567-8 (Weekly Series, 1994)).
- that the Director of the Serious Fraud Office lied to the news media and failed to prosecute people who stole money. (528 NZPD 10763 (1992)).

This string of allegations has been well publicised. The basic issue here is one of fairness. Is it fair that such statements are able to be made unfettered by the rules of natural justice while under the protection of parliamentary privilege? Parliamentary privilege has become a new political weapon.

The issues are constitutional. The symptoms of the problem outlined have much deeper causes. They lie in the unreformed nature of New Zealand's law in this area. The problems have been around a long time. The first issue is to what extent is it permissible to make allegations of dishonest and criminal conduct against people and public officials in Parliament when there is no redress available against what is said? The

continued from p 324

[1991] 1 NZLR 519 and *South Pacific Manufacturing Company Ltd v New Zealand Security Consultants & Investigators Ltd* [1992] 2 NZLR 282.

2 Sir Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46, 52.

3 In *Spring* Lords Goff, Lowry, Slynn Woolf and Keith (dissenting) decided the case while in *Murphy* Lords MacKay, Keith, Brandon, Ackner, Oliver and Jauncey decided the case.

4 *Spring v Guardian Assurance* [1993] 2 All ER 273, 293-294.

5 See Lord Lowry p 152, Lord Slynn p 161, Lord Woolf p 168.

6 See Lord Woolf p 172, Lord Slynn p 161 and Allen "Liability for References: *Spring v Guardian Assurance* (1994) 57 MLR 11, 114 and Weir "The Case of the Careless Referee" [1993] CLJ 376, 377.

7 The case went to the Court of Appeal which found no question of law arose: [1994] 2 NZLR 414.

8 See comments of Cooke J in *Mouat v Clarke Boyce* [1992] 2 NZLR 559, 565. Here His Honour thought it "unrealistic and unhelpful to refrain from saying that the view accepted in *Maclaren Maycroft* should not stand."

second issue relates to the proper role of select committees of Parliament in our system of government. How far can these select committees probe and to what extent can they conduct witch-hunts and trials in respect of the conduct of private individuals?

The law needs to be reformed. What is required is the introduction of some checks and balances against the capacity of Parliament to do injustice to ordinary citizens.

Start with the rather elementary proposition that people who are accused of criminal behaviour should be tried in the Courts. Specific charges must be laid. If the charge is serious a jury trial is available. The trial will be fair. It ought not to be influenced by political opinion or popular prejudice.

This must be one of the bulwarks of our democratic system of protections against tyranny and injustice. The law applies to all. Rich and poor alike are entitled to a fair trial. One should not have thought that such elementary propositions would require a defence at this point in our history.

Take the case of the "winebox" of documents concerning the Cook Islands tax haven currently being examined by the Finance and Expenditure Committee. No official criminal charges have been laid. But charges of criminal misconduct have been made in Parliament under the cloak of parliamentary privilege.

The authorities who are competent to address these matters, the Commissioner of Inland Revenue and the Director of the Serious Fraud Office, have decided on the basis of legal advice that they do not have sufficient evidence to lay criminal charges! Whether those judgments are right or wrong, and there would be few people with the technical competence in tax law to second guess those judgments, there is no justification for trying the individuals concerned in another forum. It is, after all, several centuries since the Star Chamber was abolished and it was abolished for good reason.

The response to the above argument is that Parliament is at the top of the system, Parliament should cure whatever problem exists. But what do we mean by such sentiments? Parliament is, of course, an appropriate place in which to pass laws, make judgments on the appropriateness of existing law, examine government policy, look trenchantly at the administration of that policy and approve public expenditure. These are the legitimate parliamentary functions.

Turning to the second issue, recent parliamentary history both here and in the United Kingdom suggests that select committees are not an appropriate place to investigate allegations of public misconduct.

As a Royal Commission set up in the United Kingdom in 1966 put it when examining these matters, the record of Parliamentary Committees on allegations of public misconduct "is, to say the least, unfortunate." (Report of the Royal Commission on Tribunals of Inquiry, paragraph 35, Cmnd Paper 3121 (1966)).

Indeed, the Marconi scandal in 1913[2] brought to an end that sort of investigation by select committee in Britain. They have not been used in New Zealand for this purpose. It would be a very sad day if we now started investigations by select committee in New Zealand. The fundamental reasons for this view were well put in the Royal Commission Report (above):

> There are many purposes for which Select Parliamentary Committees are most useful and indeed indispensable — but the investigations of allegations of public misconduct is not one of them. Such matters should be entirely removed from political influences. A Select Parliamentary Committee is constituted of members representing the relative strength of the parties in the House. Accordingly it may tend in its report to reflect the views of the party having a majority of members, or indeed as in the Marconi case, it may produce two reports. When these are debated in the House, the House may divide along party lines.

The crucial point is that investigations of public misconduct must be removed from political influences.

That passage should be considered in light of the actions of the New Zealand Parliament over the "winebox".[3] The MP who made the allegations is on the Select Committee. That raises the possibility of a real political and media circus in which people's rights are trampled on without proper protection being afforded to them. The Chair of the Select Committee in question says the rules of natural justice will be followed but at the time of writing no steps have been taken to change the composition of the Select Committee.

I well remember the tuition I received in American constitutional law concerning the activities of Senator Joseph McCarthy of Wisconsin. Legislative committees can be used to cause irreparable damage to innocent people and Senator McCarthy did that. We do not want McCarthyism in New Zealand. I think Parliament should think again about the course upon which it is embarked. Titillation of the public taste for sensation must not outweigh fundamental legal safeguards, individual rights and the rule of law.

In 1990 Parliament passed the New Zealand Bill of Rights Act which protects and promotes human rights and fundamental freedoms in New Zealand.

Section 3 provides that the Act applies to the legislative branch of Government. Section 27 requires adherence to the fundamental principles of natural justice, but the Standing Orders of the House do not require parliamentary select committees to apply the rules of natural justice. How can the main accuser be one of the Judges? Anyone in Parliament interested in following the rules of natural justice would not permit the main accuser to sit on the committee hearing the charge. I appreciate the committee will not in fact be hearing a formal charge but that will be the public impression. Difficult legal issues arise about the judicial enforcement of the Act against Parliament itself. I hope that the Select Committee will take its provisions seriously.

In my own view, the most potent lesson from this saga is proof of the need to reform the law relating to parliamentary privilege. Most people know nothing about parliamentary privilege. The law relating to it is ancient, obscure and potentially draconian. It is, in the words of one English authority, "exceptional, peculiar and discretionary." (O Hood Phillips, *Constitutional and Administrative*

Law 168, 4th ed, 1967). No other feature of our legal system exhibits such characteristics. Parliamentary privilege is centrally involved in the current problem.

First, it is parliamentary privilege which gives Parliament the power to enforce its will over the inquiry. Recalcitrants who come before it and refuse to answer questions can be imprisoned by the House. They can remain imprisoned for as long as Parliament wishes. The New Zealand Parliament has not imprisoned anyone in its history, although it nearly did so in 1896 when it fined a Bank Manager £500 for not answering a question put to him by a select committee. (93 NZPD 336 (1896)).

In 1955 an important case came before the High Court of Australia in which it was necessary to decide whether two men who had been found by the Australian House of Representatives to have both been guilty of "a serious breach of privilege" and imprisoned had been dealt with lawfully. (*R v Richards, Ex Parte Fitzpatrick and Browne* 92 CLR 157 (1955)). Applications for habeas corpus came before the Court. The two men were the proprietor and a journalist from a newspaper which had attacked a member of the House. The article in *The Bankstown Observer* to which offence was taken, accused a member of Parliament of being engaged in "an immigration market". The newspaper proprietor and the journalist were refused representation by counsel before the Privileges Committee when they asked for it. The High Court of Australia held that the committal was lawful.

These precedents could well be closely studied in relation to the current Select Committee inquiry. Parliament has not defined, with any particularity, what its privileges are, despite the fact that people can be held in contempt if they breach them. There are two provisions of New Zealand statutory law pertinent to parliamentary privilege. The Legislature Act 1908 s 242(1) provides:

> The House of Representatives . . . and the Committees and members thereof . . . shall hold, enjoy and exercise such and the like privileges, immunities and powers as on the 1st day of January 1865 were held, enjoyed and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof, so far as the same are not inconsistent with or repugnant to the provisions of the Constitution Act as on the 26th day of September 1865 (being the date of the coming into operation of the Parliamentary Privileges Act 1865) were unrepealed, whether such privileges, immunities or powers were so held, possessed or enjoyed by custom, statute or otherwise.

In essence this provision tells us that the privileges of the New Zealand Parliament are those that the House of Commons had on 1 January 1865. There is no specificity. The number of lawyers who could advise what a breach of privilege of the House in New Zealand might be can probably be counted on the fingers of two hands. The overwhelming obscurity of this law is indefensible. In the end a breach of privilege is what the House of Representatives decides it is, after the event.

The most important parliamentary privilege is the freedom of speech and debate. This was laid down after a stern struggle in the Bill of Rights 1688 in the United Kingdom. It is part of New Zealand law and provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. (Article 9).

This provision allows MPs to say what they like in Parliament, whether it is right or wrong, whether any foundation for its exists or not, and whether or not it does enormous damage to the individuals concerned. No doubt freedom of speech in Parliament is necessary for many reasons, but the pattern of its exercise which has developed in New Zealand requires some reconsideration.

In the move to MMP individual MPs and parties may be able to attract considerable attention and media coverage by unfounded allegations of criminal conduct and conspiracies. Indeed, the Auckland District Law Society Public Issues Committee which examined the matter in 1979[4] and in 1988[5] came to the conclusion that it was important to provide some protections against the abuse of parliamentary privilege. That was also the opinion of a former Chief Parliamentary Counsel of New Zealand, Mr DAS Ward CMG, who made a submission to the Standing Orders Committee on the subject in 1986.[6] He thought that the House should give a person claiming to have been defamed in parliamentary proceedings a restricted right to have a brief statement of rebuttal read and tabled in the House.

It is noteworthy that the Australian Senate has already adopted similar measures to provide protections against the damage which can be done by the unrestricted use of the privilege of freedom of debate.[7]

Indeed, the Australian Parliament has overhauled the law relating to privilege in a quite comprehensive fashion, passing the Parliamentary Privileges Act in 1987. While I think many of the features of that reform do not go far enough to curb abuse, it is beyond doubt that New Zealand has allowed parliamentary privilege to remain unreformed for too long. The Australian experience provides a precedent for change.

It would also be possible, without inhibiting or damaging Parliament's undoubted interest in getting to the bottom of matters of public concern, to place a further restriction on members' use of parliamentary privilege by requiring them to show that they have some foundation for the statement and demonstrating that to the Speaker before the charge is made.

But if the law of parliamentary privilege is to be addressed, it needs to be addressed in a comprehensive fashion. A start was made in a report of the Standing Orders Committee of Parliament which was made in 1989.[8] That Report contained a draft bill which comprised a major overhaul of the existing law. But the reform did not proceed.

It was the subject of adverse reports to the Government of the time by both the Department of Justice and the Legislation Advisory Committee. The Justice Department told the Government of the day that "in the final stage of the twentieth

Century, with its highly developed notions of due process of law, it seems questionable whether the House can or should appropriately retain to itself a power to fine or imprison citizens for contempt. (Letter from David Oughton, Secretary for Justice, Department of Justice, to Rt Hon Jonathan Hunt, Leader of the House, House of Representatives (April 18, 1990), at 2-3).

The Legislation Advisory Committee was of a similar view. Sir George Laking, in a submission from that Committee, pointed out that the law of privilege was

> . . . nowhere set out in an authoritative and acceptable form, legislative or otherwise. It is a basic principle of our legal system that the law should be accessible and certain so that citizens can know the rights they enjoy and the obligations to which they are subject. And fair procedures should apply. (Letter from Sir George Laking, Chairman, Legislation Advisory Committee, to Rt Hon Jonathan Hunt, Leader of the House, House of Representatives (June 1, 1990), at 1.)

This last observation was made because there are no procedures laid down which are legally binding on select committees of Parliament. They are not obliged by the Standing Orders to follow the rules of natural justice.

They can force an individual to incriminate himself or herself in front of the select committee. They can prevent the individual from being represented by counsel in front of the select committee and they can ensure that no cross-examination occurs if that is their will.

It is necessary to look at the bleakest scenario when analysing these matters. No doubt it can be said there are political incentives upon select committees to act fairly and that in the modern parliamentary situation no one would expect the draconian powers which exist to be used. But that is not an adequate excuse. The powers ought not to exist. The nature of the privilege ought to be defined. The whole matter needs to be tidied up.

Part of the problem which has occurred with the abuse of parliamentary privilege in New Zealand relates to the breakdown of the ability of the House to police itself effectively. For many years abuse of parliamentary privilege was virtually unknown. This must have been because the party and other disciplines exerted in the House on members ensured that they did not make unwarranted or reckless allegations.

A further serious problem with the law of parliamentary privilege relates to breaching New Zealand's international obligations. Privilege is clearly contrary to the international obligations which New Zealand has assumed under Article 14 of the International Covenant on Civil and Political Rights (1966). That provision provides:

> All persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(3) also provides certain specific guarantees to any person facing a criminal charge including the right to be informed of the nature and cause of the charge, the right to counsel, the right to cross-examine witnesses and the right not to be compelled to testify against him or herself. In exercising its privileges jurisdiction the New Zealand Parliament is not required by law to do any of the above.

There is a recent relevant case from Malta, which has a Parliamentary system similar to our own. In *Demicoli v Malta*, the editor of a satirical political periodical published an article commenting on a debate in the House of Representatives. (*Demicoli v Malta* 14 EHRR 47 (1991)). The debate had been broadcast on live television. The article was critical of two Members of Parliament. The House found the journalist to be guilty of a breach of privilege. He was subsequently fined by the House of Representatives. The European Court of Human Rights, interpreting a provision similar to Article 14, accepted the power of the Maltese Parliament to regulate its own internal affairs. However, the Court found that the way in which proceedings had been conducted against Mr Demicoli meant that he had not received a fair and public hearing before an independent and impartial tribunal. Part of the reason for this was that the two Members of the House who were criticised in the article participated in the proceedings, including the finding of guilt, and in the sentencing. This sort of situation routinely arises in New Zealand privilege cases.

The conclusion I have drawn from recent New Zealand events is that the law relating to parliamentary privilege needs fundamental reform. A Parliamentary Privilege Bill should be introduced and passed before the first MMP election. The desirable features of that Bill are as follows:

- the law should define what is involved in contempt of Parliament;
- the power of Parliament to imprison or fine should be abolished;
- where it is necessary to take proceedings to punish people by way of fine or imprisonment for the offence of contempt of Parliament, the matter should be dealt with by the High Court and not by Parliament;
- the need to define what is involved in the "proceedings of Parliament" from the point of view of the protection of speech and debate so that the law is more certain in its application;
- the freedom of speech and debate in Parliament should be reaffirmed, but safeguards should be provided against its abuse by:

(i) requiring MPs who make allegations of improper, dishonest or criminal conduct against people who are not Members of the House to satisfy the Speaker first that they have some grounds for making the charges; and

(ii) providing the person against whom the allegation is made with the right of reply.

- explicitly requiring select committees of Parliament to follow the rules of natural justice;
- abolishing the power of Parliament to expel members;
- abolishing the very narrow freedom from arrest which MPs have at present;
- tightening up a number of technical details and repealing the Legislature Act 1908.

This is an important area of unfinished business. The Report of the Standing Orders Committee recommended legislation in 1989 (see fn 8, below.) None has been forthcoming. No serious attempt has been made, as far as I can tell, to remedy the deficiencies which were found to exist in the 1989 Report of the Standing Orders Committee.

It is a matter of some urgency that legislative steps be taken to rectify the deficiencies which now exist. If the current sensations produce an opportunity to put things right then that will be positive. If we do not undertake some remedial action then our public life will be the loser and our reputation as a democratic society which protects the fundamental human rights of all will be imperilled. □

1 5 NZPD 544; 570-1; 644-5 (Weekly Series, 1994); 6 NZPD 945 (Weekly Series, 1994) and 7 NZPD 962 (Weekly Series, 1994).
2 54 HC February Series 5, Col 664 (1913).
3 Report of the Privileges Committee concerning the Printing of the Documents Tabled by the Member for Tauranga on 16 March 1994, 1994 AJHR I. 15A.
4 Public Issues Committee, MP's should be More Accountantable for Unfair Attacks on Outsiders, *Northern News*, Oct 1979.
5 Public Issues Committee, Speaking Out: Members of Parliament and the Judicial Process, 1988 NZLJ 300.
6 Submissions of Denzil A S Ward to the Standing Orders Committee of the House of Representatives (March 25, 1986).
7 See the resolutions adopted by the Australian Senate in 1988 which implemented the recommendations made in the Final Report of the Joint Select Committee on Parliamentary Privilege, (Parliamentary Paper No 219, October 1984).
8 Report of the Standing Orders Committee on the Law of Privilege and Related Matters, Second Report, 1989 AJHR I. 18B.

In view of some of the comments made by Sir Geoffrey and the principle of the right of reply we publish hereunder a brief response and comment from Hon Winston Peters MP.

Sir Geoffrey Palmer's perspective is that of one concerned with the place of the Courts in our system of government, and with the protection offered individuals by due process.

While I, as a fellow member of the legal profession, well understand and support such concerns, my perspective as a law maker must be somewhat different.

As a Member of Parliament, my ultimate responsibility is not to the law and our institutions as they stand, but to have a somewhat broader oversight of them so as to ensure that they are actually working in the interests of the public to whom they properly belong.

For some years, as is well known, I have been particularly concerned with a complex web of issues involving links between certain public institutions such as the BNZ, large-scale tax-dodge schemes, and the failure of regulatory bodies, Parliament, and the Government itself to be seen to adequately address public concern over them.

And in the end, where such concerns are real and existing institutions fail to deal with them, it is the duty of Parliament to address them. It is a duty I take seriously.

When all else fails, and the inertia of established practice proves immovable, it rests with Members of Parliament to use the unique forum of the House and the long-fought for powers that make it the centrepiece of our democracy, to address those concerns in an attempt to make good any such failure.

A little history will put this case in perspective.

The issues of alleged white-collar crime that have been before the Finance and Expenditure Select Committee, were first raised in Parliament by the present Attorney-General Paul East, and the now Prime Minister Mr Bolger, during what was labelled the "Gang of Twenty" episode in 1988. Well known business people were named in Parliament, and accused of major crimes. National called for a Royal Commission with *Terms of Reference* wide enough for a proper independent inquiry.

Then there was the BNZ, and again Mr Bolger and the National Party called for an independent Commission of Inquiry. Once in power however, even though it was only then that, faced with the huge bailout at public expense, National finally saw the full extent of the problem, his government refused to keep its word.

Again in the middle of 1990, in the aftermath of TVNZ's "Frontline" investigation of alleged links between Sir Geoffrey Palmer's Government and big business, Mr Bolger pledged that a National Government would establish "as a matter of priority" a Royal Commission to investigate such matters and those named as being involved.

Sir Geoffrey rejected those suggestions out of hand and said *any inquiry should be conducted by a Select Committee.*

Faced with this blockage, despite all the evidence and the commitments made to date, those of us still concerned with the issues rasied had no choice but to fall back on the forum of Parliament itself and the privileges it affords

Members to raise matters that are not otherwise being dealt with.

Sir Geoffrey Palmer accuses me of abusing those privileges, and expresses alarm that a Select Committee should now be used to investigate the very matters he long insisted that a Select Committee should be investigating. But of course his perspective is no longer that of a Member of Parliament.

In my defence let me say this.

I never wanted a Select Committee Inquiry. He did. I still want a proper Public Inquiry. He did not.

All my efforts over the last few years have been aimed at that end. Faced by implacable and unexplained opposition from National itself to the clear commitments on which it was elected in 1990, I have used the forum of Parliament to continue producing evidence as to why those commitments should be kept.

Faced by repeated assertions that the proper authorities had properly examined the evidence, in the face of insistence by authorities such as Molloy QC and Professor John Prebble that they had not, I continued to call for a proper Public Inquiry.

On the only inquiry thus far into anything I have said on these issues – the $200 million falsification of the BNZ's annual accounts – the Securities Commission, when finally forced to act, found the allegations to be correct.

And it is a matter of Court record that on the two occasions when a Court has required European Pacific to argue their substantive case, they have decided not to. Why?

In the end, after every attempt to shut the evidence down had failed, those who repeatedly called for a Royal Commission finally gave us the Select Committee they always rejected.

I am already on record as saying that a Select Committee has neither the competence nor the impartiality to deal with this particular matter, and have continued to press for the Public Inquiry.

I also share the views expressed by the Auckland District Law Society on the need for natural justice to apply and as my own submissions to the Committee show, have sought to ensure both that the Committee has access to proper legal advice and that we can extend immunity to witnesses.

Now, after extensive efforts to ensure wide-ranging terms of reference as well as other conditions essential to a proper investigation, we have been given a Commission of Inquiry.

Let us hope the terms of reference are widened so that it is allowed to succeed. Investigation of the issues involved has been delayed too long.

The greatest travesty of all would be for them to continue escaping the long delayed investigation they so clearly deserve simply because no politician had the integrity to act. □

Books

Security for Costs

By Stephen E Colbran

Published by Longman Professional, 1993, 332 pp. Price A$85.00

Reviewed by Colin Pidgeon QC

> *In forensic encounters the sinews of war are costs, and the capacity of parties to pay their own or to recover their costs from opponents is sometimes critical to survival of even successful litigants. Compelling the other side to provide in advance against the contingency of its own defeat is one way of escaping the painful consequences of Pyrrhic victories. Hence it is that there are rules regulating security for costs. — Hon Mr Justice McPherson.*

Many Australian texts are of dubious value to New Zealand practitioners. This is so even in the case of works which specifically state that the law in both countries has been considered. I was pleasantly surprised in examining this publication to discover that the claims of the writer to fully cover not only Australian but New Zealand and English cases, is more than justified. The text is a veritable mine of relevant cases on all aspects of the law in New Zealand relating to security for costs, and includes many unreported New Zealand decisions.

The writer has very clearly set out the basis of the jurisdiction for ordering security for costs, covers the history of the jurisdiction and then examines the specific rules and principles, making available to New Zealand practitioners a significant number of Australian cases which can be called in aid on such applications.

The treatment of the subject is logical and based firmly on principles which are spelled out in detail, removing from the writer the impression that he sometimes has of decisions on this aspect of the law being made somewhat whimsically by Courts in the exercise of its discretion.

Indeed, I would go so far as to say that the time will come when no one can consider himself or herself properly prepared to argue an application for security for costs, without first referring to this useful book.

□

The Laws of New Zealand Introduction (II)

Structure of *The Laws of New Zealand*

By P J Downey, General Editor

The first part of the Introduction booklet for The Laws of New Zealand *was published last month at [1994] NZLJ 278. This final section deals with the structure of the work, and lists the titles with authors commissioned to date. There are under 30 titles still to be commissioned.*

Style

In general terms *The Laws of New Zealand* follows the style of *Halsbury's Laws of England*. It is an encyclopaedic work dealing separately with various categories of the law in concise propositions with supporting authority. It covers the whole of the law of New Zealand, statutory, regulatory and case law – including the decisions of many Tribunals and Review Authorities. Since the law cannot be classified rigorously into watertight compartments there is inevitably some degree of overlap. This is of course a benefit. Each of the more than 140 titles in the work however, has its own distinct core and emphasis, and is a self-contained statement of the law on a particular subject.

Within each title the text is divided into consecutively numbered paragraphs grouped into Chapters and Parts. The individual paragraphs each treat of a separate point of law. The style is propositional, in that the text states what the law is, and the footnotes give the authority (with full citation) for every statement of the law. The propositional style means that it is not like an ordinary textbook which might discuss individual cases, often with lengthy factual narratives. Nor is it a work of opinion, although authors are free and have been invited, to write an introductory section dealing with the background to the present law and the author's view of possible or preferable future developments.

Acknowledgment to *Halsbury* Authors and Publisher

The Laws of New Zealand is an indigenous New Zealand work as is shown by the inclusion of such titles as "Accident Compensation", "Antarctica", and the "Treaty of Waitangi" among many others that are not included in *Halsbury's Laws of England*. On the other hand our law is in many respects derivative and consequently sometimes the text of *Halsbury* has been able to be used to some degree with amendments, adaptations, and corrections to take account of the particular development of our local law. Every paragraph and indeed every sentence has been reconsidered by the author of the title in its New Zealand legal context. Even where it has been appropriate to make substantial use of part of a *Halsbury* text, no attempt has been made to retain the long lists of English authorities that will often be found in *Halsbury*.

Grateful acknowledgment is made to the authors of the *Halsbury* text, where this has been adapted, and to Butterworth and Co (Publishers) Ltd, London, the holder of the copyright.

Comprehensiveness

The Laws of New Zealand is designed to cover the whole of the law of New Zealand. Authors are encouraged to be extensive in their treatment of a particular topic rather than to be too restrictive. Nevertheless because of the style of the work, it is a concise statement. It sets out the principles and the decided interpretations and applications of the law. All of the law statutory, regulatory, and judicial will be covered when the work is completed. It will be kept up to date by servicing on a basis similar in some ways to *Halsbury* as is explained later.

Cross-referencing

The work is focussed on New Zealand law. In this it is distinct from *Halsbury*. It recognises however that much of our law is the common law which is part of our English legal heritage. Thus English authority is quoted when relevant, and the work is cross-referenced, on a paragraph-by-paragraph basis to *Halsbury's Laws of England*. In

> (1) Where any official information is made available in good faith pursuant to this Act,—
>
> (a) No proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from making available of that information; . . .

In *X v The Attorney-General of New Zealand* (High Court, Timaru, 9 December 1993 CP 31/92, Master Hansen), adoptive parents brought an action in breach of confidence for damages against the Attorney-General sued in respect of the Department of Social Welfare for the release of information to the natural mother. In that case the plaintiffs were unable to show a breach of the requirement of good faith.

The tort of privacy and the Privacy Act 1993

In *X* the plaintiffs also failed in an action in breach of privacy. Master Hansen at p 10 cited *Bradley v Wingnut Films Limited* [1993] 1 NZLR 415, 423, in which Gallen J commenting on the existence in New Zealand of a tort of unlawful invasion of privacy, observed:

> The present situation in New Zealand then is that there are three strong statements in the High Court in favour of the acceptance of the existence of such a tort in this country and an acceptance by the Court of Appeal that the concept is at least arguable.

Section 86 of the Privacy Act 1993 provides that proceedings relating to matters of privacy may be under way at any time before both the Courts and the Complaints Review Tribunal.

"Personal Information" is defined in the Privacy Act 1993 as

> information about an identifiable individual: and includes information contained in any register of deaths kept under the Births and Deaths Registration Act 1951.

Principles 10 and 11 of s 6 of the Privacy Act set out the requirement imposed on the agency to show on *"reasonable grounds"* that it did not use the information for any other purpose or disclose the information.

Interim injunctions and ex parte applications

Interim injunctions

The object of an interim or interlocutory injunction (the terms appear to be used interchangeably in New Zealand) is to provide temporary relief to a plaintiff pending a substantive hearing. An interim injunction is very much a discretionary remedy, although it is a common remedy sought in breach of confidence actions since it provides an opportunity to hold the status quo.

The principles governing the grant of interlocutory injunctions in breach of confidence cases are set out in *Klissers v Harvest Bakeries* [1985] 2 NZLR 140. At p 142, of the case, Cooke J as he was then, observed:

> Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive.

Two recent cases involving actions in breach of confidence show the application of these principles. In *Manchester Property Care (Christchurch) Limited v William Anthony Love* (High Court, Christchurch, 10 July 1992 CP 252/92) Fraser J found that the evidence relating to alleged misuse of knowledge of the plaintiff's business fell short of establishing a seriously arguable case as to misuse of confidential information.

In *European Pacific Banking Corporation and European Pacific Trust Company (Cook Islands) Limited* the President at p 7 of the judgment of the Court of Appeal observed:

> At this interlocutory stage it is enough for us to say that on the evidence now before the Court the defendants have a seriously arguable cases for their defence of iniquity.

Interlocutory injunctions

Ex parte applications are only allowed by the Court in the most urgent of cases and the onus is placed on the plaintiff to be able to justify from the outset its position in a full hearing.

In *Martin v Ryan* (High Court, Hamilton, 8 March 1990 M 188/89), Fisher J set out five requirements for the granting of an ex parte order.

(i) a clear case on the merits
(ii) irreparable injury if notice were given
(iii) no delay by the applicant
(iv) the effect of the order should be short term or provisional
(v) there should be strong grounds for overriding normal natural justice.

In *Citicorp*, the requirements for an ex parte order had been made out. Blanchard J, in dismissing the appeal to lift the injunction and (at p 11 of the case) observed:

> Unless Mr White is restrained by the injunction there is danger that the confidential information may reach the hands of third parties, thereby damaging Citibank, but more importantly its customers.

Summary

(i) In the event of a disclosure of confidential information and accompanying breach, the Courts will look to the matter of contract and the express and implied terms of the contract or to the equitable relationships between the parties.

(ii) In both contract and equity, parties who have clearly written statements acknowledging their joint obligations are best able to achieve a remedy.

(iii) The essential quality which confidential information must possess before it can be considered confidential is "inaccessibility".

(iv) The test used by the Courts for "inaccessibility" involves an assessment of whether special labours would be necessary for a member of the public to reproduce the information. □

Tables and Index

Each title when published has its own set of tables and its own index. This means it is fully self-contained and readily usable as soon as it is published. Each title has a list of related topics and shows the particular title where these topics are dealt with fully. In the title "Agriculture" for instance there is the related topic of "fences" and the reference given to the title "Land Law".

There are four Tables in each title. These are: Table of Contents by Paragraph; Table of Cases; Table of Statutes; and Table of Statutory Instruments. Each title has a full index.

It is intended, at least once a year to publish a Cumulative Consolidated Index and Consolidated Tables. This will be similar to the Cumulative Index to the *New Zealand Law Reports* so that it will be replaceable on a regular basis.

Servicing

The law is in a continual process of change. New statutes, or amending ones are passed by Parliament, new Regulations and Orders in Council are promulgated by the Executive Council, new Rules and Practice Directions emanate from Courts, Tribunals and various Review Authorities. The Courts, Tribunals and Review Authorities continue to issue judgments and decisions of which the significant ones appear in the *New Zealand Law Reports* and other report series.

The practitioner must be provided with continuing updates of the effects of these various changes. *The Laws of New Zealand* will therefore have a servicing component. This will appear three or four times a year depending on need. It is proposed that the service will be a cumulative one so that at any time it will only be necessary to consult two texts, the particular text as it appears in the main title, and the service.

Halsbury's Laws of England, *Halsbury's Laws of Australia*, and *The Laws of Scotland* each have a slightly different method of servicing the main work. They all share the basic system of updating the work on a paragraph by paragraph basis and this will also be done in the service to *The Laws of New Zealand*. The most efficient, expeditious, and economic system possible is to be used for the New Zealand work. Consequently the system first introduced may need to be varied later as the changes or applications of the law become more extensive and when a more substantial list of titles has been published.

In the interval between new material from Parliament or the Courts becoming available and its publication in a service, subscribers should consult *Butterworths Current Law*. This has been recast so that the topics in *Butterworths Current Law* are the same as the titles in *The Laws of New Zealand*. This has been done for ease of reference.

The service will be kept as simple as possible. Relevant sections of amending or new related legislation will be referred to, as will new case law. Paragraphs will be rewritten only if this is necessary. In the event that a particular title changes substantially, as for instance with a totally new basic statute, then the title will be fully rewritten so that the existing one can be replaced. This possibility of rewriting only individual titles rather than complete volumes is one of the economic benefits for subscribers of the format adopted of publishing the titles separately rather than in bound volumes as noted above.

The policy of the publishers is to ensure that *The Laws of New Zealand* fully states the law existing at the time each main title is published, and that the entire work is kept up to date with an efficient, economical service. □

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Techniques for effective information management — What can be protected and how do you do it?

By Dr John G Robertson, Solicitor, Baldwin, Son & Carey, Patent, Trade Mark & Intellectual Property Attorneys.

These times are often referred to now as the information age. In some ways, and with justification, we think of information as related more particularly to electronic technology. But it could be argued that information in the modern sense is what was understood in the past by the word knowledge; and at least since Socrates knowledge has been recognised as having a unique value. It is probably the ease of the storage and the transmission of data that has made us so conscious of information as a commercial entity. In this article Dr Robertson considers in particular the implications of the decision of the House of Lords in the House of Spring Gardens Limited *case of 1983 concerned particularly with the protection of trade secrets and confidential information. He refers to remedies available, mainly by way of injunction, and provides a draft of a Confidentiality Agreement.*

Introduction

The concept of "confidence" as a relation between two persons was only given clear legal consequences by the Courts of England as an action called "Breach of Confidence" in *Prince Albert v Strange* [1849] 1 Mac & G 25, a case in which the Court granted injunctions restraining publication of private printed etchings made by Queen Victoria and Prince Albert.

Prince Albert and many other cases have established a situation now fully operational in the Courts of New Zealand whereby a confidence, being a relation of intimacy or trust between two persons is a legal obligation enforceable by law.

Why information should be protected: *House of Spring Gardens Limited*

House of Spring Gardens Limited v Point Blank Limited [1983] FSR 213, serves as a warning of the consequences of not protecting valuable information. The case involved the misappropriation of trade secrets, plagiarism, deception, professional misconduct by solicitors and barristers and a tangled web of companies in numerous jurisdictions: in short, like many cases involving breach of confidence, *House of Spring Gardens Limited* has all the ingredients of a great novel.

Towards the end of 1978 a Mr Waite Snr approached a Mr Sachs, a tailor in Manchester, England who had developed a new form of bullet-proof vest. Mr Waite Snr had contacts in Libya and proposed to Mr Sachs that they should embark on a joint venture. Mr Sachs without taking precaution to draw up a confidentiality agreement, divulged to Mr Waite Snr confidential information concerning the design and manufacture of the vests. Subsequently and unbeknown to Mr Sachs, Mr Waite Snr set up his own manufacturing business in the Irish Republic in Cork and began to sell vests to the Libyans.

Thereafter followed a series of Court hearings canvassing a full range of possible claims and remedies available for breach of confidence actions and involving various interlocutory measures including an Anton Piller order, an ex parte Mareva injunction and also claims for damages.

Enforcement of confidences

For effective management of information it is necessary to have an appreciation of the ways in which confidences are enforced by the Courts. It is through such understanding that a sense of balance can be achieved between the requirements of a society demanding freedom of speech for the individual on the one hand and on the other, protection for those who would hold information in secret and who should only be required to maintain reasonable physical means of containment. To achieve effective

management of information it is also necessary to appreciate remedies available for actions in breach of confidence and the likely difficulties and expense various options will pose.

(i) Confidences are enforceable by the Courts as terms of contracts and also in equity. *(Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203). Thus Confidential Information can be protected where contractual relationships can be identified and also in circumstances where a Confidant makes unjust use of information imparted in confidence.

(ii) A full range of remedies including damages and various interlocutory measures are now available in the New Zealand Courts for actions in contract and in equity for breach of confidence *(Aquaculture Corporation v NZ Green Mussel Co Ltd* [1990] 3 NZLR 299).

Protection afforded by the law of contract

The law of contract offers protection for Confidential Information through either express or implied terms of the contract. Confidentiality Agreements are also enforceable at law being contracts in their own right, the subject matter of the contract being largely limited to the Confidential Information itself.

Express terms of a contract

The Courts will enforce an express term of a contractual obligation of confidence whether written, as in *Litholite Ltd v Travis and Insulators Ltd* (1913) 30 RPC 266, or verbal as in *Portal v Hine* [1887] 4 TLR 330.

An express term of a contract serves as a warning to the Confidant of his/her obligations and thus ensures that the Confider has done everything possible to bring those terms to the Confidant's attention.

Confidentiality Agreements

Confidentiality Agreements may contain no more than a statement of understanding between parties that the Confider will confide and the Confidant will hold in secret.

Considerable care should to be given to the wording of the agreements. Ambiguous wording created a problem in *Time Ticket International Limited v Joseph Patrick Hatwell and Graham Keith Redman and Ian Anthony Birdling* (High Court, Christchurch, 16 September 1992 CP 284/92, Master Hansen). The company had been working to develop, manufacture and market an automated parking coupon which was the subject of a patent application. The Confidentiality Agreement required the directors to "keep confidential any novel information which had already been or may be disclosed to" them. The question that arose for the Court was, what was intended by "novel"?

Confidentiality Agreements serve several purposes. Apart from establishing a contractual relationship between parties enforceable by the Courts, such agreements alert the Confider to the fact that he/she must maintain the information as "inaccessible", they act as a warning to the Confidant of his/her obligations, they define the nature of the Confidential Information or what it was that the parties agreed to confide and hold in confidence and they serve to support an action in equity by assisting in the definition of the relationship between the parties.

[Drafting Notes and an example of a Draft Form Confidentiality Agreement are attached as Appendices 1 and 2.]

Implied terms

Information may also be protected through implied terms of a contract. Where an obligation of confidence has not been expressed but is necessary in order to give effect to a contract it will be viewed as an implied term (*Lamb v Evans* [1893] 1 Ch 218).

An implied contractual relationship may also operate where the parties to a disclosure of confidential information have not stood in a subsisting contractual relationship (*Mechanical and General Inventions Company Ltd & Lehwess v Austin and Austin Motor Company Ltd* [1935] AC 346).

In *Mechanical*, the House of Lords ruled that the contract breached by the defendants was constituted by the plaintiffs' disclosure of Confidential Information on the one hand and the defendants' implied promise not to use the information for any purpose other than to consider a licensing arrangement on the other. In other rather similar circumstances the Court has relied on the principles of equity to provide a remedy (*Seagar v Copydex Ltd* [1967] RPC 349).

Protection afforded in equity

In *House of Spring Gardens Limited* it was held that Mr Waite Snr had acted in breach of an obligation of confidence owed to Mr Sachs. In the judgment in the High Court of Ireland, Costello J applied the relevant principles for establishing breach of confidence as set out in *Coco v A M Clark (Engineers) Ltd* [1969] RPC 41. These principles provide a useful guideline for the potential Confider as to what will be required to be demonstrated before the Courts, in the event that a Confidant subsequently breaches confidence.

(i) The Confider must demonstrate that the information imparted was confidential – not something which is public property or knowledge.

(ii) The Confider must establish that this Confidential Information was disclosed in circumstances which imposed an obligation on the Confidant to respect the confidentiality of the information.

(iii) Having established (2) the Confider must show cause for involving the order of the Courts to enforce confidence. He/she must show unauthorised use of that information to the detriment of the party communicating it.

Categories of confidential information — What can be protected

Confidentiality Agreements or express or implied terms of confidence in contractual arrangements provide a mechanism for protection of various categories of Confidential Information. However each category of information has its own distinct flavour in relation to

protection provided by law. These flavours arise from differences in underlying policy considerations and such matters as how the parties came to exist in the their relative roles as Confider and Confidant.

The four broad, albeit overlapping categories of Confidential Information include: 1 Trade Secrets. 2 Personal confidences. 3 Artistic and literary confidences.[5] 4 Crown (Government) secrets.

Trade Secrets

In protecting Trade Secrets, the Courts have pursued a policy of preventing the Confidant from taking unfair advantage of another's labours. The fundamental characteristic of Confidential Information is its inaccessibility.

Where a Confider seeks protection in respect of commercial information the Courts will access confidentiality by reference to the process of mind which has produced the information. If that process of mind has produced information which is inaccessible to all except those who go through a similar process then the information will be confidential and subject to protection (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203).

There are several classes and subclasses of Trade Secrets including technical secrets (related to goods and services) and business secrets (related to information which a firm generates about its own activities, customer lists etc).

Trade secrets in employment contracts

Both technical secrets and business secrets were involved in *Laser Alignment (NZ) 1984 Limited v Rudi Scholz and Barbara Scholz trading as Laser and Instrumentation Services* (High Court, Auckland, 21 May 1993 M 630/93, Hammond J). The case is of interest to this discussion because it touches on what is a potentially difficult area for an intending litigant in an employment contract dispute; namely whether matters involving breach of confidence should be heard in the Employment Tribunal and Court as set out under s 3 of the Employment Contracts Act 1991 or in the Civil Courts. In *Laser* at p 11 Hammond J observed:

> The doctrinal problems arise in the High Court because the present law protects information and business advantages in various ways in contract, tort, equity, and (perhaps) as property interests. Hence, it is possible to "plead around" the provisions of s 3 and in some cases, the nature of the pleadings will determine the jurisdiction: a result unhappily redolent of nineteenth century concerns, or far as the development of the law is concerned.

Laser also deals with the need for clearly constructed confidentiality clauses in agreements with employees. In dealing with this matter Hammond J set out the propositions for dealing with breaches of Confidential Information in employment contracts as presented by Tipping J in *Peninsula Real Estate Ltd v Harris* [1992] 2 NZLR 216.

(i) In the absence of a valid restraint of trade clause a former employer cannot prevent a former employee simply from competing.

(ii) A former employer cannot normally therefore in such circumstances prevent a former employee from contracting or even soliciting clients or customers of the former employer.

(iii) An employee after ceasing his employment may not, however, use truly Confidential Information obtained in the course of that employment for the purpose of competing with his former employer, or indeed in any other way detrimental to his former employer's interests.

(iv) What amounts to Confidential Information for this purpose is not susceptible of abstract definition. It will depend on the facts of each case.

(v) There is now a clear trend of authority to the effect that whether one classifies the following information as confidential or not, a departing employee may not take with him customer or client lists for the purpose of using them in a competing role.

(vi) Neither may a departing employee deliberately memorise such information for that purpose.

(vii) Whether the departing employee takes customer lists or not, generally he may not solicit or approach a client of his former employer in respect of a transaction current at the time of his departure.

Trade Secrets — Bona fide purchaser for value without notice of breach

Even in cases where it would seem unlikely that the parties might have reason to consider a Confidentiality Agreement the Courts may impose an obligation of confidence on the Confidant. In *Citicorp NZ Limited and Citibank NA v Mark J Blomkamp and Paul Gordon Edward White* (High Court, Auckland, 4 September 1992 CP 1017/92, Blanchard J), the second defendant Mr White, sought an order setting aside an ex parte injunction obtained by Citibank restraining him from selling computer software and business secrets. In that case at p 9, Blanchard J cited Lord Denning in *Fraser v Evans* [1969] 1 QB 349:

> The jurisdiction is based not so much on property or on contract as on duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence.

Personal confidences

In the protection of personal information, whether personal to an individual or to an organisation, the protection of privacy is commonly a major consideration. However, it would appear that such privacy will only be awarded if there is an intention not to seek publicity as in *Woodward v Hutchins* [1977] 1 WLR 760. In *Lennon v News Group Newspapers Ltd and Twist* [1978]

FSR 573, 574, Lord Denning observed:

> It seems to me as plain as can be that the relationship of these parties has ceased to be their own private affair. They themselves have put it in the public domain. They made it public to all the world themselves, and I do not think that one or other of them can obtain an injunction to stop it being published.

A further question relating to policy that arises in situations of personal confidences and particularly at the interlocutory stage of proceedings, is whether iniquity might be done in not releasing information to the public. The question is one of whether to publish or not in the public interest. In *European Pacific Banking Corporation and European Pacific Trust Company (Cook Islands) Limited v Television New Zealand Ltd and Ian Wishart* (High Court, Auckland, 3 February 1994 CP 768/93), Robertson J, in refusing to remove an interim injunction restraining TVNZ from broadcasting a programme relating to the plaintiffs observed (at p 7):

> The core issue before the Court is, are the defendants using confidential material which has been unlawfully obtained? If they are or have, then does what is described in shorthand as the "iniquity concept" overcome the right of confidentiality which would otherwise exist?

In *European Pacific Banking Corporation and European Pacific Trust Company (Cook Islands) Limited v Television New Zealand Ltd and Ian Wishart* (Court of Appeal, 16 May 1994 CA 43/94, CA 61/94, CA 72/94, Cooke P, Casey J, McKay J), in which the Court dismissed appeals by the plaintiffs against three interlocutory applications, (1) disallowing disclosure by the defendants of the source of documents, (2) requiring provision by the plaintiffs of further documents, and (3) requiring provision by the plaintiffs of further particulars, the President observed (at p 6):

> What has been called ever since *Gartside v Outram* (1856) 26 LJ Ch 113 the defence of iniquity is an instance, and probably the prime instance, of the principle that the law will not protect confidential information if the publication complained of is shown to be in the overriding public interest.

Artistic and literary confidences

Where artistic or literary confidence is in question, the Courts will tolerate a reasonably wide circulation of information within the meaning of confidentiality although as with Trade Secrets, know-how and personal information the "inaccessibility" of the work is still a fundamental criterion for determining confidentiality (*Gilbert v Star Newspaper Co (Limited)* (1894) 11 TLR 4). In some measure copyright provides a more appropriate protection being a statutory protection for the *form* in which this type of information is expressed. In *Shelley Films Limited v Rex Features Limited* 1994 IPR 2, the case was argued in both copyright and breach of confidential information. For both causes of action the Court found a serious question to be tried and the balance of convenience to be in favour of the plaintiff and the injunction was granted.

Crown (Government) confidences

Policy factors concerning Government information

For a cause of action in breach of confidence against the Government, where "inaccessibility" was the fundamental test for determining whether Trade Secrets, personal information and artistic information are confidential, for Government information it must also be shown that it is in the public interest that the information remains inaccessible (*Attorney-General v Jonathan Cape Ltd* [1976] QB 752).

Gurry, *Breach of Confidence* (reprinted 1991) 230, has reached two tentative conclusions on the matter:

> 1. It seems clear that an obligation of confidence may attach to any Government agency empowered by statute to acquire confidential information from or concerning individuals or firms. Such an obligation will attach, it seems, whether the information is given to the agency under compulsion or voluntarily. The obligation will arise whenever confidential information is given for a limited purpose and will impose a duty on the confidant not to use the information for any extraneous purpose (unless ordered by the Courts to do so).
> 2. The provisions of the enabling statute, or any other relevant statute, will be important in determining the existence of the obligation. This statute will define the purposes for which acquisition of the information is authorised, and may indicate any area of special sensitivity concerning the information.

Government control of information

In a recent review of the literature (Rouse, "Government Information — A Review of the Literature" January 1994, Policy and Planning Unit, National Library of New Zealand, Te Punga Matauranga o Aotearoa) the author observed that:

> In more than 25 statutes dealing specifically with information in New Zealand, there is no one explicit principle or code that defines what information is.

However, "Official Information" is defined in s 2 of the Official Information Act 1982 as:

> The content of every official document, or information good, held in an official capacity by bodies that can be identified as official information repositories.

Official Information Act 1982

The Official Information Act and its amendments is the principal mechanism that defines the duties and responsibilities of official information repositories to provide the public with access to official information. Rouse reports that it is the only Act which governs access to official information in all its forms and in every repository.

Test for breach of confidence under the Official Information Act 1982

In order to show that information was released that should not have been released, it is required to show lack of good faith on the part of the Crown.

Section 48(1) of the Act provides:

> (1) Where any official information is made available in good faith pursuant to this Act,—
>
> (a) No proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from making available of that information; . . .

In *X v The Attorney-General of New Zealand* (High Court, Timaru, 9 December 1993 CP 31/92, Master Hansen), adoptive parents brought an action in breach of confidence for damages against the Attorney-General sued in respect of the Department of Social Welfare for the release of information to the natural mother. In that case the plaintiffs were unable to show a breach of the requirement of good faith.

The tort of privacy and the Privacy Act 1993

In *X* the plaintiffs also failed in an action in breach of privacy. Master Hansen at p 10 cited *Bradley v Wingnut Films Limited* [1993] 1 NZLR 415, 423, in which Gallen J commenting on the existence in New Zealand of a tort of unlawful invasion of privacy, observed:

> The present situation in New Zealand then is that there are three strong statements in the High Court in favour of the acceptance of the existence of such a tort in this country and an acceptance by the Court of Appeal that the concept is at least arguable.

Section 86 of the Privacy Act 1993 provides that proceedings relating to matters of privacy may be under way at any time before both the Courts and the Complaints Review Tribunal.

"Personal Information" is defined in the Privacy Act 1993 as

> information about an identifiable individual: and includes information contained in any register of deaths kept under the Births and Deaths Registration Act 1951.

Principles 10 and 11 of s 6 of the Privacy Act set out the requirement imposed on the agency to show on *"reasonable grounds"* that it did not use the information for any other purpose or disclose the information.

Interim injunctions and ex parte applications

Interim injunctions

The object of an interim or interlocutory injunction (the terms appear to be used interchangeably in New Zealand) is to provide temporary relief to a plaintiff pending a substantive hearing. An interim injunction is very much a discretionary remedy, although it is a common remedy sought in breach of confidence actions since it provides an opportunity to hold the status quo.

The principles governing the grant of interlocutory injunctions in breach of confidence cases are set out in *Klissers v Harvest Bakeries* [1985] 2 NZLR 140. At p 142, of the case, Cooke J as he was then, observed:

> Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive.

Two recent cases involving actions in breach of confidence show the application of these principles. In *Manchester Property Care (Christchurch) Limited v William Anthony Love* (High Court, Christchurch, 10 July 1992 CP 252/92) Fraser J found that the evidence relating to alleged misuse of knowledge of the plaintiff's business fell short of establishing a seriously arguable case as to misuse of confidential information.

In *European Pacific Banking Corporation and European Pacific Trust Company (Cook Islands) Limited* the President at p 7 of the judgment of the Court of Appeal observed:

> At this interlocutory stage it is enough for us to say that on the evidence now before the Court the defendants have a seriously arguable cases for their defence of iniquity.

Interlocutory injunctions

Ex parte applications are only allowed by the Court in the most urgent of cases and the onus is placed on the plaintiff to be able to justify from the outset its position in a full hearing.

In *Martin v Ryan* (High Court, Hamilton, 8 March 1990 M 188/89), Fisher J set out five requirements for the granting of an ex parte order.

(i) a clear case on the merits
(ii) irreparable injury if notice were given
(iii) no delay by the applicant
(iv) the effect of the order should be short term or provisional
(v) there should be strong grounds for overriding normal natural justice.

In *Citicorp*, the requirements for an ex parte order had been made out. Blanchard J, in dismissing the appeal to lift the injunction and (at p 11 of the case) observed:

> Unless Mr White is restrained by the injunction there is danger that the confidential information may reach the hands of third parties, thereby damaging Citibank, but more importantly its customers.

Summary

(i) In the event of a disclosure of confidential information and accompanying breach, the Courts will look to the matter of contract and the express and implied terms of the contract or to the equitable relationships between the parties.

(ii) In both contract and equity, parties who have clearly written statements acknowledging their joint obligations are best able to achieve a remedy.

(iii) The essential quality which confidential information must possess before it can be considered confidential is "inaccessibility".

(iv) The test used by the Courts for "inaccessibility" involves an assessment of whether special labours would be necessary for a member of the public to reproduce the information. □

APPENDIX 1

CONFIDENTIALITY AGREEMENT — DRAFTING NOTES*

1. NATURE OF AGREEMENT

A Confidentiality Agreement should contain at least the following features:—

(a) mutual undertaking of confidentiality;

(b) an undertaking by the Confidant (as defined) to use the Confidential Information (as disclosed) only for the specific purpose (as defined); and

(c) an acknowledgement by the Confidant that all intellectual property subsisting in the Confidential Information disclosed is and remains the property of the Confider (as defined).

2. DEFINITIONS

All key terms in the Confidentiality Agreement should be defined to avoid ambiguity.

3. RECOMMENDED SCHEDULES

I. Parties – to be set out in full (preferably in a Schedule) together with details of registered offices and principal business addresses.

II. Confidential Information – to be set out as a brief but clear definition of the Confidential Information to be disclosed by each party showing what Confidential Information belongs to whom. In circumstances where Confidential Information is to be swapped between parties, then separate schedules should be adopted for each party. Confidential Information defined in the Schedule should be set out as follows:

> "information developed by the Confider and relating to (give a general indication of the 'field' of the Confidential Information)".

III. Purpose — set out in the Schedule a brief description of the purpose for which the disclosure is being made. An example is provided as follows:

> "to allow the Parties to examine the Confidential Information with a view to their participation in the further development and/or commercial exploitation thereof".

IV. Operation – the manner in which the Confidential Information is to be handled between the Parties should be clearly set out in a Schedule. For example the Schedule should state that where Confidential Information is disclosed in writing it should be stamped "Confidential" and the Confidant should be requested to sign a copy thereof acknowledging receipt. When Confidential Information is disclosed verbally it should be confirmed in writing within a defined number of days and an acknowledgement of receipt thereof be obtained from the Receiving Confidant.

4. AUTHORITY

As is the case with all contractual agreements, the confidentiality agreements should not be executed unless by the appropriate authority. This person(s) should be clearly identified.

5. EXECUTION

The formal terms and conditions of the Confidentiality Agreement and Schedules should be bound together to form one document and produced in duplicate. The form of execution of contracts required by each party should be strictly adhered to.

Each party should execute both copies and then exchange the copies. Each party should file their copy and hold it in a locked safe.

* **Disclaimer:** Baldwin, Son & Carey shall not be held liable for any use or application by any party of this Draft Confidentiality Agreement or any part thereof.

APPENDIX 2

DRAFT FORM CONFIDENTIALITY AGREEMENT*

THIS CONFIDENTIALITY AGREEMENT is made on ..... the day of 1994

BETWEEN: "the Confider"

AND "the Confidant"

RECITALS

A The Confider owns confidential information ("Confidential Information") identified in the Schedule I **attached** hereto it wishes to disclose to the Confidant for the purpose ("the Purpose") identified in the Schedule II **attached** hereto.

B The Parties have agreed that the disclosures referred to in Recital A shall take place on the terms of this Agreement.

NOW IT IS AGREED

1 DEFINITIONS

Confider — shall mean any of the parties which is disclosing its Confidential Information

Confidant — shall mean any of the parties which is receiving Confidential Information

2 DISCLOSURE

2.1 The Confider shall disclose to the Confidant so much of its Confidential Information as the Confider, in its sole discretion, believes is necessary for the Purpose.

3 OBLIGATIONS

3.1 In respect of the Confidential Information as set out in the attached Schedule the Confidant shall:

(a) keep all Confidential Information in its possession and treat all Confidential Information as confidential regardless of when disclosed;

(b) not use any Confidential Information in any way other than for the Purpose;

(c) refrain from making or having made any recording or duplications of Confidential Information;

(d) limit access to Confidential Information to those of its employees reasonably requiring it for the Purpose;

(e) require all employees given access to Confidential Information to sign a written binder of Confidentiality and Non-Use comparable in scope and duration to that herein set out and provide the Confider with copies of the same;

(f) not use any of the Confidential Information in any way which would be harmful to the best interests of the Confider; and

(g) deal and operate with all Confidential Information as set out in Schedule III **attached** hereto.

***Disclaimer:** Baldwin, Son & Carey shall not be held liable for any use or application by any party of this Draft Confidentiality Agreement or any part thereof.

3.2 A Confidant's obligations under this agreement will not extend to any Confidential Information:

(a) that is publicly available at the date of its disclosure to the Confidant;

(b) that is, at the date of its disclosure to the Confidant, already properly in the possession of the Confidant in written form from sources other than the Confider:

(c) that, after the date of its disclosure to the Confidant, becomes publicly available from sources other than the Confidant;

(d) that, after the date of its disclosure to the Confidant, properly becomes available to the Confidant on a non-confidential basis from a third party having no obligation of confidentiality to the Confider with respect thereto; or

(e) is independently developed by an employee or officer engaged by the Confidant having no knowledge of Confidential Information.

4 BURDEN OF PROOF

4.1 The burden of proof of showing that any Confidential Information is not subject to the obligations of confidentiality in this Agreement will rest on the Confidant.

5 RETURN OF CONFIDENTIAL INFORMATION

5.1 At any time upon the written request of the Confider the Confidant shall return to Confider the Confidential Information disclosed to it and shall not keep any copies thereof.

6 TERM

6.1 Subject to clause 3.2, the Confidant's obligations of confidentiality and non-use under this Agreement shall enure until the lawful publication of Confidential Information disclosed to it.

7 PROPRIETARY RIGHTS

7.1 The Confidant will obtain no proprietary rights of any kind to the Confidential Information disclosed to it.

8 METHOD OF DISCLOSURE

8.1 The obligations in this Agreement shall apply irrespective of the method by which Confidential Information is disclosed, whether in writing, in computer software, orally by demonstration, description, inspection or otherwise.

9 LIABILITIES

10 DISPUTE RESOLUTION AND GOVERNING LAW

11 TERMINATION

12 ENTIRE AGREEMENT

EXECUTED BY THE PARTIES (AS WITNESSED)

SCHEDULES:

I CONFIDENTIAL INFORMATION
II PURPOSE
III OPERATION

Judges, deconstruction and the rule of law

By Bernard Robertson, Massey University

The interpretation of statutory provisions is of course one of the main functions of Judges especially in New Zealand. In this article Bernard Robertson looks at a particular case and analyses the difficulties inherent in taking too extended a view of giving a liberal interpretation as against a strict interpretation based on the ordinary understanding of the meaning of the words. Deconstruction of a text may be a literary fad at the moment, but applying it to the law as a principle of indeterminancy can have undesirable social and legal consquences.

There is a philosophical argument that says that words have and can have no meaning: language is essentially indeterminate and it is impossible to communicate. There is also a respectable philosophical argument that we cannot be certain of anything, even of the existence of objects we think we see before our very eyes.

It is, however, empirically observable that we can convey what we intend by adhering to certain conventions. If I ring my wife up from Wellington and tell her that I will be on the train arriving at Levin at 9.40pm, I observe that then or thereabouts she arrives in the car to collect me. Since she seldom goes into Levin in the evenings I infer that this is because I have succeeded in conveying my meaning sufficiently to cause her to act in the way I wished.

It is also necessary to assume that meaning can be conveyed by agreed conventions in order to organise society, just as we proceed upon the assumption that what the vast majority of us perceives is real. So far as I know no Court has ever acquitted anyone on the ground that since it could not be certain it existed it could not be certain that the defendant committed the offence.

In the same way it is convenient to suppose that Parliament can pass laws composed of words which have some meaning. Otherwise the whole democratic structure breaks down. If we do not know what the laws passed mean, how can we hold their authors accountable at elections? It is said to be a fundamental liberal principle that criminal offences must be precisely defined so that I know in advance what conduct will invite sanction. This, of course, presupposes that the words in the definitions have some accepted meaning. It also serves as a warning to Parliament and to draftspersons that they must constantly struggle to make their meaning clear.

Because Parliament cannot foresee all possible situations we have Courts, one of whose roles is to "interpret" the words in Acts. But this does not mean, or at any rate has not traditionally meant, that Courts have a licence to make up new meanings for words or sentences in Acts. If they did then there would be no need for Parliament to continue passing Acts. It could simply pass one Act entitled "Oglookug Nafginat Droolihu" which continued in the same vein. The Courts could then interpret this Act however they felt, whenever they needed to.

Nor does it mean that Judges are High Priests with access to arcane knowledge and understanding denied the rest of us. They are not "interpreting" chickens' entrails, they are interpreting words that have a large measure of accepted meaning. The Courts are simply a process by which we agree which meaning to accept when the correct one is not self-evident.

It is not clear that all New Zealand Judges accept the above argument. The Court of Appeal has interpreted the word "while" in s 55 of the Transport Act 1962 to mean "because". (*R v O'Callaghan* [1985] 1 NZLR 198). The natural meaning of "while" is "at the same time as" which was the meaning for which the prosecutor was contending. The only other meaning given in *The Oxford Dictionary* is actually the opposite of that given by the Court of Appeal, namely "despite" or "although" (as in: "while holding you in great respect I think you are wrong"). If words are to be interpreted this way then the task of the draftsperson becomes increasingly difficult.

The Serious Fraud Office Act empowers the Director to summon "any person" for examination (s 9). Now, I have little difficulty interpreting this expression. It means that the class of persons from whom the Director may choose to summon is the entire human race. In fact I cannot think of a more succinct way of expressing that thought. However the Court of Appeal has found this expression insufficiently clear in the past (*CIR v West-Walker* [1954] NZLR 191). So the Act takes precautions. It provides that a person may be summoned for examination notwithstanding that he may have been charged with a criminal offence (s 50). That must surely dispose of the strongest case for exemption and would be redundant if the Court could be relied upon to interpret "any person" as "any person". The Act further provides that legal professional privilege (as defined in the Act) provides an excuse for failing to answer a question (s 24) but that the privilege against self-incrimination does not (s 27). The first provision actually restricts *West-Walker* and the second should dispose of the strongest possible excuse for failure to answer a question. If any

further listing of reasons had been attempted it would invite arguments of inclusio unius, exclusio alterius.

Evidently this is not clear enough. In *Hawkins v Sturt* [1992] 3 NZLR 602 Tompkins J decided that the spouse of a person charged with a criminal offence could not be questioned about the offence by the Director. The essence of the decision is that the privilege of a spouse to refuse to answer questions which might incriminate a spouse charged with a criminal offence is a "fundamental principle of the common law" which can only be negatived by "clear words". The Serious Fraud Office has not appealed the decision, either because the usual rules of precedent mean that the issue can simply be relitigated next time or perhaps because the bizarre English decision on which Tompkins J based his reasoning (*R v Director of Serious Fraud Office ex p Smith* [1992] 1 All ER 730) has since received the treatment it deserved in the House of Lords ([1993] AC 1 (DC & HL); [1992] 3 All ER 465).

This decision raises a number of questions. Two obvious ones are:

> (a) what are the implications of this decision for provisions such as s 67 of the Transport Act 1962, which requires the owner or hirer of a vehicle to identify the person driving it on the occasion an offence was committed?
>
> (b) what other rules of evidence are "fundamental principles of the common law" the operation of which has to be excluded by "clear words"?

This decision thus creates uncertainty where none existed before and rewards the arguing of what would appear to be an unarguable case. The recent decision of Heron J in *Commissioner of Inland Revenue v Registrar of Companies* (1993) 7 PRNZ 224 continues this trend.

In this case the CIR applied for an order declaring the dissolution of a company void. This was met by the argument that the order could not be made as, by the time of the hearing, the statutory time limit had expired.

Section 335(1) of the Companies Act 1955 reads:

> 335. Power of Court to Declare Dissolution of Company Void – (1) Where a company has been dissolved the court may at any time within two years of the date of dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested make an order . . . declaring the dissolution to be void . . . .

Heron J said:

> If one scans the provision I think it is equally capable of the interpretation that the two year time limit applies to the application that has to be made before the order can be made, as it does to the order being made.

This sentence clearly parses as follows:

1 The main verb is "may make". The fact that the auxiliary verb is separated from its subtended infinitive by 37 words makes parsing more difficult but does not affect the meaning.

2 The subject of the main verb is "the court".

3 The object of the main verb is "an order".

4 "Where a company has been dissolved" is a subordinate clause setting a condition precedent to the Court's jurisdiction.

5 "On an application being made for the purpose by the liquidator of the company or by any other person" is a phrase (with its own subordinate relative clause) which clearly modifies the main clause "the court may make an order" and constitutes an additional condition precedent to the Court's jurisdiction.

6 The crucial adverbial phrase "at any time within two years of the date of dissolution" can only modify the main verb. It creates a third condition precedent to the Court's jurisdiction.

This sentence is clumsy but its meaning is clear. Had the time limit been intended to refer to the time of making the application the phrase "at any time . . ." would have to be placed after the phrase "on an application being made". It is, with respect, impossible to read the time limit as referring to the making of the application as the sentence stands.

Given his finding of ambiguity, His Honour felt able to give a "purposive construction" to the section and to interpret the time limit as applying to the making of the application not to the date of the making of the order. The case was therefore allowed to proceed. The main policy argument was that the time the Court process may take is not within the applicant's control, but this could only be determinative if the section were ambiguously phrased.

But, with respect, it was not. It is possible to read almost anything ambiguously if it is "scanned". The question is what is revealed when it is read carefully. There is no reason to favour those who "scan" Acts of Parliament over those who read them carefully. The Act is clear and public and anyone who contemplated this procedure under the 1955 Act was under notice that the procedure had to be commenced well within the two year period, so as to give the Court time to grind through its processes.

If this turns out to be grossly unfair (eg if the simplest application takes two years to come to Court) then the remedy lies with Parliament. But it is not clear that this provision is grossly unfair. After all, third parties want a date after which they know that a dissolved company is dissolved for ever, not a date after which no further applications can be made.

The Rule of Law seems to be in question here. The judiciary may be the "least dangerous branch" but Camden LCJ warned us over 300 years ago that:

> the discretion of judges is the law of tyrants . . . it is different in different men. It is casual, and depends upon constitution temper, passion.

To quote TRS Allen "Legislative Supremacy and the Rule of Law – Democracy and Constitutionalism" (1985) 44 Camb LJ 111, "The first requirement of the rule of law, in the context of statute law, is that the citizen should be bound by, and be entitled to rely on, the law as it is

continued on p 346

Words, ideas and judicial notice

By Nigel Jamieson, University of Otago

Questions of copyright are often misunderstood. In this article Nigel Jamieson pursues the point made editorially, at [1994] NZLJ 201 that it is expressions of ideas and not ideas themselves that are copyrighted; and looks at this in terms of academics and others who have bright ideas. As he notes there may be several people who have the same bright idea but the person who gets copyright is the one who writes it down first.

Just five years on from the Treaty of Waitangi, but very pertinent to today's drought-stricken Auckland, there is a case, *Fay v Prentice* (1845) 14 LJCP 298 at 299, in which Common Pleas accepted the inimitable Serjeant Shee's argument that "the Court will take judicial notice that rain falls from time to time". Besides taking notice of the rain, Courts insist on compiling their own *Who's Who* rather than acknowledge, to use Lord Mansfield's phrase in *R v Wilkes* (1770) 4 Burr 2527 at 2562, "the huzzas of thousands, or the daily praise of all the papers which come from the press". Like God himself (Acts X.34), the Judges are no respecter of persons, and it is doubtless the same topic of judicial notice that provokes *Nokes on Evidence* (p 53) to comment slyly that "inquiries from the Bench about persons of evanescent fame . . . hint that evidence is required as to their identity".

"I think I am entitled to take judicial notice of the fact that the late Elvis Presley was resident in and performed largely within the USA," decided Vinelott J in *RCA Corp v Pollard* [1982] 1 WLR 979 at 992. Yet Scrutton LJ complained in *Tolly v Fry* [1930] 1 KB 467 at 473, "it is difficult to know what Judges are allowed to know, though they are ridiculed if they pretend not to know".

I once excited a near physical assault from a magistrate in Lower Hutt during the sixties by merely quoting what I took to be a common knowledge of Aristotle. In all fairness to the judiciary I should say that quoting Aristotle also won me a law moot before Mr Justice North in the Supreme Court at Wellington. (No, it wasn't the same quotation.) In *L B Plastics v Swish Products* [1979] RPC 551 at 621, however, it is Lord Hailsham who has taken the judicial initiative to introduce "the late Professor Joad". There was a time of renaissance philosophy in which one could not move an intellectual muscle unless first beginning with Aristotle. I know now I was wrong in trying to reinstitute a renaissance of classical learning in the lower Courts, but nowadays in the nineties who recalls "the late Professor Joad"?

Lord Hailsham and I are both old enough to remember the late Professor Joad. Lord Hailsham says of copyright law in the *Swish* case, "as the late Professor Joad used to observe, it all depends on what you mean by ideas". Professor Joad was not just a philosopher, but that *rara avis*, also a very popular one. Not only did he write a comprehensive *Guide to Philosophy* that could be understood by the ordinary man in the Clapham omnibus, but he played a very important role in the BBC's wartime broadcast of *The Brains' Trust*. His philosophy – astoundingly relativist for a nation at war – was on everyone's lips. Never had philosophy been quite so popular – at least not since the sophists. What brought the triumph of philosophy over the populace to a sudden stop was the Professor being caught in a first-class rail carriage with only a third-class ticket. English society, particularly before British Rail, could be so class conscious!

This experience proved to the Professor that life does not just depend on "what you mean by ideas". Nobody believed him any longer when he said it did. It is quite surprising that in 1979, Lord Hailsham should still be quoting Professor Joad on copyright.

The issue of fantasy copyright dealt with by the editor of this journal at [1994] NZLJ 201 is terrifyingly important for academics. To have bright ideas – even a very big one such as $E=mc^2$ – is simply not enough. One could lecture quite brilliantly on all one's bright ideas until one were as old as Lord Hailsham and I – and this would still not be enough. Of course there are good precedents in Aristotle and other full-time lecturers for doing this sort of thing. Besides, both Socrates and Jesus Christ managed without even writing up their lecture notes.

The fact still remains that Lord Hailsham and I would never have reached where we are without getting into print. So roll over Beethoven – it's not how your symphonies sound that counts. We all know you first heard some butcher's boy first whistle the tune. On the contrary, what

continued from p 345

expressed". To adapt the warning of Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, it endangers continued confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes which otherwise might have consequences they consider injurious to the public interest.

Furthermore we seem to be creating an atmosphere in New Zealand in which almost any argument is "worth a go". There is always the possibility that a Judge will be persuaded by some policy argument to override the clear words of an Act (or "give them a broad interpretation"). The result is to encourage litigation, which some appear to believe is a good in itself. This clearly advances the economic and political interests of the legal profession and the judiciary, but no one else's. □

counts more for copyright is what the music looks like on the score.

How should legal academics behave? In being legal academics we must be presumed to know the law of copyright. Should we follow Aristotle's precedent in giving brilliant lectures to be later published by our students, or should we play our bright ideas out in our own brains until we can see them into print. The trouble is that holding on to bright ideas makes for constipated thought. There are quite a few would-be Aristotles around. Perhaps our dear old Professor Joad was on the ball, and Lord Hailsham was quite right in quoting him in the *Swish* case for saying that "it all depends what you mean by ideas".

Socrates would have looked to experience to decide such issues; but then in looking to experience Socrates never wrote a word. He instead commissioned Plato as his amanuensis, just as Jesus Christ commissioned a dozen disciples. Alvin Toffler would maintain that since then, the didactic writer's life has hotted up. What should one do then in this dynamic age of ongoing future shock when Omar Khayyam's moving finger has proliferated into ten rapidly moving fingers that never sit still, and the spectre of repetitive strain injury rules supreme over the computer keyboards?

I am not avoiding the question or changing the subject when I say that fifteen years ago I had a rather unfortunate experience with a colleague who had hit on the self-referentiality of s 5(j) of the Acts Interpretation Act 1924. It is a very bright idea which can be very simply stated. Indeed, simplicity of communication is one characteristic of very bright ideas. Like $E=mc^2$ and love your enemies, they share the formulary programming of lapidary law that allows them to be stated as slogans. The Soviets fabricated a state sausage machine to turn out slogans as law. And it is just this very characteristic of being able to be simply stated which makes bright ideas pre-eminently vulnerable to their being purloined by others. Thus the motto of the Soviet Young Pioneers is borrowed from the Boy Scouts: it is Baden Powell's one of "Be Prepared".

As academics we are so terrified of losing our own bright ideas that we would like to claim in such cases that they are being stolen, but as legal academics conversant with intellectual property, we have to be satisfied with the less than bright idea that they are only being purloined. And in the end, as with all really big ideas, we have to admit that without knowing who Homer really was, Homer cribbed from Homer.

Readers will recognise that I have become a bit cagey about explaining the bright idea expressed by the self-referentiality of s 5(j), but considering there is some hope of seeing this in print, let me simply say that in requiring a fair, large and liberal interpretation of statutes, s 5(j) in turn requires the same fair, large and liberal interpretation of itself. By now that once very bright idea is old hat; but where I hurt my Canterbury colleague (now departed) who was sharing his bright idea with me before it had come out in print, was to say "Yes, I know, we already teach that down here at Otago."

If that were the truth then my colleague needed to know it no less than Professor Joad needed to find out that ideas aren't everything. But if that were all the truth, then there is no real reason to carry our conversation any further into print. The fact is that the whole truth and nothing but the truth is far fuller than indicated by our collegial conversation. This wasn't the first time I had ever discussed the self-referentiality of section 5(j) of the Acts Interpretation Act 1924. Ten years before that (you must remember that Lord Hailsham and I are now a fair age) a number of law draftsmen had held long discussions on this very issue in the Parliamentary Counsel Office.

First of all, the idea seemed to come to *me*. As it struck, it seemed a very bright idea, and being academically inclined to go into print I put it in my little private hoard of things to write about. The very same week another draftsman, Neville Richards, shot into my office with the very same bright idea. "I know," I said, "it's just struck me."

"Let's try it out on Ward at morning tea," said Neville.

"Right!" said I.

"What makes you both think you're the first to have come up with that idea?" asked Denzil Ward, who as Counsel to the drafting office had had more than most to do with drafting the statute. I leave the last word with Denzil Ward, for we never ever found out who had thought of it first.

□

Recent Admissions

Barristers and Solicitors

Cochrane EJ	Hamilton	19 August 1994
Loza MJ	Auckland	10 August 1994
Mason GF	Auckland	17 June 1994
Mason GM	Auckland	17 June 1994
Molloy NA	Auckland	17 June 1994
Muller YL	Auckland	17 June 1994
Murdoch BJ	Auckland	17 June 1994
O'Halloran PT	Auckland	17 June 1994
O'Neill AA	Auckland	17 June 1994
Pedersen AP	Auckland	17 June 1994
Pivac JM	Auckland	17 June 1994
Potter R	Auckland	17 June 1994
Railton JM	Auckland	17 June 1994
Rainey MD-M	Auckland	17 June 1994
Ramanui LK	Auckland	17 June 1994
Reanney VE	Auckland	17 June 1994
Scott JM	Auckland	17 June 1994
Shavin D, QC (Vict)	Auckland	15 June 1994
Sly MN	Auckland	17 June 1994
Sparks BD	Auckland	17 June 1994
Sussman WP	Auckland	14 July 1994
Tata IM	Auckland	17 June 1994
Taylor CM	Auckland	17 June 1994
Thomson KL	Auckland	17 June 1994
Urlich MN	Auckland	17 June 1994
Ward DJ	Auckland	17 June 1994
Warner NC	Auckland	17 June 1994
White HIK	Auckland	17 June 1994
Wilks JMP	Auckland	17 June 1994
Wilson CA	Auckland	17 June 1994
Wilson DGS	Auckland	17 June 1994
Windeatt PA	Auckland	17 June 1994
Yan RWW-M	Auckland	17 June 1994
Zegers J-BPM	Auckland	17 June 1994

Hypnotically induced testimony: Implications for criminal law in New Zealand

By K Barrie Evans, of Auckland

Problems of recollection are of course one of the major evidentiary matters that defence counsel concentrate on in criminal cases where the heavy onus is on the Crown to prove its case beyond reasonable doubt. More recently attempts have been made by the Police in the course of their investigations to use hypnosis as a means of assisting recollection. This article considers the implications of this and the risks inherent in it.

Introduction

Controversy has developed concerning the validity of hypnotically induced recollection. Appellate Courts in the United States of America have held that using hypnosis in this manner, may form the basis for testimony, and it is up to the Judge or jury to consider any difficulties introduced by hypnosis in determining the weight of the evidence. Other Courts have held that no individual who has ever been hypnotised should be allowed to testify concerning a matter where memory has been "refreshed" during hypnosis. Still others have ruled that specific guidelines on the way hypnosis is carried out must be followed to assess whether in any given instance testimony based upon hypnotically refreshed recollections is admissible.

The potential uses of hypnosis in Court are numerous. It may, for example, be used to explore investigative leads where the facts are not known; it can also be used to increase the recall of witnesses or victims who are associated with a crime, and to assist in the psychological and psychiatric evaluations of defendants. Orne (1979) and Warner (1979) further claim it has a role to play in sentencing. Hypnosis could be used after a defendant is convicted and the Court is considering an appropriate sentence; additional recall at this stage, once the Court's judgment is passed may be relevant to the severity of the sentence that should be passed.

In order to appreciate the implications in the acceptance of evidence at a criminal trial that has been elicited from a Crown Witness, it is necessary to examine the findings of both psychology and medicine. The use of hypnosis by appropriately trained physicians or psychologists has been recognised as a valid therapeutic modality by the American Medical Association since 1958. There is now a general acceptance in the United States of America for the validity of hypnosis as an analytical tool for diagnosis. The research psychologist has much to say that is relevant and important in the area of hypnosis and the law.

Acceptance of hypnotic testimony in Australia was given for the first time by the Australian Supreme Court in *Barnie*, in Tasmania in September 1973, when a medical practitioner testified in defence of a woman charged with arson.

The landmark decision in the United States was *Harding v State* (1968) where the Maryland Court of Special Appeals held that refreshing memory with hypnosis was no different from referring to notes or other memoranda. When the Minnesota Supreme Court was faced with a similar question in *State v Mack* (1980), it reviewed expert opinion and ruled against the admissibility of testimony from a witness whose memory had been refreshed by hypnosis.

In New Zealand the Court of Appeal decision of *R v McFelin* is the only precedent to date.

Despite an increasing acceptance of hypnosis in law enforcement, there has been little in the way of guidelines in New Zealand to assist investigators in setting policies for appropriate and responsible use of the technique.

Vulnerability of the hypnotised subject

The problem has been that subjects in hypnosis are more vulnerable to biasing and undue suggestibility than they are without hypnosis. When subjects were asked leading questions about a simulated accident they witnessed earlier, they were more likely when hypnotised to incorporate erroneous information from the leading question into their memory reports. The hypnotist's cues and encouragement can unwittingly translate a hypnotised witness's suspicion into a believable memory to which he will confidently testify.

Conclusions reached from some scientific evidence is that hypnosis should not be allowed to form the basis of testimony in Court. A very real risk exists that pseudo-memories have been created in hypnosis which the witness cannot distinguish from his original recollections. This thesis will examine this issue.

Research on hypnotic memory

If inaccuracies are ignored and only the correct recollections are considered, as was done in the early studies there appears to be an increase in memory when hypnosis is used. If on the other hand, the total amount of information reported in hypnosis

is taken into account, this inaccurate information is at least as likely to be increased as is accurate information – yet neither the hypnotist nor the subject can distinguish which is which.

There are many different roles the psychologist may play in the legal system. The psychologist has much to contribute to the understanding of memory and how it works. The recall of stored information is an integral component of legal inquiry, such recall typically emphasising the process of retrieval of material that has been acquired and retained for some period of time. A point of some argument in the memory literature however, is how permanent the original material or stored information has become.

The writer submits that it is the suggestions of the hypnotist that are in question – not the concept of hypnosis itself in its use in the Courts.

The power of hypnosis should not be underestimated. Hypnosis has been used successfully in amnesia, partial pain relief, and complete pain control where, for example, caesarean births have been done completely without any form of anaesthesia. The Auckland School of Medicine is presently researching the effects of hypnosis on the immune system.

Where hypnosis has worked at its best within the law, the results have been dramatic.

There should be specific guidelines, the use of which, is intended to permit subsequent evaluation of a hypnosis session by independent experts and the trier of a fact, in order to determine whether undue suggestiveness was present.

Developments in eliciting the truth

Increasing developments in science and technology have seen new forms of expertise, testing the bar, the bench and the schools of law. Expert testimony is engulfing criminal trials here and overseas in areas of credibility such as lie detector tests in the form of a polygraph, a machine designed to detect and record changes in physiological characteristics, for example, rates of pulse and breathing, psychiatric opinions on credibility, and truth serum tests. Courts generally refuse to allow experts to testify about their opinions of another witness's credibility. Most Courts allow expert testimony concerning a medical condition, emotional disturbance, or psychological abnormality that has impaired a witness's ability to perceive, recollect, or relate facts. Areas of expertise focus on comparison tests of items such as bite marks, tool impressions and blood. Forensic dynamics, reconstructing movements, mechanics, and pathology from the resultant evidence have also been subjects of expert testimony in criminal trials. As well as biochemical engineering, there is analysis of circumstances, such as testimony on the battered child syndrome and gang culture. Court decisions regarding evidence of the deoxyribonucleic acid, the self-replicating material present in nearly all living organisms, especially as a constituent of chromosomes which is the carrier of genetic information, and used in fingerprinting tests, has burst on the evidence scene as perhaps the single most important advance in the forensic sciences in 50 years. Based on human genetic makeup, the test can match human cells in hair, blood and semen found at the scene of the crime with the cells of a suspect. It is the area of expertise involving the mental process, psychiatric opinion on a person's mental state and in particular the science of hypnosis that this article concerns itself.

This study reviews empirical evidence regarding the reliability of hypnotically induced testimony.

From time immemorial various methods have been used to detect deception. Some primitive ordeals relied on divine intervention to establish guilt or innocence. Current methods are using physiological, psychological and personality proneness tests. Lombroso used a scientific machine to detect deception as early as 1895 in the form of a blood pressure instrument (hydros-phygmograph) on criminal suspects. John Larson developed an instrument in 1921 for recording physiological responses to questioning during an entire examination period. This so-called lie detector has improved substantially over the past 60 years as has the training in interview techniques and the knowledge in psychophysiology and psychology. Introduced in the 1970s was the Psychological Stress Evaluation instrument which is currently used to detect deception by voice analysing. Sodium pentothal and sodium amytal are drugs used to expose deception and establish truth. All are questionable, no method or technique can detect deception in anyone but they can obtain supplementary information on a person's psychological makeup. As controversial as any of the above is the field of investigative hypnosis in law enforcement and the enhancement of memory via hypnosis.

A resolution adopted by the House of Delegates and referred by the Board of Trustees to the Council on Scientific Affairs, called upon the AMA to "study the subject of refreshing recollection by the use of hypnosis of witnesses and victims of crime, and prepare a report on the present scientific status of this matter". This report was prepared by a panel of the Council on Scientific Affairs consisting of Martin T Orne, MD, PhD, Chairman; A David Axelrad, MD; Bernard L Diamond, MD; Melvin A Gravitz, PhD; Abraham Heller, MD; Charles B Mutter, MD; David Spiegel, MD; and Herbert Spiegel, MD. Rogers J Smith, MD, served as Liaison from the Council on Scientific Affairs. Matthew H Erdelyi, PhD, John F Kihlstrom, PhD, and Donald Rossi, PhD, participated as Consultants to the Panel, and John McD Bradford, MB ChB, DFM, participated as a Resource Person. Frederick J Evans, PhD (Society for Clinical and Experimental Hypnosis); Fred H Frankel, MB ChB, DPM (International Society of Hypnosis); and Harold J Wain, PhD (American Society of Clinical Hypnosis) served as Liaisons to the Panel from their respective societies. Janice Hutchinson, MD, was secretary to the Panel. The tasks of the Panel were to evaluate the scientific evidence concerning the effect of hypnosis on memory. The Panel limited its deliberations to hetero-hypnosis (where both a hypnotist and a subject are involved). Self-hypnosis or spontaneous hypnosis may occur. There is anecdotal evidence that memory may be affected by these other hypnotic states. However, there is no empirical evidence with which to evaluate such effects at this time. The Panel did not deal with legal cases nor with questions where no scientific data was available, but rather focused on the effects of hypnosis on memory reports under a variety of conditions. The scientific literature on the following aspects of these questions carefully reviewed:

(1) memory during hypnotic age regression;
(2) hypnotic enhancement of rote memory;
(3) hypnotic enhancement of recognition memory for meaningful and complex material;
(4) hypnotic enhancement of recall memory for meaningful and complex material;
(5) hypnotic enhancement of memory for analogue events;
(6) clinical case and field reports; and
(7) pertinent reviews of the literature.

There was a diversity of views within the Panel. They found that although different theorists account for the phenomena of hypnosis in different ways, there is consensus that these events occur, are real to the subject, and may be utilised clinically.

Hypnotic age regression

Controlled laboratory studies that have attempted in various ways to verify the accuracy of recall in hypnotic age regression have not supported the claims of single case reports. It was the consensus of the Panel that hypnotic age regression is the subjective reliving of earlier experiences as though they were real – which does not necessarily replicate earlier events.

With reference to "hypnotically suggested increased recall", in this the Panel investigated the so-called "television technique" where the subject is told to imagine a television screen in his mind and that he will begin to see a documentary of the events to be remembered with the all the "Zoom in" qualities of the home video. (Of course without the feelings of discomfort that may have occurred at the time.) This is (or was) a common technique used for memory recall. The consensus on this topic was interesting and definite. The "television technique" is not merely presented to the subject as a metaphor, but rather represents a belief of how memory is organised, and is the premise for assuming that hypnosis can actually refresh memory. The author and main proponent of this technique states:

> The subconscious mind is alert and on duty 24 hours a day, seven days a week; it never sleeps. Because the perceptual apparatus works in a cybernetic fashion, much like a giant videotape recorder, the plethora of information perceived by the sensory system is recorded and stored in the brain at a subconscious level.

However, the Panel refuted this and claimed

> The assumption, however, that a process analogous to a multichannel videotape recorder inside the head records all sensory impressions and stores them in their pristine form indefinitely is not consistent with research findings or with current theories of memory.

The Panel stated that when defendants show clear evidence of amnesia, hypnosis may be requested by the defence. In occasional cases hypnosis has yielded important information that was later corroborated by physical evidence as in the case of *State v Staggers*.

Harding v State of Maryland (1968) was the watershed case in the United States, in the admissibility of hypnotically influenced testimony. The defendant James Harding was convicted in the Criminal Court of Baltimore, of assault with intent to rape and assault with intent to murder. Unable to recall anything after being shot and raped, a young woman did describe and identify her assailant under hypnosis. In the Court of Special Appeals, Thompson J held that the man who induced the hypnosis was a professional psychologist who testified that there was no reason to doubt the truth of the witness's statement. Relevant points arising from *Harding* are:

> Admission of expert testimony is primarily a matter for the trial Judge to decide.

> Formal training is unnecessary to qualify a witness as expert so long as record demonstrates that the witness is not possessed of any knowledge or information which would elevate his opinion above the level of conjecture or personal reaction.

> Where prosecuting witness in prosecution for assault with intent to rape and assault with intent to murder stated that she was reciting facts from her own recollections, the fact that she told different stories or had achieved her knowledge after being hypnotised affected her credibility but not the admissibility of her testimony.

Several cases subsequently adopted the *Harding* position of complete admissibility. The line between such cases and those which hold hypnotically influenced testimony as inadmissible is the *Frye* test. This rule requires that a scientific procedure or technique must have gained general acceptance in its particular field before the result of that procedure is admissible in Court.

***Frye* test**

The *Frye* test is a general test for the admissibility of scientific techniques which originated in *Frye v United States*. *Frye* involved expert testimony based on the results of an early type of polygraph test. *Frye* held that before a Court can admit expert testimony deduced from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field in which it belongs. In the case of *State of Minnesota v Mack* the Court stated – "This Court has relied on *Frye* in repeatedly ruling inadmissible results of polygraph tests". *State v Kolandes, State v Goblirsch, State v Hill, State v Wakefield, State ex rel, Trimble v Hedman*: these cases held that spectograph results, or "voiceprints" meet the standard of scientific reliability necessary for admissibility under *Frye*.

State v Mack was the first major case to apply the *Frye* test, and on the basis it ruled that hypnotic evidence was inadmissible. Several Courts have reached similar decisions, but there is a middle ground between the *Mack* and the *Harding* approaches. The Court in *State v Hurd* ruled hypnotically influenced testimony was admissible if it complied with certain standards regarding reliability.

In the United States around the 1970s hypnosis was used extensively in criminal investigations, and with some success. Because it could not always be relied on, Courts in various states had to address the problem of admissibility of testimony of witnesses hypnotised prior to trial. The decisions of the admissibility varied from limited admissibility to complete exclusion.

In *Greenfield v Commonwealth* the Court, utilising a *Frye* analysis, ruled hypnotic evidence not admissible in a criminal prosecution.

Under the *Frye* rule, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate. The *Mack* Court said that

> although hypnotically-adduced "memory" is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable in that context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of memory, is truth, falsehood, or confabulation – a filling of gaps with fantasy. Such results are not scientifically reliable as accurate.

The evidentiary approach to the Frye rule

The *Frye* test is misplaced in its application to hypnotically influenced testimony. *Frye* had to access the credibility of expert testimony gained from a scientific instrument. That such credibility should be sufficiently established to have gained general acceptance in the field to which it belongs. The early type of polygraph had gained no such acceptance and therefore the results deduced from this scientific technique were not admissible. This test when applied to a scientific technique, is an acceptable one for the admissibility of testimony deriving from it. However the admissibility of hypnotically influenced testimony is usually concerned with eye witness testimony and not the work or otherwise of a machine. Hypnosis is not meant to be an instrument of truth, whereas the polygraph and voice-analysis is. When hypnosis is used in criminal trials or criminal investigation it is to enhance memory recall, it is not meant to be a truth elicitor and should not be judged by the standards requiring such results. It is the finder of fact who is the determiner of truth in criminal trials, the hypnotically influenced testimony will either aid or distract from that finding, depending upon the circumstances involved.

McCormick on Evidence argues that the *Frye* test should be discarded entirely. He states

> General scientific acceptance is a proper condition for taking notice of scientific facts but not a criterion for the admissibility of scientific evidence. Scientific evidence should be received unless its admission creates evidentiary dangers such as undue prejudice, misleading the jury, or excessive consumption of time. This approach does have merit in utilising scientific advances and is more compatible with the statutory Rules of Evidence.

There is a crucial distinction between the use of hypnosis as a means of enhancing the recollection of a witness and the use of the polygraph or narco-analysis. The latter are generally used to demonstrate the subject is lying or to extract the truth. That has been the goal of hypnosis. Its purpose is to revive the witness's memory or to sharpen recall. Therefore, testing the reliablity of hypnosis as a means of finding the truth is inappropriate.

The case of *State ex rel Trimble v Hedman* where voiceprints were considered, and placed hypnotically refreshed memory in the same category. Then upon applying the *Frye* test to such testimony, the Court concluded that hypnotic evidence failed to meet the standard of reliability. Several Courts have adopted the reasoning of *Mack*.

In order to determine whether hypnotically influenced testimony should be admitted in criminal trials in New Zealand Courts, it is necessary to understand what we can of hypnosis. While much has been written about the unreliability of hypnosis there is much to commend it. Its effectiveness in some areas can produce results that cannot be obtained in any other way. A blanket inadmissibility to the testimony of anyone who has been hypnotised would be regrettable. Its risks should be weighed by its possible value particularly in the medico-legal areas. For example it has been used successfully in cases of amnesia where the results have been to the benefit of both the law and medicine. It is not irrelevant to the topic to look at how psychiatrists and psychologists have used hypnosis for the relief of pain in a dramatic way.

Janet Seles, an American housewife, in 1962 became the subject of a now famous medical film. Janet was preparing to have a baby by caesarean surgery using only hypnosis to control pain. Mrs Seles could not have her baby without caesarean surgery. She was also allergic to anaesthetics. Her doctors felt that her only chance was to use hypnosis for pain control. The baby was born safely and Mrs Seles says she felt no discomfort.

Doctors filmed one of Janet's caesarean operations because they wished to convince sceptical medical colleagues that psychological techniques had a place in pain control. There were no pain killing drugs used in the operations.

Today hypnosis is endorsed by the British and American Medical Associations but there is still no generally accepted theory to explain it.

Amnesia

In retrograde amnesia, where an individual is in a fugue state, hypnosis has successfully been used to lift the amnesia and recover the split of memories. Altered states of consciousness have been examined by Fischer who identified an area of amnesia between a state of intoxication and one of sobriety. He postulated that the recovery of memory from any specific state or level involves the particular spatio-temporal neuronal-synoptic firing pattern that prevailed during the initial experience, and that this must be reinstated. In the same way, Fischer believes that amnesia may follow a violent crime.

Studies have been made on victims of crime and violence which report that victims of crime and some witnesses are often severely traumatised, leading to the use of the defences of denial, disassociation, and repression; which means that the need to ward off the unpleasant memories results in the conscious forgetting of crime details important to the investigation. In these case investigative hypnosis interviewing is the method of choice.

Hypnosis and the child witness

The child witness is usually unwilling to testify and often so confused by the proceedings, that the child is incapable of communicating its knowledge to the Court, resulting in memory loss or inability to

communicate. One of the reasons that some jurisdictions disallow hypnotically refreshed recollection is the fear that the testimony will be tainted by suggestion and therefore based on fantasy. Many standard techniques in trial preparation with children, already do these things, and yet they are accepted as standard practice. Dr Loftus points out that even under ordinary questioning the witness's recollection and the way a question is worded will be integrated to affect how a witness remembers an event. With a child witness who is very often the only person available who knows the facts, it is better to face the danger of hypnotic procedure under specified guidelines, than to abandon the chance to find out what the child knows.

Substantial work has been achieved in developing methods of interviewing and evaluating the testimony of victims of sexual abuse by Professor Udo Undeutsch of the University of Cologne, Federal Republic of Germany and Professor Arne Trankell, head of the Laboratory of Witness Psychology at the University of Stockholm, Sweden. They have studied the testimony of thousands of cases and their systems are similar. Undeutsch's approach is to solicit testimony in a careful manner. The account has to fit the cognitive abilities of the informant with respect to perception, understanding and powers of recollection. Undeutsch tests the veracity of the text of the testimony rather than judging the overall truthfulness of the informant. Individuals with reputations for telling the truth may have the most to gain by careful lying. Undeutsch is concerned how the testimony develops over several interviews.

A particularly horrific crime is recorded in the United States of *People v Singleton* 1980. A man driving a van in Northern California picked up a 15-year-old girl hitchhiker. After tying her up and sexually abusing and raping her, he then chopped off both her forearms with an axe. He then stuffed her into a highway drainage tunnel. After he had gone, the victim crawled out, stopped a passing vehicle, and was taken to hospital. Because of her highly traumatised state, she was only able to recall limited details of the suspect and the events. Later, during a hypnosis session, the victim was able to recall the suspect's name, his occupation, and other items of the conversation. She described the vehicle and also was able to assist the police artist in the construction of a composite drawing. This information was subsequently corroborated by physical evidence and other witnesses, which led to the conviction of the criminal.

In the infamous US case *Hatton*, 1978; *People v Woods et al,* 1977, in Chowchilla, California, 26 children and the driver of their school bus were kidnapped at gunpoint by three masked men. They were taken to a quarry and buried six feet underground. Later they were able to dig themselves out and were rescued. Questioning by the Federal Bureau of Investigation could not elicit specific descriptions of the suspects or other pertinent information. The bus driver Ed Ray, agreed to a hypnosis interview and was able to recall all but one digit of the licence plate on the suspect's white van. Owing to the hypnosis of the bus driver, three males were apprehended and subsequently convicted of the crime. These facts are well documented. Again this case could not have been concluded without the use of hypnosis.

The hypothesis claimed by some researchers is that hypnosis can enhance recall when the original learning state is recreated. The hypothesis is supported by cases where witnesses intoxicated by drugs or alcohol during the crime event, fail to recall the event when questioned by detectives. During hypnosis interviews they remember the events in some detail. Hilgard's concept of the hidden observer is confirmed by such cases. Hilgard's concept proposed that the observing portion of the ego remains aware of what is happening in the real world regardless of the level of regression experienced by the hypnotised subject and that information is processed at conscious and subconscious levels simultaneously. (Hilgard ER (1977) *Divided Consciousness: Multiple Controls In Human Thought and Action*. New York, Wiley-Interscience.)

One of the most important cases regarding investigative hypnosis in the history of the United States Supreme Court is the case of *Rock v Arkansas* [1987]! An interesting facet of the case is that it represented a reversal of the normal situation. Whereas, usually, hypnosis-related cases have the defence protesting its admission and the prosecution supporting it, in *Rock*, it was the defence supporting and the prosecution condemning it. In *Rock* the defence attempted to introduce testimony based on information recalled by the defendant under hypnosis. The trial Court ruled the information inadmissible, citing *Shirley* (1982)[2] as precedent, which is interesting, since that decision exempted defendants such as Vicki Lorene Rock. She was convicted and sentenced to ten years in prison and fined ten thousand dollars. The Arkansas Supreme Court upheld the conviction, duplicating the trial Court's error of not admitting the post-hypnotic recall of a defendant. That set the stage for an appeal to the highest Court in the land on the basis of denial of due process under the Fifth, Sixth and Fourteenth Amendments to the Constitution. Although the Court had previously managed to sidestep making a decision on cases involving hypnosis, the question of due process was so strong in *Rock* they opted to hear the appeal. The Court ruled in favour of the defendant and, in so doing, stated that standard cross-examination techniques are effective even in the face of a confident witness, that a state can establish guidelines governing hypnotic examinations, that expert testimony can be provided to answer questions about hypnosis and that juries can be given cautionary instructions. They also pointed out that evidentiary hearings by trial Judges can eliminate any obviously unreliable information.

A review of the United States Federal and State Appellate Court decisions are given below.

The variance in treatments by these Courts can best be analysed by grouping their decision into four categories:

1 Prior hypnosis affecting credibility not admissibility;
2 Admissibility of post hypnotic testimony contingent upon a showing of reliability;
3 Inadmissibility of any testimony based on hypnotic recall but permitting testimony relating to events recalled prior to hypnosis;
4 Absolute bar to admissibility.

Credibility not admissibility

The 1968 case of *Harding v State* (supra) comes under this category. The trial Judge allowed the case to go

to the jury in its entirety with the following precautionary statement:

> You have heard, during this trial, that a portion of the testimony of the presenting witness, Mrs Coley, was recalled by her as a result of her being placed under hypnosis. The phenomenon commonly known as hypnosis has been explained to you during this trial. I advise you to weigh this testimony carefully. Do not place any greater weight on this portion of Mrs Coley's testimony than on any other testimony that you have heard during this trial. Remember, you are the judges of the weight and the believability of all the evidence in this case.

The Maryland Court of Special Appeals upheld the defendant's conviction finding that the post-hypnotic testimony of the prosecuting witness was sufficient to support that verdict.

Admissibility contingent upon reliability

In this standard of limited admissibility, the Courts recognise the inherent problems in the hypnotic process, holding that its admissibility is contingent upon showing that the hypnotically refreshed recall is reliable. It is more or less a balancing test of its probative value against possible confusion of issues and unfair prejudice.

Hypnotically induced recall inadmissible

In this third category, some Courts are holding that the probative value of hypnotically induced recall is outweighed by the danger of prejudice. Their analysis is based (quite wrongly in the opinion of the writer) on the *Frye* test. — *Frye v United States* 1923.

Conclusion

Hypnosis has come to be seen as a two-edged sword. An example of its usefulness can be demonstrated in the American case of *People v Barbosa* 1977. It involved the kidnapping and rape of two girls aged 7 and 12. In the waking state, the victims' memories could not provide any substantial leads. With hypnosis, however the older girl remembered rust spot patterns on the perpetrator's car; details of articles in the car; and a transaction between the abductor and a repairman at a San Diego gas station, including use of a "red, white and blue credit card" for repairs. When the FBI apprehended the kidnapper, they confirmed the details of the girl's hypnotically refreshed memory. Also in the case of *People v Woods*, 1977 (supra) where a school bus was hijacked and twenty-six children and the bus driver were abducted at gun point and imprisoned in vans in an underground tomb in a remote quarry. After everyone had escaped, the bus driver questioned in his normal waking state was unable to recall sufficient details to help the police. With hypnotic retrieval of memory he was able to remember all but one digit of the licence plate and provide the police with the lead they needed to catch the kidnappers.

Professor Orne is one of the therapists who is a frequent expert witness in the use of hypnotically induced testimony in Courts. He has set up guidelines for its use in Court, and accepts hypnosis as an investigative tool in police work. However he is not an advocate of its use in the Court scene. He characterises hypnosis as a subject's increased responsiveness to the experience of alterations in perception memory, or mood. Dr Orne says the only way police will be able to use this tool is if they have really tough safeguards and the FBI for example have adopted these safeguards and so has the Federal Government in general.

> They use hypnosis, they use it effectively, successfully and it doesn't interfere.

Interviewer: "But presumably with your experience you would have no need of using the safeguard of a videotape?"

Dr Orne: "On the contrary I would never trust myself to be certain what happened because I tend to pay very close attention to what the subject does and I don't watch every thing which I do as carefully as I might because I am focusing on the subject therefore I have got to study the videotape in order to know what went on between the subject and myself otherwise I can't be certain as to what the subject did on his own and what I might have inadvertently helped him to do or remember."

Interviewer: "So what is at stake here?"

Dr Orne: "If you do not use the safeguards, if you are not careful, it will inevitably deprive the authorities [of] the use of hypnosis because it will lead to a miscarriage of justice."

The problem is, with frequent Court appearances as expert witnesses who continue to testify, they can be perceived as having a theory to sell. Not all writers accept this "hypersuggestibility" model and do not consider hypersuggestibility to be a necessary characteristic of a trance. It is true that hypnosis does not always exactly reproduce events of the past, but neither does waking memory. Shapiro suggests that highly susceptible subjects in a trance state can provide clearly superior recall. Most writers in this area contend that any significant hypermnesia reported for hypnotised subjects is found in highly susceptible individuals who enter a deep state of hypnosis during the remembrance phase of the studies. The clinical experience of Shapiro and Scheflin has found that amnesia victims of alleged crimes who show low levels of hypnotisability have not demonstrated hypermnesia for the events.

Hypermnesia is the ability to recall events in greater detail than at non hypnotic levels of awareness and it is generally believed that depth of trance is an important factor in hypnotic hypermnesia. In clinical studies it does seem important to measure trance depth but obtaining empirical data is not easy to measure and difficult to compare.

New Zealand case

The only New Zealand Court of Appeal case to date on the use of hypnotically induced testimony, is the case of *The Queen v Paul Francis McFelin and Karen May McFelin* [1985] 2 NZLR 750. From 20 February 1984 to 23 March 1984 the two appellants, who are brother and sister, stood trial before Hillyer J and jury in the High Court at Timaru on charges arising from the kidnapping of a 14-year-old girl, Gloria Kong, from her home near Oamaru on 29 June 1983. The trial resulted in convictions on all charges, namely:

1 That on 20 June 1983 both accused broke and entered the house of her father, James Kong, with intent to commit a crime therein.

2 That on the same day Paul McFelin being armed with offensive weapons, namely a shotgun and a .22 calibre rifle, robbed Mr Kong.
3 That on the same day, by violent means, both accused rendered Mr Kong and others incapable of resistance with intent to facilitate the kidnapping for ransom of Gloria Kong.
4 That on the same day they converted Mr Kong's Commodore car.
5 That between 29 June and 1 July 1983 at places near and in Oamaru they unlawfully detained Gloria Kong without her consent, with intent to hold her for ransom.

Referring to the guidelines for the admissibility of hypnotically induced testimony, the Court of Appeal of New Zealand in their judgment 6 August 1985 in *McFelin* said

> It would be premature at this stage for us to select any particular set of guidelines for use by New Zealand Courts. Still less should we try to evolve a new set. We would welcome any move, perhaps on the initiative of the Minister of Justice, to reach a consensus between all the various responsible scientific and medical bodies. Any standards so agreed could be used, if approved by the Courts, much as the Judges' Rules are used as regards confessions.

There still is an absence of statute law on this question of admissibility in New Zealand. The *McFelin* case does not establish a suitable precedent for our case law in New Zealand, because in the *McFelin* case the Crown had sufficient evidence against the accused, irrespective of the evidence of the witness who was hypnotised. Therefore it was unnecessary to attempt any comprehensive ruling on post-hypnotic evidence.

As David Spiegel, MD, Stanford, California put it

> one need but see one patient who develops a traumatic amnesia; a rape victim who has no memory at all that the crime occurred even though she was fully conscious at the time. Hypnotised she goes back in time to the period just before the rape and suddenly, with vivid and painful detail, relives the assault as if it were occurring again. The whole walled-off, or disassociated body of memories becomes available. This warded-off material is accessed through the formal use of hypnosis, a state of intense, focused concentration with a relative suspension of peripheral awareness. Now the victim can give a vivid description of the circumstances of the alleged crime.

Can a phenomenon that can be so powerful in such a setting be easily dismissed?

As recently as June 28 1993, the United States Supreme Court ruled in *Daubert v Merrell Dow Pharmaceuticals Inc* that the *Frye* standard has been superseded by the legislatively enacted Federal Rules of Evidence for Federal Courts. The Rule specifically states that all evidence is relevant and, therefore, admissible and it is for the trier of fact to determine its credibility.

The absence of guidelines in statute law in New Zealand could put the police in a dilemma. There is no doubt of the value of hypnosis as an investigative tool. The police however do not know that by using hypnosis as an investigative tool to develop leads to solve crimes, the witness so hypnotised may not then be qualified to testify.

The right to hypnotise

The absence of guidelines further confuses the controversy as to who may lawfully utilise hypnosis. Should police officers trained in hypnosis but untrained in psychology be permitted to employ the hypnotic procedures with witnesses and victims? Should this work be carried out only by neutral, impartial mental health professionals? In the debate over forensic hypnosis, when the law approached mental health professionals expecting clear information in a consistent voice, it heard diversity and stridency instead. When the debate turned acrimonious, the mental health community was further divided; clinicians were left without satisfactory guidelines and clients were left with their mental health and legal rights in peril. The law was led into confusing and sometimes unjust rulings, occasionally under the influence of individuals taking extreme positions on every side of the question. Professional therapists argue that the police are inadequately trained to be aware of such problems as confabulation, excessive suggestion, accuracy of recall, and deception in a trance state. Police organisations, on the other hand, insist that they are better trained for investigative hypnosis work than mental health practitioners who have no training in criminal investigation and interrogation.

It has become obvious to the writer that not all professional therapists are aware of the dangers and pitfalls of hypnotically refreshed testimony or of its admissibility in Court.

Another factor is that regardless of hypnotic procedures, hypnosis is a skill, and various hypnotists, be they police trained or those with professional therapy credentials, will produce variable results.

This paper sugggests that the important requirement is experience, that in New Zealand, this work should be carried out by a chosen few, perhaps one selected by the school of medicine and one expert from the Police.

The New Scotland Yard has produced guidelines for the use of hypnosis in police investigation some time ago. One of the requirements was:

> An officer wishing to use the scheme will firstly consult with his Detective Chief Superintendent who having been satisfied as to the seriousness of the offence and the suitability and willingness of the witness will contact C5 Branch (either the Detective Chief Superintendent or the Detective Chief Inspector.)

On Friday May 10, 1994 the English Court of Appeal quashed the conviction in November 1989 of Eddie Browning because the police failed to release a video to the defence, of an eye-witness who was undergoing hypnosis, to recall details of the event. In the criteria laid down for the use of hypnosis by Scotland Yard, it is police practice that:

> The fact that hypnosis was used will be mentioned in any report made to Solicitors Department or the Director of Public Prosecutions and all statements taken will be attached.

This case is analogous with the *McFelin* case, where the New Zealand

Court of Appeal likewise ruled that evidence obtained under hypnosis must be released to the defence.

The case of Eddie Browning did not address the admissibility of hypnotically induced testimony.

The editorial of the *New Law Journal*, May 20 1994, discusses the case and mentions the television technique. This technique referred to earlier, is outdated and not used by competent hypnotherapists. The editorial also emphasises the need for guidelines and states that

> The Home Office must now further promulgate its 1987 guidelines more fully. It is not surprising there are difficulties for the police officers and evidence is excluded, if forces act without the benefit of any clear guidelines. This is good for no one – defendant, witness, police or victim.

The *McFelin* case in New Zealand drew criticism from the Court of Appeal when it stated: "This Court was concerned at the failure to disclose to the defence that Gloria had been hypnotised." The Court of Appeal also stated that

> It will be apparent from what we have said that while hypnotism may occasionally be valuable, even essential, as an investigative technique, its use on a potential witness should never be embarked upon without careful consideration of the evidential risks. What we have said has necessarily been concerned with hypnotism of Crown witnesses. In general, however, the same approach must apply as regards defence witnesses.

It is recommended that the following guidelines be incorporated into statute law, to deal with the admissibility of hypnotically induced testimony in New Zealand.

1 The Prosecution must disclose to the defence in due time that they intend to introduce hypnotically induced testimony.
2 The hypnotist should be an impartial expert who has had training in both the clinical use of hypnosis and in its forensic applications.
3 The expert ideally should know little or nothing of the case. The necessary information should be given orally to the hypnotist by individuals involved directly in the case.
4 The hypnotic session between the witness or victim should be videotaped, showing both the hypnotist and the subject in the picture.
5 A clock with a second hand should be in the picture where it is practicable. The absence of such should not rule against its admissibility.
6 Only the hypnotist and subject shall be present during the session.
7 A full written, informed consent for the procedure is required before the session commences.
8 The hypnotists should endeavour to obtain a free narrative flow, and avoid interrupting to elicit the needed details.
9 The waking interrogation of a previously hypnotised witness must be audiotaped or videotaped. It may be possible that a witness who has been hypnotised, may later become a suspect. Because of the voluntary rule in confessions, it is important that the interrogator did not capitalise on a more vulnerable state of the witness due to his previous hypnosis.
10 A record shall be made prior to hypnosis documenting the subject's description of the event.
11 The testimony should be limited to those matters to which the witness related to prior to the hypnosis.
12 The hypnotist did not so affect the witness as to substantially impair or make unreliable the ability to be cross-examined concerning the witness's pre-hypnosis recollection.
13 Nothing in this section shall be constructed to limit the ability of a defence counsel or the prosecution to attack the credibility of the witness who has undergone hypnosis. □

1 107, SCt 2704, 2713, 97 L Ed 2d 37 [1987].
2 (1982) 31 Cal 3d 18, 181 Cal Rptr 243, 723P 2d 1354.

Hypnosis and evidence

Last Friday [13 May 1994] the Court of Appeal quashed the conviction in November 1989 of the former night club bouncer Eddie Browning for the killing of Marie Wilks. The decision of their Lordships unfortunately did not need to go to the heart of the problem – whether or not a Court should ever accept the testimony of a previously hypnotised witness.

On June 18, 1988 Mrs Wilks was brutally murdered after her car broke down on the M50 near Bushley. . . . The Court of Appeal ruled that a video of an eye-witness who had driven past the murder scene should have been released to the defence. The video was of an off-duty police inspector attempting, under hypnosis, to recall the details of the car he had seen pulling on to a hard shoulder. He recalled a non-hatchback Renault with a completely different number plate from that of Mr Browning, whose Renault was a hatchback. The officer, Inspector Clarke, later gave evidence. It really is difficult to see how it was thought that the video tape of Inspector Clarke was not relevant to the case and so was kept from the defence. Reading a report of the Court of Appeal's decision, it seems the fault for this lies with the senior officer in the case but unfortunately it highlights yet again how evidence can fail to cross the bridge between the police and the CPS [the Crown Prosecution Service].

However, the real problem which this case highlights is the use of a previously hypnotised witness in giving evidence. We had thought – obviously wrongly – that following a disaster at a trial in 1987, this practice effectively had been discontinued. Clearly we were wrong . . . .

From time to time, it may be essential for the police to ask a witness if he or she is prepared to be hypnotised so that they try to obtain a lead of some kind. When this is the case, that witness should be sacrificed. He or she should not be allowed to give testimony of any kind. It may be that this will itself cause hardship but trials both in America and here have shown too often that the use of hypnotised witnesses leads to miscarriages of justice. The Home Office knows of these dangers and should act to prevent then re-occurring.

Editorial comment
New Law Journal
p 661, 20 May 1994

Deconstruction and jurisprudence

The following extract is taken from a review by the American Judge and jurist ***Richard A Posner*** *of the book* There's No Such Thing As Free Speech And It's A Good Thing Too *by Stanley Fish the well known academic deconstructor of literary texts. The review appeared in the* Times Literary Supplement *of 15 July 1994.*

Fish famously believes that all intellectual activity is rhetoric; but rhetoric is usually understood to mean *persuasive* speech; and the "ethical appeal" – making the speaker seem the type of person likely to tell the truth – is one of its most important devices. Yet the impression of himself that Fish conveys is of someone who wants to be noticed (there are two pictures of him on the dust-jacket), not necessarily believed, or even taken seriously. . . . He calls himself a "contemporary sophist", and adds, "I don't have any principles." I believe him.

Fish has no principles because he thinks, in a parody of Wittgenstein, that theory can have no effect on practice. For Fish, every area of human activity is a game that has, like chess, rigid rules. You could have a theory about chess – about its origins, its fascination, even how it might be improved by a change in its rules. But you could not use the theory in playing chess. When you play chess you play by its rules, not theory's rules. So jurisprudence or legal theory could not be expected to alter the way judges decide cases, Fish argues, because judges play the judging game, which has its own rules. The theory game and the practice game never intersect.

Never? The rules of the judicial game are much looser than those of chess, and theoretical insights and perspectives can alter the rules – can make them more like those of economics, say, or of social science generally, or of moral reasoning, or, as used to be the legal profession's aspiration, of logic. Fish does not allow this to be possible because he thinks that judges make decisions *only* on *ad hoc* political grounds and *always* conceal their political ad hocery in a deceptive rhetoric of rule and principle. He offers the following examples of how legal rules are emptied of meaning so that the judges can do justice on a retail basis, uncabined by rules. According to the parol evidence rule, if a written contract recites that it is the complete agreement between the parties the Court will not listen to testimony that contradicts the written agreement. This so-called rule is phoney, argues Fish, because, for example, the Court *will* hear evidence that the trade to which the contract pertains (maritime shipping, cotton factoring whatever) attaches a special meaning to certain words used in the contract, a meaning that would not be apparent to an outsider. So, says Fish, the parties are allowed to contradict the written contract after all. A vital distinction is overlooked. Trade usage can be established by disinterested testimony to a reasonable degree of certainty. To consult trade usage is like consulting a dictionary. The concern behind the parol evidence rule is that written contracts would mean little if a party could try to persuade a jury that while the contract said *X*, the parties have actually agreed, without telling anybody or writing anything down, that the deal was *Y*.

Fish makes a similar mistake in arguing that the doctrine of consideration – a promise will not be enforced unless the promisor has received a reciprocal promise or some other benefit – is fake. He points out that promises are often enforced when the promisor had *already* received the benefit from the promisee. The promisee might have rescued the promisor and been injured in the process. If the rescued person promises for the first time *after* the rescue to compensate the rescuer for his injuries, and thus receives nothing in return *for the promise*, how can the promise be thought to be supported by consideration. Well, consider why there is a doctrine of consideration? Like the parol evidence rule, it reduces the likelihood of phoney contract claims. In the rescue case, which is emblematic of the "past" or "moral" consideration cases that Fish considers doctrinally aberrant, the likelihood that the promise was in fact made is high, so a wider mesh for straining out phoney claims is appropriate.

The rules of law, though fraudulent, are indispensable, Fish argues, because "the law's job [is] to give us ways of redescribing limited partisan programs so that they can be presented as the natural outcomes of abstract impersonal imperatives". But many highly respected judges have been notably candid about the large element of discretion in law. The lay public understands that law is part of the political fabric of society . . . .

The judges' pretence that they can detach themselves from their own values and preferences is at one, Fish argues, with the liberal pretence that the state can and should be neutral among rival world-views. In the essay "Liberalism Doesn't Exist", Fish argues that liberalism is just another ideology and every ideology must rest on a fundamental conception of what the world is like – the scientific conception, for example, or the religious conception . . . .

Though wrong that theory and practice never intersect, Fish is right that often they do not. As Wittgenstein taught us in *On Certainty,* believing that all knowledge is contextual does not enable one effortlessly to shuck one's own contexts. Fish is also right that the judicial game is different from the philosophy game, so that jurisprudes who believe that the problem with judges is that they are not good philosophers are barking up the wrong tree. He is right that interpretation is something we can do competently without having a theory about it, and that theories of interpretation are unlikely to affect the practice of interpretation. But he misunderstands the stakes in legal debates over "originalism" and other interpretive theories. As with the parol evidence rule and the doctrine of past consideration, the issue is what evidence shall be admissible in the resolution of particular types of dispute. Not all debates in legal theory are, as Fish would have it, the product of semantic confusion.

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