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The legal system at risk

Contempt of Court is described in the relevant title of *The Laws of New Zealand* as having been developed by the Courts to ensure a fair trial and to sustain public confidence in the administration of justice, (*Laws NZ*, Contempt of Court para 4).

It would seem that no one has been sentenced to imprisonment for contempt since 1968 when Jack Stuart Wiseman, an Auckland practitioner was imprisoned for three months in respect of affidavits he had filed in Court proceedings in which he was a party. North P in the judgment of the Court of Appeal in *re Wiseman* [1969] NZLR 55 at p 58 said that in these affidavits the

> violent accusations against the Judges who heard the cases in which the respondent was a party, clearly impute the most improper motives to the late Gresson J, Hardie Boys J and, to a measure, also to Woodhouse J. It is quite impossible to regard these statements as being within the widest limits of legitimate criticism and, in our opinion, clearly have the tendency to lower the authority of the Courts and to reflect on the integrity, propriety and impartiality of the Judges. We have no doubt whatever that this respondent must be convicted of contempt of Court in respect of the statements made and published by him.

There is a useful survey by Professor J F Burrows of the latest case law in the area of Contempt, including decisions in England and Australia as well as here, in *New Zealand Recent Law* [1994] Part III at p 287 under the general heading of media law. The overriding test as expressed at p 288 may not be quite accurate, as would seem to be indicated later in the article itself in discussing the decision of the High Court of Australia in *R v Glennon* (1992) 106 ALR 177. One might also question the decision of Hammond J in *Mwai v Television NZ Ltd* (High Court, Auckland, CP 630/93, 19 October 1993) referred to in the article and to suggest with respect that perhaps His Honour had been infected by the television immediacy virus during his North American sojourn. One has only to consider how our Courts would (or perhaps will soon have to) deal with a New Zealand case similar in terms of media interest to the O J Simpson case before that trial has even commenced.

At pp 287-288 Professor Burrows refers particularly to sub judice contempt as follows:

> It is a long time since proceedings have been successfully instituted in New Zealand for contempt of court in respect of matter published while a case is sub judice. Yet the law on contempt of this kind has not evaporated, as some would like to think. Judges, and the Solicitor-General, occasionally warn that there is still a line which must not be over-stepped. Robertson J recently criticized "a developing view that while cases are under consideration by the court, no restraint is any longer necessary on the part of those commenting on them": *North Shore City Council v Waitemata Electric Power Board* (HC Auckland, CP 88/93, 12 May 1993 (conference minute)).

A very recent case, *Solicitor-General v Wellington Newspapers and others* (unreported, High Court, Wellington, CP 17/94, 30 September 1994, Eichelbaum CJ and McGechan J), illustrates again the importance of this branch of the law in maintaining the integrity of the legal system. In this case a John Gillies was arrested on a charge of aggravated wounding arising out of an altercation involving a police officer who suffered serious spinal injuries. The police issued a media release with a photograph of the suspect only hours before he was in fact arrested. It transpired that the accused was on bail at the time. Various newspapers and Radio New Zealand made an issue of this, with the complicity to some extent of police officers, before Gillies had even entered a plea to the charge. The newspaper and radio accounts need not be detailed here.

The judgment of Eichelbaum CJ opens with a particularly clear expression of the nature and purpose of the Contempt of Court proceedings. The Chief Justice said:

> As to the legal principles, the onus is on the Solicitor-General to prove the case beyond reasonable doubt. To establish contempt he has to show that as a matter of practical reality the actions of the particular respondent caused a real risk, as distinct from a remote possibility,

of interference with the administration of justice; here, specifically, interference with a fair trial. Risk is assessed not by the actual outcome but by the tendency of the publication, although subsequent events may form part of the evidence. While the meaning of publications is decided by the impression made on the hypothetical ordinary reasonable reader (or, in the case of radio, listener) the tendency is assessed by the Court.

Since the expression "contempt of court" can raise misleading perceptions it is desirable to commence with some general remarks as to the concept. In cases of the present kind it is not the dignity of the Court which is involved or offended, the point is the preservation of an impartial and effective system of justice. The particular facet in issue here is to maintain the right of accused persons to a trial before a jury free of bias and preconception whose decision will be based only upon facts that have been proved in evidence adduced in the course of the trial in accordance with the recognised rules and procedures of courts of law. See *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 309, *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 229 and *Solicitor-General v Radio New Zealand Ltd*]1994] 1 NZLR 48, 53.

In an era when these principles are frequently threatened by the conduct of politicians, police and media it is desirable not only to re-emphasise them but to underline that they exist and exist solely to preserve the prerogative of the ordinary citizen to a fair, effective and impartial justice system. This fundamental right applies across the board to all, including those whom the police may believe in advance to be guilty. In an era of rampant crime the public may not care overmuch about the refinements of a fair trial for those they believe deserve punishment but that attitude if unchecked will destroy the right to impartial justice. If Joe Public is accused of an offence of which he believes he is innocent he will not wish to be tried in the media. When charges are laid in court the public must be assured the issues will be decided in the courts and nowhere else.

This statement calls for little comment. Perhaps the most unhappy aspect of the reference the Chief Justice was constrained to make was to have to include politicians and the police alongside the media as those whose conduct frequently threatens the preservation of an impartial and effective system of justice.

A new problem is now becoming clear. It is the tendency for a post-trial television retrial in which convicted criminals, and their supporters, are interviewed to give an obviously one-sided argument. It may be that in the near future the Court of Appeal will be put in a most difficult position by this public retrial development. It is analogous to the situation the Solicitor-General was put in recently, by a Member of Parliament and the media, over deciding on whether to appeal a name suppression order. No matter how responsibly and impartially the Solicitor-General made his decision to appeal, the *appearances* are that the decision was politically motivated. The Solicitor-General is in a no-win situation in a case like this; and when the issue has been made a political one the decision should perhaps more properly be left to the Attorney-General with all the political consequences that would flow from that. The Solicitor-General's independence and impartiality as a legal officer of the Crown also needs to be protected from public misunderstanding.

Sadly some members of the legal profession who should know better were recently inveigled into what is in effect a denigration of the judicial system by anonymous highly personal criticisms of practically all of the Judges of the High Court and Court of Appeal. That Judges are human is not only obvious, but just as well. The idea of inhuman Judges does not appeal as a prospect. But the short, sharp comments that were published, when taken together, were not only damaging in their impact but in many cases were simply untrue; and in the other cases were so unbalanced as to be grossly misleading as regards the discharge by the Judges of their judicial functions. It may be that the pieces published were unfairly selected out of context from what the individual interviewees said, but none of them appears since to have made even that excuse — not even anonymously.

The role and function of Judges is notoriously a sore point with politicians. This is true throughout the Common Law world. The issue is a basic constitutional one as is illustrated by the article of Sir Robin Cooke, published at [1994] NZLJ 361, in which he considers a decision of the Supreme Court of India on the question of judicial appointments.

Justice Michael Kirby, President of the Court of Appeal of New South Wales touched on the issue of attacks on the judiciary in his address on 27 September 1994 to the Fifth International Criminal Law Congress in Sydney. His Honour was particularly concerned with this phenomenon as shown in the media. In the course of his address, which is published in full in this issue at [1994] NZLJ 365, His Honour referred to what he called "the power thing". He expressed it as follows:

> Finally there is the power thing. I mentioned this in my speech at a seminar on the media and the judiciary in Madrid in January. Pull down the Queen. Pursue the trivial sexual peccadillos of the President. Disparage the churches. Belittle the universities. Laugh at the Parliamentarians. Attack the judges. What will then be left in our society to stand up for the good and the right and the true? You have it. Only the media.
>
> The power of the media — which now stretches globally into every nook and cranny of the earth's surface — has expanded beyond its sense of responsibility. It has outstripped effective legal national regulation. To a large extent it sets the public agenda.

This last point about setting the public agenda was acknowledged recently by David Lange in a newspaper column when he applied it to politicians. Effectively politicians do not so much make news as respond to and react to those issues that the news media determine.

In relation to the independence of the judiciary, and the maintenance of an impartial system of justice, Contempt of Court can be seen to be an even more significant branch of the law these days than it has been historically.

P J Downey

Case and Comment

Aspects of s 9 of the Insurance Law Reform Act 1936

FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd [1994] 1 NZLR 11

Introduction

Section 9 of the Insurance Law Reform Act 1936 allowing a third party in certain circumstances to proceed directly against an insurer as defendant rather than the insured has rescued many a plaintiff's claims over the last 50 or so years. The Court of Appeal in *FAI v Blundell* recently clarified certain aspects of s 9 with the most notable, perhaps, being an answer to the question of whether a plaintiff must first exhaust all possible common law remedies before seeking leave to proceed under the section. In addition other questions involving supervening bankruptcy and the limitation periods applicable against the insurer were also examined.

The facts

In 1984 Gathergood, a real estate agent, contracted to buy property owned by Blundell and Brown Ltd and later that year sold it for a higher price. Blundell and Brown Ltd later obtained judgment for breach of fiduciary duty against Gathergood and also Leishman, a solicitor acting as trustee for the family trust used by Gathergood in the transaction. Leishman held professional indemnity insurance with FAI but was adjudicated bankrupt before final judgment was entered against him.

The timetable of events is as follows: FAI claims notified policy commences – October 1990; Leishman notifies claim to FAI – July 1991; FAI accept liability to indemnify Leishman – March 1992; Court of Appeal judgment decides Leishman in breach of fiduciary duty – April 1992; Leishman adjudicated bankrupt – 15 June 1992; Blundell and Brown Ltd give notice to FAI claiming a charge over insurance – 25 June 1992; FAI decline cover – August 1992; Judgment in High Court against Gathergood and Leishman – December 1992.

Leishman being bankrupt Blundell and Brown sought leave under s 9 to commence proceedings against FAI who defended the application on three grounds as follows below.

Leave and the exhaustion of remedies

Since other possible defendants were potentially available besides Leishman, the question was raised whether Blundell and Brown were obliged to pursue these defendants before they could gain leave to proceed against FAI. The classic interpretation of this aspect of s 9 comes from Roper J in *Campbell v Mutual Life and Citizens Fire and General Insurance Company* [1971] NZLR 240 who considered that the real purpose of the proviso was to ensure that a plaintiff does not take direct action against an insurer where there is a perfectly good common law defendant available. This statement of Roper J was later approved in several Australian decisions dealing with their equivalent of s 9.

Did this mean that Blundell and Brown were first obliged to pursue other possible defendants? The Court of Appeal unanimously concluded no. In the present case Mr Leishman's bankrupt estate was not a perfectly good common law defendant and therefore leave should be granted. To ask the plaintiff to sue other defendants would deprive it of its right of election as to which of possible multiple defendants to pursue.

The perhaps ambiguous phrasing of the statement by Roper J did leave open the interpretation argued by FAI but it is submitted that the decision in this case is entirely consistent with the reasoning in *Campbell v MLC* and with the wording of s 9.

The timing of the bankruptcy

The second argument of FAI based on s 9(2) was directed to the timing of bankruptcy. It was submitted that unless the case falls within that provision (ie the defendant is bankrupt or insolvent at the time of the event being litigated) s 9 is not available against the insurer.

This argument was rejected by the Court of Appeal as a similar argument had been by Roper J in *Campbell v MLC*. The present position in New Zealand would appear to be that if a defendant is insolvent or bankrupt at the time of the event being litigated then the claimant can proceed against the insurer as of right without first seeking leave of the Court. For all other situations including supervening insolvency or bankruptcy after the event being litigated the leave of the Court must first be obtained before proceeding against the insurer.

Limitation of time against the insurer

The third argument of FAI raised rather complex points as to limitations of time. In this case the claim by the plaintiff against the defendants was in equity for breach of fiduciary duty. Accordingly no time limit applied between the plaintiff and the defendant as equity does not recognise a time limit for a fiduciary breach of duty.

FAI however argued that as s 9 created a statute-based charge, then s 4(1)(d) of the Limitations Act (dealing with actions to recover a sum of money by virtue of any enactment) imposed a time limit of 6 years to bring an action against the insurer and that since 6 years had passed the claim was time barred.

This raised the question of whether s 9 does create an independent statute-based charge or whether it is a procedural section that places the insurer in the same position as the insured with regard to the claimant.

After reviewing several relevant Australian cases the Court of Appeal held that s 9 did operate to place the insurer in the same position as the insured as against the claimant. The claims against the insured and against the insurer run in tandem. As there was no time limit against Mr Leishman there was accordingly no time limit against FAI and the claim was not time barred.

Possible future limitation of time arguments

This disposed of the present case but in following the Australian authorities the Court may have left the door open for possible future defences under the Limitations Act, by insurers, against s 9 claims in circumstances that may be unjust.

This is illustrated by the facts of the much criticised Australian case of *Grimson v Aviation and General (Underwriting) Agents Pty Ltd* (1991) 25 NSWLR 422. In that case Mrs Grimson commenced an action in 1979 (in respect of the death of her husband) against Venture Aircraft Sales Pty Ltd, alleging negligence over a 1977 air accident. The primary action was not heard prior to Venture going into insolvency in 1982. In June 1988 the plaintiff sought to bring proceedings against the insurer but the New South Wales Court of Appeal held the claim time barred.

The reasoning of the Court of Appeal in *Grimson* was that the Act placed Mrs Grimson in the same position against the insurer as against Venture. This meant that any defence available to Venture would also be available to the insurer. Accordingly the Australian Court asked itself the question what Mrs Grimson's position would be if she began proceedings against Venture in 1988 for negligence committed in 1977. The only possible answer was the melancholy one that her claim would be time barred.

This decision has been criticised as unjust and Hardie Boys J in *FAI v Blundell* was prepared to indicate tentatively that there is much to be said for the view that time ceases to run once an action has been commenced in respect of the happening from which the liability of both the insured and the insurer arises. Any injustice to the insurer consequent upon lapse of time can be avoided by the Courts' power to refuse leave.

Such reasoning would have avoided the injustice of the *Grimson* case as time would have ceased to run once the action had been filed in 1979 and the claim would not have been time barred againt the insurers (although the Court would still have had the discretion to refuse leave).

It remains to be seen if the obiter remarks of Hardie Boys J will be adopted in future cases.

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Making the Angels Weep

By Sir Robin Cooke, KBE, President of the Court of Appeal of New Zealand

This article was originally written for the Journal of the United Lawyers Association of India *and is published here by agreement with that Journal. The article is concerned with a Supreme Court of India decision on judicial appointments and the meaning to be given to the word "consultation" in the Indian Constitution. The article compares the Indian decision with a decision of the New Zealand Court of Appeal and the Western Samoa Court of Appeal. The article concludes by suggesting that the judiciary has a part to play in helping to create constitutional conventions, and not merely in expounding them.*

The President of the United Lawyers Association is a most persuasive advocate, and as persistent as he is persuasive. He is also a friend, from a common connection with the London-based organisation Interights. So it is that I find myself making a brief contribution to the inaugural issue of the Association's Journal, as well as sending best wishes from afar for the success of the Journal and the continued success of the Association.

The decision in 1993 of the Supreme Court of India in *Supreme Court Advocates-on-Record Association v Union of India* attracted the attention of jurists throughout the world. It might be thought presumptuous and intrusive for an outsider from as distant a country as New Zealand, with regrettably little first-hand knowledge of the great country of India or its legal system, to offer any comments on such a decision. At the outset the limitations of my knowledge must be fully confessed. But occasionally a totally detached reaction may be not without some marginal relevance. So, for what if anything they may be worth, here are the impressions left on me by a reading of the judgments delivered by or concurred in by the nine members of this highly respected Court.

The copy that I have is the report in the 1993 (Supplement) Scale published by the Supreme Court Almanac. It was kindly sent by another friend, one indeed of longer standing in that respect than Soli Sorabjee.

The Attorney-General for India, Milon Banerji, and I were up at Cambridge in the same College (Clare) together, rather long ago: in the early nineteen-fifties. It has been a pleasure to renew our friendship recently. In his letter accompanying the judgments he not unnaturally commended the "strong minority view expressed by the next Chief Justice of India, Justice Ahmadi, who upheld my contentions". But Banerji AG then went on to speculate. He said "perhaps, the majority judgment may have your approval".

The reason for that tentative view may have been awareness that I am a committed supporter of the rule of law, with a particular interest in constitutional and administrative law. But possibly and unsurprisingly my old friend is not closely familiar with my judicial approach. In the event I find myself on his side and that of Ahmadi J. Their reasoning appeals to me as irresistible. That is said without any vestige of disrespect for the views of the majority. One transcending impression of the majority judgments – no less applicable, though, to the minority judgment – is of their dedication to judicial independence as a key value in its own right and as an essential ingredient of any democratic polity. The Sovereign Socialist Secular Democratic Republic of India, to quote the words (as augmented in 1976) of the Preamble to the Constitution, is fortunate that its judicial arm so strongly embraces fundamental principles.

The central points in the *SCAORA* case were very simple. Article 124(2) of the Constitution provides, so far as relevant –

> (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.
> Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

Article 217 provides, so far as relevant:

> **217. Appointment and conditions of the office of a Judge of a High Court** — (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court . . .

Article 222(1) provides:

> **222. Transfer of a Judge from one High Court to another** – (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

The issue was whether "consultation" in those provisions means "concurrence". In essence it would

seem to have been a question no more complicated than that; but its starkness can be and was decently disguised by more abstract formulations, such as whether the opinion of the Chief Justice of India is entitled to primacy. More symbolically, Solomon's throne and the supporting lions referred to by Bacon were among the figures of speech deployed. In *S P Gupta v Union of India* 1982 (2) SCR 85, where Bhagwati J (as then was) delivered the main judgment, a Court of seven Judges had held by a majority of 4 to 3 that the Chief Justice's opinion did not enjoy primacy, and by a majority of 6 to 1 that on a plain reading of Article 222(1) it could not be argued that the consent of a Judge proposed to be transferred is a sine qua non. On the latter point Bhagwati J had adhered to his view previously expressed judicially that the requirement of consent must be read into the Article to protect the independence of the judiciary.

In his judgment in the instant case, Pandian J speaks of a "chorus of protest" against the majority decision in *Gupta*, saying also that its reconsideration was necessitated by "the opinion of some learned outstanding Judges here and elsewhere, eminent jurists and the Law Commission". Hence the reference to a nine-Judge bench. To a distant observer this is surprising; and it is still more surprising to find that the judgments after the reconsideration extend to 169 closely-printed pages. Punchhi J speaks of the Indian Constitution as "perhaps the longest in the world, a document written profusely. There is no miserliness employed in the use of words". Similar remarks might be made about the judgments, yet not without adding that their richness and breadth are patently redeeming features. To Punchhi J's final rhetorical question "Was it worth it?", a possible answer is that nothing which so massively underlines the value of judicial independence can be dismissed as a waste of time and energy.

In any ordinary context, including administrative law contexts, the meaning of "consultation" is tolerably clear. In the New Zealand Court of Appeal we had to consider the word in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671. The case concerned a statutory duty of an airport company to consult with airlines before fixing charges for the use of the airport. We were referred by counsel, just as the Indian Supreme Court was referred, to leading English authorities such as *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 111, and to the proposition in the Privy Council judgment delivered by Lord Morris of Borth-y-Gest that the nature and object of consultation must be related to the circumstances which call for it. In a unanimous judgment delivered by my colleague McKay J, our Court said:

> We readily accept Mr Fardell's submission that one of the purposes of requiring consultation was to place some restraint on the airport company, which would be in a monopoly position as the only provider of airport facilities in Wellington. The airport charges had previously been fixed by statutory regulations, and we were told that they are similarly controlled in virtually all other countries. The obligation to consult can be seen as providing some protection to the airlines and to the public against an abuse of monopoly power. Other constraints are the fact that the airport company is dependent for by far the greater part of its revenues on the three major airlines, that it is a public utility whose charges are eventually passed on to the public, and the fact that if it were to act irresponsibly it would be open to the Government to impose price control under section 53 of the Commerce Act 1986.
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> From this base, however, Mr Fardell went on to submit that the object and purpose of the consultation obligation could be stated as an opportunity to allow the airport users to negotiate a level of charges that ensured that the monopoly position which the airport company occupied was not being abused. He submitted that the context of the obligation could be stated as "an ongoing dialogue of such quality that it can readily be described as negotiation based upon information transparency which involves the airport company making available all information which it is necessary for the airport users reasonably to satisfy themselves that the airport company's position is not being abused".
>
> We do not think "consultation" can be equated with "negotiation". The word "negotiation" implies a process which has as its object arriving at agreement. There is no such requirement in the present case. The airport company is given the power to fix charges. Before doing so it must consult, and for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses. The process is quite different from negotiation, however. One cannot expand the statutory requirement by replacing the word "consultation" with "negotiation" and then importing into the section the very different meaning of the latter word.

Up to a point the view expressed in that passage harmonises with parts of the judgments in the judicial appointments case. For instance, Pandian J there adopts statements in earlier cases by other Indian Judges on the lines that "consultation" requires that all the material in the possession of one who consults must be unreservedly placed before the consultee: he cannot keep facts up his sleeve. I fully agree, and believe that my colleagues would also agree. Whether in fact adequately wide and unreserved consultation takes place in New Zealand before appointments to high judicial office are made by the Governor-General on Ministerial advice is a different question. The description of New Zealand practice given in the judgment of Ahmadi J is not one that I recognise. The learned Judge does not name his source.

Proposals are on foot for a more structured form of consultation but the New Zealand Government does not appear to be attracted to the idea of a Judicial Commission charged with the function of recommending appointments. We lag behind India in the sense that there is no statutory duty of consultation, let alone a constitutional one, nor at present even a convention that can be defined with any precision. So the surprise with which one reads the majority judgments in the Supreme Court is coupled with a degree of envy. It

should be added, however, that by and large the ideal of judicial independence has been respected in New Zealand in the past, at least in principle. There have been no flagrantly political appointments. Subtleties of political preference between reasonably qualified candidates can of course arise. And pressures for judicial decisions in a certain direction (in sentencing for example) are probably increasing through the conjoint effects of political and media opportunism and current notions of accountability. No doubt the tendency is world-wide.

The striking point, though, is not that India is ahead, but the overwhelming extent of its lead. "Consultation" has been held to mean "concurrence" and the judicial techniques employed in reaching that result must deserve close scrutiny. Perhaps it is sufficiently obvious that in ordinary contexts the two words are quite different in their senses. If so, the issue becomes whether in the context of a constitution, construed as a living and developing instrument and permeated by powerful ideas such as the separation of powers, the vital word may be perceived to bear a special meaning.

The old inhibitions against looking at reports of Parliamentary debates in interpreting statutes have been abandoned for some time in New Zealand and Australia, and now in the United Kingdom also since *Pepper v Hart* [1993] AC 593. But ordinarily resort to Hansard is not encouraged, for it is time-consuming and often unproductive, and it can add to the cost of litigation. Varying reservations are expressed about when it is permissible. Certainly very few Judges, if any, would agree that it could be permitted for the purpose of rejecting an interpretation clearly required by the terms of an Act construed in the light of the apparent statutory purpose. Similar reservations do not apply, at any rate with the same force, to references to the proceedings of an assembly in the evolution of a constitution. Again they may be inconclusive, but to disregard them would surely be irresponsible. So it is that the Supreme Court judgments, of both the majority and the minority, draw on the historic debates of the Constituent Assembly.

In that respect, but in that respect only, the case is reminiscent of one in which, with two other New Zealand Judges, I sat in 1982 to constitute a Court of Appeal in Western Samoa. That South Pacific country's judicial resources usually do not enable an appellate Court to be composed of resident Judges, and New Zealand provides this form of help from time to time. The case is *Attorney-General of Western Samoa v Saipai'ia Olamalu,* reported in (1984) 14 Victoria University of Wellington Law Review 275. When Western Samoa attained independence after the second world war, a condition laid down by the United Nations was the adoption of a written constitution guaranteeing human rights. One provision in the resultant Constitution is that all persons are equal before the law; there are other anti-discrimination provisions. Compare Articles 14 and 15 of the Indian Constitution. Constitutional instruments commonly deal with the suffrage for parliamentary elections as a distinct and separate subject, as do Articles 325 and 326 of the Indian Constitution with their provisions respecting adult suffrage.

Significantly, the Western Samoa Constitution made no provision for universal suffrage but did provide for separate rolls for territorial constituencies and individual voters, thus impliedly envisaging a continuance of the existing system whereby the *matai* or elected family heads voted for local members and the population of non-Samoan origin voted on the roll for individuals. In that context, applying the principles of interpretation both generous and sui generis stated by Lord Wilberforce in his famous Privy Council judgment in *Minister of Home Affairs v Fisher* [1980] AC 318, the Court held that equality before the law was not intended to extend to voting rights. Thereby we reversed the decision of the (Australian) Chief Justice. But I am happy to say that, possibly to some extent in response to a concluding hint in our judgment, the Samoan legislature has now introduced fully democratic suffrage. The judiciary can influence change without imposing it.

The reason why that case comes to mind is that on examining the debates in the Convention which adopted the Western Samoa Constitution we found that after a lengthy debate the Convention had rejected an amendment providing for universal adult suffrage. To shut our eyes to that rejection, to refuse to consider it even as an aid to interpretation, seemed to the Court artificial. It lent strong support to the conclusion that we were prepared to reach without it.

At this stage the comparison with India breaks down. In the Indian Constituent Assembly, amendments were proposed specifically requiring the *concurrence* of the Chief Justice of India for high judicial appointments. They reflected the recommendation of the Body of Judges. But they were defeated. Granted that the meaning of the Constitution can evolve with time, it is still not easy to see how in less than half a century "consultation" as the term presumably must have been understood by the Constituent Assembly has been transmuted into "concurrence". Nor would it seem easy to find in the majority judgments convincing reasons for circumventing the difficulty. One must not overlook the use made by Punchhi J of a recorded remark of Dr B R Ambedkar in the final Assembly debate:

> To allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day.

Whether those few words of political argument, unelaborated upon by their speaker, can bear the weight sought to be attached to them forty years and more on is a question upon which it will be better for an outside observer to refrain from an opinion.

But the debates in the Constituent Assembly are of secondary importance. In the end what must be in the forefront are the terms of the Constitution itself, interpreted in the spirit recommended by Lord Wilberforce to whose approach I have often expressed judicial allegiance. Here the judicial appointments case calls for primary focus on the judgment of J S Verma J, generally concurred in as it was by the majority Judges; although Punchhi J vigorously – and tellingly – dissented from the view that "the Chief Justice of India" should be taken to mean the latter after taking into account the views of the two seniormost Judges of the Supreme Court. Another separate judgment was that of Kuldip Singh J, who

agreed with the majority on primacy and on consultation of the two most senior Judges but held that the Chief Justice of India should be appointed on the basis of selection by merit and that the seniority alone rule should not apply.

It is then to the judgment of J S Verma J that we should look for the actual decision of the case. Its most striking feature is the enunciation of a set of 14 numbered conclusions. They begin with stress on the need for a participatory consultation process, a concept with which few would quarrel. Prominent among the other conclusions are the rules that *invariably* appointments to the Supreme Court must be initiated by the Chief Justice of India, appointments to a High Court must be initiated by the Chief Justice of that Court, and transfers of Judges of High Courts must be initiated by the Chief Justice of India. No appointment of any Judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of the Chief Justice of India. The latter rule is subject to a limited exception "for stated strong cogent reasons", but if these are not accepted by the Chief Justice and his consulted colleagues the recommended appointment should be made "as a healthy convention". That is the only appearance of the word "convention" in the concluding summary. There are several such references in the main part of the judgment. It is not entirely clear how far the judgment is merely proposing conventional norms.

The judgment also speaks of very limited judicial review and justiciability; but the justiciability envisaged extends to transfers without the recommendations of the Chief Justice of India, and also to reviews of Judge strength. Moreover a timetable for the performance of functions is laid down, as is a requirement to record consultations in writing. To some extent at least, therefore, the rules appear to be propounded as more than conventions. A further specific rule propounded is that appointment to the office of Chief Justice of India should be of the seniormost Judge of the Supreme Court considered fit to hold the office. There the word "should" is more suggestive of a convention, but the same can hardly be said of "The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices".

Analysis of the judgment brings out, I think, five main reasons given to justify the propounded rules:

1 Under the Government of India Acts, high judicial appointments were in the absolute discretion of the Crown. By contrast the obligation of consultation was imposed by the Constituent Assembly to safeguard judicial independence. The comment is inevitable that this seems scarcely to justify reading "consultation" as "concurrence".

2 Usually the Chief Justice is best suited to know the worth of a prospective appointee. The same comment has to be made.

3 In England by convention the Prime Minister in advising the monarch on certain high judicial appointments departs from the advice of the Lord Chancellor only in the most exceptional case. The comment has to be that the analogy would be helpful in the evolution of an Indian convention, but not in formulating a legal rule.

4 Articles 121 and 211 of the Constitution preclude discussions in Parliament with respect to the conduct of Judges, except upon motions for removal; real accountability lies with the Chief Justices, who will have to bear the brunt of the criticism of "the ever-vigilant Bar". The apparent implication is that the Indian Bar would be prepared to criticise a Chief Justice for an appointment for which he had no responsibility.

5 The President is required by Article 74(1) to act in accordance with the advice of the Council of Ministers, but that advice must be given in accordance with Articles 124(2) and 217(1) as construed by the Court. As to this reason, if the Court's construction is correct, so much would presumably follow.

With the utmost respect, when the foregoing reasons are placed alongside the ordinary meaning of "consultation" many lawyers and many ordinary readers would probably not see them as adequate to change the meaning of that word to "concurrence". In truth the task is Herculean. Verma J quotes from *Measure for Measure* the well-known adage that it is excellent to have a giant's strength, but tyrannous to use it like a giant. Shortly afterwards the rather odious Isabella ("More than our brother is our chastity") said something equally well-known:

> . . . but man, proud man,
> Drest in a little brief authority,
> Most ignorant of what he's most assur'd,
> His glassy essence, like an angry ape,
> Plays such fantastic tricks before high heaven
> As make the angels weep; who, with our spleens,
> Would all themselves laugh mortal.

Happily the Judges making up the majority in the judicial appointments case enjoyed in fact authority neither little nor brief, but perhaps the rest of the quotation could not so easily be dismissed as inappropriate.

Yet I do not end on a note of criticism. As held by the majority of the Supreme Court of Canada in *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, recognising and giving precision to constitutional conventions is a legitimate function of the Courts. Despite the proffered evidence that of 547 appointments to the higher Indian judiciary in the decade ending in 1993 only seven were not in accord with the opinion of the Chief Justice of India, it may be assumed that some genuine apprehension underlay the deliberations of the Judges and the arguments of counsel in *SCAORA v UOI*. The majority of the Court may have gone too far, if their conclusions be viewed as an interpretation of the Constitution intended to be binding in law. but the judicial arm of the state has a part to play not merely in expounding conventions, but in helping to create them. The decision of the majority will no doubt have at least that tendency in India itself. And the overall impact of their decision is a blow struck for the principle of judicial independence that will be felt in India only. However vulnerable in detail, it will surely always be seen as a dramatic event in the international history of jurisprudence. □

Judges under Attack

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

Our constitutional institutions like Parliament and the judiciary, as well as our social institutions like marriage, are under continuous media attack — and often also from one another as when politicians in Parliament denigrate individual Judges, and the judiciary interprets legislation and "develops" the law at the expense of the social contract of marriage. The attack by the media is going on throughout the common law world, and recently in this country has regrettably been indulged in by members of the legal profession whom one would have expected to know better. Justice Kirby gave an address on this topic at the Fifth International Criminal Law Congress in Sydney on 27 September 1994. This article is the address he gave on that occasion. The need to protect the legal system from undue, unfair, media intrusion was illustrated in the recent Contempt of Court case referred to in the editorial at [1994] NZLR 357.

This week I complete ten years as President of the Court of Appeal. I approach my twentieth year as a Judge. You can count on your hands the Judges of this country who have had a longer service. I have therefore had plenty of opportunity to view the relationship of the community and the judiciary. To say that it has changed from the time of my first appointment in 1974 would be an under-statement. When I was first appointed, I still had ringing in my ears Sir Owen Dixon's words of assurance:

> The authority of the courts of law administering justice according to law is a product of British tradition and it is for us to maintain it. There is I believe a general respect for the Queen's courts of justice which administer justice according to law, and I believe that there is a trust in them. But it is because they administer justice according to law.
>
> It is important to maintain the prestige of the legal profession and it is important to maintain the status of the judiciary.[1]

Our topic is "Judges under Attack". We should begin by putting the attacks we suffer in proper perspective. In my function as Chairman of the Executive Committee of the International Commission of Jurists, I am closely associated with the work of the Centre for the Independence of Judges and Lawyers in Geneva. That body publishes an annual report *Attacks on Justice*. That report, organised by countries, discloses the many jurisdictions where "attacks" on the Judges go far beyond verbal abuse or media harassment. In Colombia, Italy and many other countries, Judges in office are killed in brutal retaliation or crude intimidation. In other places they simply disappear after a decision unfavourable to a powerful interest. In my United Nations work in Cambodia I have met Judges who have had to jump out of the window of their Courts to escape the retaliation of powerful armed litigants invading their domain in retaliation for an adverse finding. Sadly, we have witnessed in this country the murder of Judges and members of families. But these attacks are extremely rare. For the most part the independent judiciary of Australia can go about its work without peril as to physical survival and safety. Our problems lie elsewhere.

The reports on Australia in *Attacks on Justice* tend to concentrate on the attacks on Judges by parliaments and governments of different political persuasions. In recent years we have seen a series of shocking attacks on the tenure of judicial officers. Tenure is the foundation-stone for their independence and courage to do brave and strong things on behalf of society. This form of attack on Judges has been developed to an art form. Courts and tribunals are abolished. A new body is set up. The Judges tenured in the old body are not appointed to the new. Labor governments did this to Justice Staples in the arbitration commission and five magistrates in New South Wales. Coalition governments have done it to judicial officers in a number of States. In Victoria last year nine undoubted Judges of the Accident Compensation Tribunal were simply dismissed from office by the expedient of abolishing their Court. This action extracted barely a whimper from the media.

The Australian media spends so much time gazing at its own navel that it is simply not interested, for the most part, in the defence of the fundamental institutions of our constitution. Any talk about the media and the journalists will seize the headlines. Yet talk about the protection of the liberties of citizens by the assurance of independent Judges, and the media become co-conspirators in silence with opinionated politicians. This is a truly worrying development in Australia. It has been noted by the CIJL in Geneva. Unarrested, it would pull down Judges so that they become little more than another branch of the bureaucracy of the Government of the day. Doing this might salve bureaucratic and media egos. But it would not be good for the freedoms we enjoy. Every now and again it is imperative that politicians, bureaucrats and media people should be submitted to independent scrutiny, and reminded of the law which is above us all. No-one can do that, ultimately, but the Judges.

If I were to address the topic of "Judges under Attack" in Australia, these are the themes that I would develop. But from the personalities of my co-panellists this morning, I must assume that what is intended is an examination, once again, of the attacks on the Judges by the media. This is not simply a local development. Indeed, it is not a development confined to attacks on

the authority of Judges. It is not even a development without its positive side. But it is clearly one of considerable importance for the rule of law.

Four media phenomena

The Personal Attack:
The first thing to notice is the way the media personalises issues. Today there is less hard copy. More mixed news and comment. This is probably a print media response to the necessities of television and to the magazine and pictorial approach to the presentation of news. Lawyers who hanker for serious debate, and Judges who are used to it, are bound to be disappointed.

I have told elsewhere of a good illustration of the Australian media's love of confrontation news.[2] In the course of a judgment I drew attention to a perceived injustice in workers' compensation legislation. This was run seven days later as an "attack on the Premier for being the architect of . . . most unjust legislation". This, in turn, provoked a radio interview and the ensuing print headlines "Fahey Hits Back at Kirby's Compo Attack" and "Fahey Lashes out at Kirby Comment". A serious discussion of the perceived source of injustice in the law becomes impossible. Instead, the public has served up to it a highly personal "clash", with "hitting back" and "lashing out". Every week, Stuart Littlemore instances these examples of poor, biased and even mischievous journalism. Judges have had a lot of this treatment, especially in the last three years or so. Their conventions restrain them from discussing publicly – except in their judgments – the merits of their decisions. Judges simply cannot answer back. See *R v Commissioner of Police of the Metropolis; Ex parte Blackburn [No 2]* [1968] 2 QB 150, 155. This makes them a shackled combatant in media attacks upon them. To these attacks must now be added the new peril of cameras following them from the train station and journalists barking questions at them in the public streets. The public may not understand why the Judge cannot answer. The media should know that the Judge is accountable through the appellate and review process of the Courts. Not to the High Court of 60 Minutes or Four Corners [or in New Zealand to Holmes, or 20/20 or Pam Corkery].

The Pack Mentality:
Monica Attard, with expertise usefully gathered in Moscow, has described the journalism she found on her return to Australia. Her Walkley Lecture[3] warmed many a judicial heart. She accused her colleagues of poor, unfair and biased coverage of important events; of preconceived views that kill uncongenial stories; of a passion for the "smell of blood" and the pack mentality which turns important and complex issues into reporting that takes on the "aspect of a sporting contest". Another journalist illustrated the same thesis with the unrelenting personalised calumny heaped on Mr Arthur Tunstall.[4] Justice Bollen could (had he been free to speak) have told a similar tale. Many members of the Australian judiciary have suffered from this phenomenon. There need to be more exacting standards.

Global Media:
The third phenomenon is global media.[5] Monica Attard spoke, with disdain, of the growing dominance of CNN in the world's television news. But what does that dominance bring to the law? In Lesotho I was badgered by endless television reports of the trial of Mr Kennedy Smith. In Madrid, in January, whilst Australia was aflame, the media – international and local – (with the precious exception of the BBC) was obsessed with the trial of Mrs Bobbitt and the predicament of her husband's reconnected penis. To this extent, our local media have caught the disease of entertainment. The old traditions which separated news and comment have almost wholly disappeared. In this way, the fashions of American journalism penetrate, by technology, the four corners of the world. They reach to Australia. They challenge our notions of the proper balance between free speech and due process. We would not, by our law, have permitted the pre-trial of O J Simpson. Even a celebrity is entitled to a fair trial. Yet American media are not prepared to allow that their notions of the balance may not be apt for Australia. Instead, its Judges are attacked as enemies of free speech or impervious to the blinding light of First Amendment jurisprudence. With global media has come a diet of superficial entertainment. Judges, it seems, must just get used to cameo roles as the "fall-guys": dim or obdurate establishment figures ripe to be taken down a peg or two. The stereotyping of the judiciary involved in this is appalling.

The Power Thing:
Finally there is the power thing. I mentioned this in my speech at a seminar on the media and the judiciary in Madrid in January. Pull down the Queen. Pursue the trivial sexual peccadillos of the President. Disparage the churches. Belittle the universities. Laugh at the Parliamentarians. Attack the Judges. What will then be left in our society to stand up for the good and the right and the true? You have it. Only the media.

The power of the media – which now stretches globally into every nook and cranny of the earth's surface – has expanded beyond its sense of responsibility. It has outstripped effective legal national regulation. To a large extent it sets the public agenda. It helps to frame public perceptions. But it has a very short attention span. The damaged objects of its attention, if they be Judges, must simply pick themselves up, dust themselves off and get on with the onerous business of the Courts.

A sense of perspective
None of this is to say that some criticism of the judiciary of Australia has not sometimes been warranted and beneficial. Especially on gender issues on the substance of the law, on its accessibility to ordinary citizens and in relation to other topics of discrimination and minorities, the alert of the young journalists to the mostly older Judges has been mainly beneficial. The attention to the judicial institution itself has been useful. I certainly agree with Sir Anthony Mason that wider discussion of the judiciary, so long as it is informative, will promote better understanding of the law and of what the Courts are doing.[6] It has encouraged many reforms which would probably have happened, but perhaps much more slowly. For all their faults, the media remain a global force for freedom. But with the ever expanding power must come the obligations of responsibility. That is the lesson of every rule of law society.

The challenge for the judiciary is to reform and adjust an institution eight hundred years old: keeping the

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Books

Local Government Law in New Zealand (Second edition)

By Kenneth A Palmer

The Law Book Company Limited, Sydney, 1993 ISBN 0 455 21180 9, ISBN 0 455 211817 (limp). NZ prices $208.00 (library binding), $120.00 (limp), net, GST inclusive.

Reviewed by Jonathan I Field, Barrister, Auckland

For more than a decade and a half, Dr K A Palmer's thorough and comprehensive text books on the law of local government, and planning and development in New Zealand have enjoyed a well-deserved reputation as the New Zealand standard reference works in these areas of the law, indispensable alike to practitioners, both legal and lay, to scholars, and to students.

The first edition of his *Local Government Law In New Zealand*, published in 1978, followed a dramatic period of local government reform which had begun with the embryonic Local Government Act 1974. That Act had been but the Hon Henry May's first step, as Minister of Local Government, towards achieving his vision of a unified statute which was progressively to integrate virtually all the legislation of his time governing municipal corporations and counties. Three significant amendments appeared during 1977 alone, re-configuring the then newly-described territorial authorities, regional councils and united councils, among other things, and forcing a last-minute revision of Dr Palmer's manuscript. By then, however, local government law could reasonably be regarded as "relatively settled". That, at least, was the author's expectation, now revealed in the Preface to the second edition.

Perhaps, with the benefit of that experience, Palmer might have been prepared for what was to come. When, in 1984, he commenced revising the text for a second edition, history chose that precise moment to repeat itself, with a vengeance. The following years, until the text of the second edition was completed in mid-1993, saw processes of legislative change without parallel in the history of this country. Whether, at least in the local government arena, these changes should properly be regarded as "reform", or given some other label, is a topic for debate, its importance totally eclipsed by the profound nature of their impact.

This was "roller-coaster" stuff! Ironically, it included another restructuring of regional councils! Some radical and highly significant changes were introduced to Parliament at the last moment by way of Supplementary Order Paper. Keeping pace must have been a nightmare for an author seeking to bring his text up to date. That Palmer has achieved scholarly relevance through this period of momentous change is indeed a tribute to his craftsmanship.

Substantially re-written once again, the new edition not only incorporates the new law of local government as affected, up to 1 August 1993, by the re-focusing of the regional bodies, and by new legislation on employment contracts, workplace health and safety, privacy, human rights, building controls, historic places, energy, and resource management, but it also discusses, and provides copious references to, judicial decisions shaping the new law in this country and relevant decisions from other jurisdictions. Alone amongst the restructuring packages, the Biosecurity Act 1993, which appeared after the text was finalised for publication, escapes analysis in the book – but it is referred to in the Preface.

The fruit of about seven years' work, acknowledged by the author as being both frustrating and requiring creativity, is a highly readable, and thoroughly comprehensive, work of outstanding scholarship. It illumines every issue with a background, both interesting and helpful, with a summary of the present law, with comprehensive references and, where appropriate, with a discursive treatment of the developing jurisprudence. No stone is left unturned.

The author has succeeded admirably in his stated aim of providing for the needs of the legal profession at all levels; and at the same time conveying "insights and guidance" for the assistance of local authority members and their staffs and of people who have dealings with the various institutions of local government. The second edition may confidently be expected to become an essential item of reference for all in the field as New Zealand looks forward to what the author foresees – perhaps a trifle optimistically – as "a period of stability in the area of local government law". □

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professionalism, integrity and independence which are good whilst discarding the inefficiency, delay and outmoded attitudes, which are a blight on justice. The challenge for the media is to retrain the freshness of new ideas, an adherence to truth (as it is perceived) and provision of differing opinions whilst keeping under control the personality reporting reducing serious issues to entertainment, following the pack and exerting brute power. After the diet of the past few years less entertainment and a more balanced presentation of the judiciary to the people they serve might be in order in Australia. □

1 Address by Sir Owen Dixon upon taking the oath as Chief Justice of the High Court of Australia (1952) 85 CLR xi and xv.

2 M D Kirby, "Judiciary, Media and Government" (1993) 3 JJA 63 at 69. For attacks on Judges see (1991) 65 ALJ 635.

3 M Attard, Second AMP Walkley Lecture, Sydney, 8 September 1994 noted *The Australian*, 9 September 1994, 3.

4 K Edwards, "Real Heroes and a False Villain" in *Time*, 12 September 1994, 52.

5 M D Kirby, "The Globalisation of the Media and Judicial Independence", Paper for a seminar on the media and the judiciary, Madrid, Spain, 18 January 1994 reproduced in part in (1994) 1 *Aust Media LR 125*. As to the disease in England see P Reed, "Sitting in Judgment" (1994) 91 *Guardian Gazette* 20.20.

6 A F Mason, "Role of the Courts in the Year 2000", noted *Herald Sun* (Melbourne) 6 November 1993, 22.

Was Eve merely framed; or was she forsaken?

By The Hon Justice E W Thomas, a Judge of the High Court of New Zealand

Justice Thomas has presided over numerous rape trials. He has also read widely on the subject of rape. He believes that giving evidence in a rape trial is a brutalising experience for complainants. In Part I of his paper, the Judge questions whether the adversarial system is capable of ensuring the well-being of the victims of rape or sexual assault. In Part II the Judge explores the changes which could be made to alleviate this distress without compromising the accused's right to a fair trial.

Part I

The rape crisis

Rape is the most vicious and reprehensible crime in the criminal calendar. Every individual possesses a core persona which makes up the essence of their being. It is an intensely personal and private self which necessarily includes the individual's sexuality and autonomy. Rape shatters a woman's sexual integrity and personal autonomy. Victims suffer acute trauma and endure lifelong psychological and emotional scars. All this is well documented. The immediate acute and long term adjustment problems of what is called rape trauma syndrome are now well established in numerous reports and studies.[1]

Rape trauma syndrome is marked by behavioural, somatic and psychological reactions.[2] Burgess and Holmstrom, in their seminal work, *Rape — Crisis in Recovery* (1979), identified two phases to the trauma (p 35):

> the immediate or acute phase, in which the victim's lifestyle is completely disrupted by the rape crisis, and the long term process, in which the victim must re-organise this disrupted lifestyle.

In his study of rape victims in New Zealand, *Rape Study Volume 1*, Warren Young considered that three stages of reaction could be identified; an acute phase, an adjustment phase and a long term integration phase. (Young, fn 2, at pp 28-34.)

The acute phase is characterised by feelings of guilt, self-blame, shame, anxiety, degradation, fear, anger, powerlessness, humiliation, embarrassment, disbelief, disgust and desire for revenge. It is commonly marked by sleep disturbance, nightmares, lack of appetite, physical pain or discomfort, and sexual dysfunctioning. (Temkin, fn 1, at pp 1-2.) Most women say that for weeks afterwards they scrub their bodies raw, but they never feel clean.[3] All the victims in Young's study reported that at the time of the rape they had been completely disoriented and incapable of rational action. They all said that they were scared, or terrified, and many believed that they were going to die. Most of the victims interviewed had not come to terms with their experience. (Young, fn 2, at pp 28-29.)

The common supposition that women will, in the immediate aftermath of a rape, be hysterical and tearful has been shown to be often misplaced. (Burgess and Holmstrom, p 1.) Two divergent emotional reactions have been observed. One is expressive, with feelings of anger, anxiety, and the like, being exhibited along with crying, sobbing, restlessness and tenseness.[4] The second is a controlled reaction, where the victim's feelings are masked by a composed or subdued demeanour.[5]

Many of these reactions continue into the adjustment or integration phase of the victim's trauma. Victims can endure feelings of extreme fear, depression and loss of self esteem and confidence. Their capacity to form inter-personal relationships is often seriously impaired and their work and social behaviour is adversely affected as a result. Most rape victims experience intense nervousness or rape-related fears. Fear that their assailant will return is not uncommon, and many change their residence and telephone numbers. Some even leave the country. It also appears that knowing the rapist does not improve the victim's recovery process. It may even pose additional problems for her.[6]

The position of complainants in other crimes is not comparable with the plight of the rape victim. Being stopped at knife point and forced to relinquish an item of property cannot validly compare with the violation of a woman's sexual integrity and autonomy. Nor does a robbery with violence necessarily sear the persona and dignity of the victim in the same way as rape does of its victims. One cannot, of course, downgrade the serious consequences for the victim of any act of violence. Victim impact statements frequently testify to their seriousness, but rape is a crime apart which strikes at the core of a woman's humanity.

All the studies have graphically confirmed the lasting effects of the trauma caused by rape. Most victims of rape never fully recover. It is an experience which shakes the foundation of their lives. The human cost to the victim is plain to see. (Young, fn 2, at p 34.) The victims are indeed scarred for life.

The crisis continues

Over 220 charges of sexual violation are heard in the High Court each year. (Justice Statistics 1990, at pp 119-120.) About 60 per cent of these charges result in conviction. This percentage compares with a 70 per cent conviction rate for all offences.[7] Studies also show that only a minority of rapes are ever reported to the police.[8] One study suggests that only one in five women reports the crime. (Eastel, fn 8, at p 90.) The principal reasons why rape is not reported to the police have been found to be shame, shock, and fear of the perpetrator. The social context in which the rape occurs and a perception that the police will not, or cannot, do anything about it, are also significant factors in a rape victim's decision. (Eastel, fn 8, at p 89, Brereton, fn 8, at p 52 and Home Office Report No 106, fn 1, at p 3.)

Women who are raped and report the crime will eventually be required to give evidence in Court as the main witness for the prosecution. It is the victim's plight in Court which I am concerned with in this paper. The complainant's involvement in the Court proceeding is, I believe, a brutalising experience which, notwithstanding the evidential and other reforms of the past decade, has not been sufficiently recognised. In this paper I explore what might be done to ameliorate the victim's Courtroom ordeal.

Selecting a particular aspect of the rape victim's experience for examination does not mean that I am unmindful of the traumatic experiences which precede her appearance in Court. Following the physical and mental ordeal of the crime itself, the victim will be suffering the acute symptoms of rape trauma syndrome. In addition, she all too often fails to receive the understanding and sympathetic support of her family. Then, reporting the incident and making a statement to the police is, in the circumstances, a distressing experience and undergoing a medical examination or examinations, notwithstanding the helpful measures adopted in recent years, can be degrading and humiliating. Waiting for the trial is likely to prolong the complainant's suffering and impair the prospect of her psychological and emotional rehabilitation. None of these facts are to be neglected. Rather, for present purposes, they form the background against which the victim eventually appears in Court and compound the obligation to approach her involvement with the utmost sensitivity.

Nor does the fact that I have chosen to focus on the plight of the victim mean that I am uninstructed in the thinking and reforms proposed by women in what is loosely termed the feminist literature on the subject. Such writings have made a major contribution to our understanding of rape as part of a social order in which male perceptions of sexuality predominate. A "penetrative/coercive model" of sexuality results in which woman inspire and react to sexual desire rather than experience it, and a woman's ability to explore sexual pleasure is repressed.[9] The social meaning of consent is perceived to be inherently tied to a system of unequal sexual relationships in which the man actively initiates the sexual encounter and the woman is relegated to the more passive role of responding to initiatives.[10] I fully accept that the approach to rape adopted in our criminal law reflects a male-dominated culture. I also accept that an equal sexual relationship cannot be grounded in the notion of "consent".

I do not therefore reject much of the feminists' thinking, and much of it coincides with what I have to say in this paper. I do not, however, endorse the more extreme claims of feminist writers which seem to portray the disadvantaged position of the victim in a rape trial as the outcome of something akin to a male conspiracy or the extension of a universal male propensity for aggression. I believe that the vast majority of men view rape as totally abhorrent. Confronted with a rape case in which there is a degree of force or coercion, they find it difficult to imagine how any sex drive could be maintained by the assailant. They too, equate sex with concepts of mutuality, warmth and intimacy which are incompatible with unwanted intercourse. This lack of understanding is part of the problem, because it means that nothing in the "normal" male's conscious experience equips them to understand the nature of rape, or what it is that motivates the rapist. Failing to understand the nature of rape and the power-directed or sexually aberrant drive of the rapist, they fail to appreciate the reaction and behaviour of the women who fall victim to it. The victim's reaction is judged against preconceptions which divest the rapist's behaviour of its full aggression and brutality and deprive the victim of the benefit of a realistic appreciation of the trauma of her experience.

I am also aware that some feminists condemn the role that men and male institutions, particularly the criminal justice system, play as "protectors" of women. The description of women who have been raped as "victims" is rejected.[11] "Victimism", as it has been called, results in a woman being perceived as a passive object of injustice deserving of pity and sorrow. Such an attitude, it is said, denies a raped woman the integrity of her humanity. She is seen, not as a "living, changing, growing, interactive person" but as a victim, someone to whom violence is being done and who is therefore in need of special protection.[12] This results in concerned men and male institutions being perceived as protective and paternalistic.

I confess that I am uncertain how to react to this line of thinking. The difficulty, it seems, is to be sensitive to the raped woman's plight and the ordeal of her Courtroom appearance, without being paternalistic in the process. I doubt that the use of the word "victim" of itself would induce this victimism. Rather, it is the attitudes behind the use of the word which need to be addressed and which require enlightenment through public information and education. For myself, and without wishing to trespass on sensibilities I might not fully understand, my perception is that a woman who has been raped suffers a violent ordeal which is a denial of her humanity and that, when she gives her evidence in the

Courtroom, she suffers a further traumatic ordeal which is also a repudiation of her humanity. I would claim that it is the fact that a woman's essential humanity is recognised and that she is seen as a living person, and not as a passive object of the criminal justice system, which generates the desire to improve the present system. Having been a "victim" of male savagery once, the violated woman should not be victimised a second time.

But it is, perhaps, as well to spell out that my express motivation and guiding force in re-examining the role of the complainant in the Court proceeding is compassion and consideration for women (or men) who are sexually violated. In undertaking that re-examination it is not my intention or wish to be either protective or paternalistic.

Two cases of rape

Two rape cases in which I presided at the trial can be briefly recounted. They will serve to illustrate much of what I have to say in this paper.

1 ***R v M*** (3 October 1990. T 114/90)

M was a young man in his early twenties. He met the 15-year-old complainant when attending a social gathering. She was well known to *M*. She had stayed with his family for a time and had no reason to distrust him. In the early hours of the morning, *M* and the complainant left the party and walked to nearby school grounds. For a while they sat talking on a bench. *M* said that the complainant had become attractive to him since the time she had been living with his family, and he began to forcibly press his attention upon her. She managed to escape and ran off, losing her shoes in the process. *M* caught up with her and threw her down on to the concrete in the school yard. He overpowered her with his superior weight and strength, and then raped her. During the course of the rape, *M* covered the victim's mouth with his hand to stop her screaming. He nearly strangled her with her jersey. She suffered various injuries, including a three millimetre tear to her vaginal opening. The complainant immediately, in a distressed condition, complained to her friends, their parents and ultimately to the police.

When she gave evidence the complainant was 16. She looked even younger. Slight of build, she was neatly dressed and courteous in her speech. She had an open countenance and an appealingly direct and innocent manner. Her evidence was given clearly and calmly. But suddenly she broke down. She breathed deeply as if hyperventilating. I do not doubt that she re-lived what had been a horrific experience for an innocent young girl.

The victim impact statement indicated that the complainant was badly shocked and scarred by the rape. The experience affected her in a number of ways. She developed a strong reluctance to venture out at night, or in the daytime unaccompanied. She experienced feelings of being "dirty", and had gone through a stage of blaming herself for being raped. She was, in the early months after the incident, preoccupied with reliving the experience. She found difficulty in sleeping and had nightmares. She became withdrawn and found it difficult to talk and relax with her workmates. Her work concentration deteriorated, particularly as the Court appearance drew near, and she developed an uneasy discomfort and fear of men. She became wary of anyone who had been drinking. Her relationship with her mother degenerated.

M was uncooperative with the police and maintained his innocence at the trial and thereafter. He expressed no remorse for his actions. I sentenced him to, effectively, an eight year term of imprisonment. On appeal, *M's* conviction was upheld, but his sentence was reduced to six years' imprisonment.

2 ***R v M*** (28 July 1993. T 173/91)

The accused, *M*, was a middle-aged business man who had been in a relationship with the complainant which had come to an end. Both had formed fresh liaisons. He had already been convicted of sexual violation by rape in an earlier trial, but had been granted a retrial, largely on the ground that the trial Judge had erred in excluding cross-examination of an earlier sexual incident with another man. At the trial before me this evidence was to prove almost farcically irrelevant. Also at the trial before me, *M* dispensed with his lawyer and conducted his own case.

The complainant suffered from a complaint known as Myalgic Encephalomyelitis, called ME for short. The illness is a very debilitating disorder, characterised by chronic fatigue or lack of stamina and a feeling of being absolutely exhausted and spent. By arrangement, the complainant had been staying in a flat owned by the accused. He visited her one morning and they had some toast and coffee in the kitchen. The complainant was sitting down when *M* came up behind her and put his arm around her shoulders. He started kissing her. She protested and told him to leave her alone, and she pushed him away. He grabbed her face in his hands, squeezed her jaw open and stuck his tongue in her mouth. She tried to push him away, and pushed hard. But *M* did not like his advances being rejected and he persisted all the more strongly. He tried to interfère with the complainant's clothing. As she struggled the accused put both his arms around her, held her arms down, and dragged her across the kitchen and into the lounge. The complainant kicked and pleaded with him to let her go. But *M* was relentless in his attack. She did all she could to stop him. She scratched and bit him.

Because of her condition the complainant's strength dissipated quickly. *M* pushed her down onto a couch. She kept on pleading with him to desist, but he would not. He took hold of both her hands by her wrists and held them tightly so that she could not wrench free. Still holding her wrists he pulled her top clothing up and started to mouth her breasts. He then took hold of both her hands by the wrist with his one hand and undid the top button of her jeans and pulled them down. The complainant's strength was now virtually spent. In her own words she had turned into a "lump of jelly".

M took his clothes off, and carrying on a one-way conversation about how he was going to enjoy having sex with her, he inserted his fingers into the complainant's vagina. Eventually he raped her. The ordeal had gone on for more than an hour. After the incident, the complainant was shattered. *M*

remained on the premises and at one stage taunted her with the comment that she should "ring the police".

The complainant was cross-examined by *M*, her assailant, for approximately five hours extending over two days. It was the most insensitive cross-examination of a complainant which a Judge is ever likely to witness. It was cruel and inhumane. The victim was required to relive and retell her ordeal in minute detail sitting within metres of her alleged rapist. When the cross-examination was finished she was exhausted and distressed. She was unable to leave the witness box without assistance.

On a number of occasions, of course, I interrupted the cross-examination and adjourned to chambers where I advised, pleaded, cajoled and, indeed, at times, berated the accused to desist, but to no avail. The cross-examination, which was itself an act of (verbal) violence, continued unabated. Any greater intervention on my part would have resulted in a claim that the accused had been denied his right to a fair trial and run the risk that there would have been yet a further retrial.

The victim impact statement recorded that the complainant had undertaken weekly counselling since the date of the incident. She had become depressed and described the ordeal of giving evidence as "like being raped again". When she learned that there was to be a retrial, her health rapidly deteriorated and she was bedridden for four months prior to the trial. She indicated that she would be moving overseas permanently when *M* was released from prison. She continued to have pain in her body from the attack, she suffered from sleep disturbances, including insomnia and nightmares, and she had difficulty eating due to decreased appetite and nausea. When interviewed by her counsellor she cried freely. The complainant had endeavoured to minimise what happened to her in order to protect her family from distress and this had impeded her therapy.

The complainant's counsellor described how the complainant had felt exhausted and deeply distressed by the Court process leaving the Courtroom each day in a physically depleted and emotionally distressed state. The counsellor expressed the view that the retrial had been as damaging to the complainant as the original rape. She expressed the opinion that the complainant's self-esteem and self-confidence had been irreparably damaged, and thought that it was unlikely that she would be able to live independently within the foreseeable future.

No doubt, I have selected these two cases because they stand out in my mind. There would, however, be any number of other rape cases which could be selected, which would be equally graphic in demonstrating the traumatic impact of the trial upon the complainant.

The victim in Court

The real advances which have been made in the past decade in protecting the rape victim when giving evidence cannot be denied. Generally, the complainant does not have to give evidence at the preliminary hearing; she may be accompanied by a friend when she gives her evidence at the trial; almost without exception the Courtroom will be cleared while she gives her evidence; cross-examination of her prior sexual conduct, if any, is prohibited without the leave of the Judge; and publication of her identity is prohibited. If the complainant is young, she is likely to be protected from a direct confrontation with the accused. He will be obscured behind a screen, or she will give her evidence in a separate room and the evidence will be relayed into the Courtroom by closed circuit television.[13]

But these reforms have not removed the brutality of the victim's experience in the Courtroom. It remains a traumatic ordeal. The complainant is required to describe the alleged rape in minute detail to a Courtroom consisting of twelve strangers on the jury, the Judge and counsel bedecked in strange and forbidding apparel, Courtroom functionaries, the officer in charge of the case, and any news media representatives who may be present. She will frequently be subjected to a lengthy and distressing cross-examination in which her credibility is likely to be strenuously attacked.

Apart from the relatively rare case where it is alleged that the complainant has mistaken the identity of the man who raped her, defence counsel can adopt one of two strategies. They can suggest that no sexual activity took place at all, and that the complainant is therefore lying, or that she in fact consented to intercourse with the accused, and that in denying that consent she is lying. A defence lawyer's loyalty is to his or her client, and their purpose is to save their client by destroying, as far as is possible the credibility of the complainant. Within the law they must do whatever they can to accomplish that objective. By its very nature, the cross-examination, however temperately it may be handled, is almost certain to be a harrowing and painful ordeal. And in the course of the cross-examination the complainant will be required to reiterate the details of the incident, probably many times over.

The question whether the victim consented to intercourse taking place is the issue in the vast majority of rape trials.[14] It serves to place the focus of the trial, not on the man who is the accused, but on the woman who is the complainant. Her state of mind, before and during intercourse, will always be relevant to the prosecution's task of proving that intercourse took place without consent. Small wonder that, with the focus of the legal process being on the complainant and her state of mind, and cross-examination being directed at destroying her credibility on that critical issue, victims frequently feel that it is they who are on trial.[15]

Victims in New Zealand, interviewed in 1983, reported that they found the experience in Court to be negative and destructive. A number said that they considered the Courtroom ordeal to be even worse than the rape itself. The conclusion was that the Court proceeding undoubtedly added to and prolonged the psychological stress which they had suffered as a result of the rape. (Young, fn 2, at p 124.)

It takes only a moment's reflection to confirm that these claims are readily acceptable, and possibly understated. Within the past year the complainant has undergone a horrendous ordeal in which her sexual integrity and autonomy has been terribly violated. She will be experiencing many of the acute symptoms of the rape trauma syndrome. Her

psychological and emotional distress will have been exacerbated and prolonged by the delay pending the trial. Psychologically and emotionally unstable, she must nevertheless steel herself to relate the full details of the incident at the trial, a prospect which she must face with dread. No personal assistance, however sound and valuable it may be, can fully prepare her for the ordeal of recounting the rape in evidence in chief and then again, at least once, in cross-examination before twelve strangers in the formidable, if not intimidating, environment of the Courtroom. In effect, the victim is required to relive a traumatic event and, in reliving that event, she must suffer again the trauma of the original ordeal. It is not surprising that some have described the experience as being worse than the rape itself. It is seen as a "second rape".[16]

Viewed objectively, I do not believe that it is an exaggeration to describe the experience which rape victims are required to undergo as being brutal and barbaric. How else can a requirement that the trauma of a devastating ordeal be relived by the victim in the cold and dispassionate surrounds of a Courtroom be described? No-one of sound mind would suggest that the remedy for a victim complaining of rape would be to be raped a second time. Yet, sparing the complainant only the physical interference involved, that is the likely effect of her appearance in Court.

The extreme distress of a complainant giving evidence in a rape case and reliving the trauma of the ordeal in the witness box, can be seen in the Courtroom at any time. It is not an uncommon occurrence, and it is done in the name of justice. But there can be no justice in a practice which brutalises the victim of a crime in a way which is repugnant to all civilised persons. It is inexplicable that the practice can be tolerated with such equanimity.[17]

Without detracting from the ordeal of the victim, the position of a third party, say, the Judge, will assist to illustrate this point. If a Judge were to pass within three metres of a woman being raped, then notwithstanding his presumed age and possible infirmity, he would be expected to intervene, if not physically, at least by registering a protest or raising an alarm. Yet, a Judge is expected to preside over the trauma of the "second rape" without protest!

The inhumane experience to which the complainant is subject in the Courtroom is due to many factors. Prime among these are the aggressive features of the adversarial system, the lack of sensitivity resulting from a traditionally male dominated criminal justice system, and the definition of the crime of rape itself.

Is the unthinkable thinkable?

Under our criminal justice system, an accused has the inviolate right to have a charge against him or her proved beyond all reasonable doubt. They have the right to put the Crown to proof. Charges are approached in that manner by both accused and criminal lawyers. There is little if any encouragement for an accused to voluntarily accept responsibility for his or her actions. Rather, the inquiry following the charge is likely to be directed at the strength of the Crown's case with a view to determining whether a plea of not guilty is a viable course to pursue.

The same approach is adopted in respect of charges of sexual violation by rape. Notions of personal accountability and responsibility are either alien concepts or are subjugated to the desire to put the Crown to the proof with the objective of the accused "getting off."[18] But the consequences of this conventional approach fall disproportionately heavily on women alleging rape simply because the question of consent is perceived to be intrinsically contestable. Moreover, by virtue of the nature of the crime, the victim's evidence is likely to be the only direct evidence available to the Crown in relation to that issue. From the outset, therefore, the adversarial system virtually guarantees that the complainant will be required to travel a hard road.

In Court, however restrained the questioning and cross-examination, the hearing is undeniably confrontational. As already pointed out, more often than not the complainant's credibility is challenged. Although her prior sexual history may not be put at issue without the leave of the Judge, any behaviour on her part which may suggest that she is a "woman of easy virtue", or that "she asked for it", or that "she deserved what she got", or the like, will be explored before the jury. It has been observed that the distinction is drawn between "worthy and unworthy women" and that this distinction affects the strength of outrage felt by men and women alike. (Kennedy, p 114.) Because the jurors' response to the alleged crime will or may be influenced by the portrayed character of the complainant, few defence counsel will resist seeking to depict her as unworthy of their outrage or sympathy.

But unlike many witnesses in crimes from homicide to theft, the victim is not giving evidence of what she has objectively observed. She is giving evidence of a deeply traumatic personal experience in which her sexual integrity and autonomy were cruelly violated. That affront to her dignity and esteem is perpetuated as a part of the adversarial trial process.

It is, of course, an outdated error to persist with the claim that the adversarial system ascertains the truth. At times it may do so. But a criminal trial is not directed at ascertaining the truth. Its overt objective is to determine whether the Crown has established the charge beyond reasonable doubt. A fair and correct outcome in terms of that test may or may not coincide with the truth. Yet, is the victim of a personally destructive crime such as rape not entitled to claim that the objective should be to ascertain the truth? Does she not have a "right" to have the truth determined? Vital as the standard of proof is to our criminal jurisprudence, it provides little consolation to the victim who, having undergone the tribulations of the investigation and trial, finds that her evidence has then been regarded as insufficient to meet that standard. To the honest victim, feelings of rejection and alienation must inevitably follow, and these must add to her psychological and emotional distress.

It was probably inevitable that, in a criminal justice system in which the view that no innocent person is to be convicted of a crime is quite properly entrenched, the interests of the victim would be subordinated to the interests of the accused. Yet, the

interests of the victim remain extant. It was an appreciation of the victim's position which led to the evidential and other reforms already mentioned. But the question may be properly posed whether the adversarial system in cases of rape, even with further modification, is capable of recognising and safeguarding the well-being of the victim. It is in this context that the further question must be tentatively raised; would an inquisitorial system not be more appropriate to resolve complaints of rape or sexual assault?

The question can be vested with some credence if the views of the mythical man – or woman – from Mars is sought. That extra-terrestrial being is thought to bring to any earthbound problem an objectivity untrammelled by the preconceptions, prejudices and conditioning of history and tradition. Would such a distant and dispassionate observer condone the present system? One would imagine that, while holding steadfast to the paramount importance of ensuring that no innocent person is convicted of a crime, our Martian would urge that there must be a better system for securing both the interests of the accused and the interests of the victims of rape. An inquiry of a more inquisitorial nature, designed to arrive at the truth, and in which the victim would never be required to enter a Courtroom and face the vicissitudes of an adversarial trial, might seem to offer that prospect.

To speak of a shift to a more inquisitorial mode of resolving a complaint of rape smacks of heresy to many lawyers and laymen alike immersed in the British tradition of criminal law. In her marvellous book, *Eve was Framed*, Helena Kennedy graphically describes the horrors of rape and the full impact of the trauma on the victim. But she rejects the inquisitorial system used on the Continent as an advance on the adversarial method of the British Courts. She adverts to the failings of the Continental system and reiterates her faith in the British legacy of justice (p 3). One can accept that the inquisitorial system has its failings and that miscarriages of justice occur under that system, but they occasionally also occur under the adversarial system. Inquisitorial systems are also pledged to avoid the conviction of an innocent person. Where such a system would seem infinitely superior is in the sensitivity with which it can treat the victim. Inquiry must be kinder than confrontation.

It is, however, only realistic to accept that the adversarial system is too deeply ingrained in our culture for it to be bypassed in cases of rape or sexual abuse in the foreseeable future. A more inquisitorial system which does not sacrifice the right of an accused not to be convicted of rape unless he is guilty, but which recognises the dignity and humanity of rape victims may, however, increasingly be regarded by some as an objective or ideal to be pursued. Perhaps, in the manner of so much criminal law reform a more humane system will develop gradually. As Lord Devlin has said:

> Lawyers' law reform, especially in matters of procedure, always flows sluggishly; and especially in criminal procedure, tradition plays a strong part in protecting it from change![19]

I will address what might be done more immediately to alleviate the rape victim's plight in the Courtroom in Part II of this paper. I will not pretend, however, that the measures which I will propose for consideration will suffice to extinguish the complainant's Courtroom ordeal. Indeed, the suggested reforms may serve only to demonstrate that a more fundamental change to the system is required if the victim is to be treated humanely, and is to receive the justice to which she too is entitled. □

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1 Ian Freckleton, "Contemporary Comment: When Plight Makes Right – The Forensic Abuse Syndrome" (1994) 18 CLJ 29. See also Jennifer Temkin: *Rape and the Legal Process* (1987, Sweet & Maxwell) 1-2; Susan Brownmiller, *Against Our Will* (1975, Penguin) 384, 391; Carolyn J Hursch, *The Trouble With Rape* (1977, Nelson-Hall) 96; and "Concerns About Rape" (1989) HO Research Study No 106, 2.

2 Warren Young, *Rape Study Vol I: A Discussion of Law and Practice* (1993). A study directed by Mel Smith and Warren Young and undertaken by the Department of Justice and the Institute of Criminology.

3 Helena Kennedy, *Eve was Framed* (1992, Chatto & Windus) 28.

4 D A Dwyer, "Expert Testimony on Rape Trauma Syndrome: An Argument for Limited Admissibility" (1988) 63 Wash LR 1064.

5 A W Burgess and L L Holmstrom, "Rape Trauma Syndrome" *Aust Jour of Psychiatry*, 131:9, 1981. Burgess and Holmstrom found that many victims have a controlled response in which they mask their feelings and appear calm and composed.

6 K Fisher "Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome" (1989) Univ of Illinois LR 691, at pp 705-706.

7 Justice Statistics 1990. See also Philip Spier and Marion Norris, "Conviction and Sentencing of Offenders in New Zealand: 1983 to 1992". Policy and Research Division, Dept of Justice.

8 Dr David Brereton, "Rape Prosecutions in Victoria". *Women and the Law* (Eds Easteal and McKillop-1993, AIC No 16) Proceedings of a Conference held 24-26 September 1991, at pp 52-53; Patricia Weiser Easteal, "Without Consent: Confronting Adult Sexual Violence", *Survivors of Sexual Assault: A National Survey* (Ed Easteal) Aust Inst of Criminology, Canberra, ACT, Proceedings of a Conference held 27-29 October 1992, at pp 80 and 89-90.

9 Bernadette McSherry, "No! (Means No?)" (1993) Vol 18 No 1, *Alternative LJ* 27, at p 38.

10 Martha Chamallas, "Consent, Equality, and the Legal Control of Sexual Conduct" [1988] Vol 61:777, Sth'n Cal LR 777, at p 814.

11 I am indebted to Anet Kate for a most helpful memorandum on this point.

12 See Sarah Hoaglund, *Lesbian Ethics: Toward New Value* (1988) – Inst of Lesbian Studies) 49.

13 Section 183C Summary Proceedings Act 1957; s 375A Crimes Act 1961; s 138 Criminal Justice Act 1985; s 23A Evidence Act 1908 (as amended by Evidence Amendment Act (No 2) 1985); ss 139 and 140 Criminal Justice Act 1985; and s 23E Evidence Act 1908 (as amended by the Evidence Amendment Act 1989).

14 See David Shapcott, *The Face of the Rapist* (1988, Penguin Books), fn 28, at p 213.

15 Simon H Bronitt "Rape and Lack of Consent", (1992) CLJ 289, at pp 290-291; and Carolyn J Hursch, *The Trouble With Rape* (1977, Nelson-Hall) 96.

16 Sue Streets. "Reforming Victoria's Rape Laws: Essentially Rape" (1991) Legal Serv Bul Vol 16, No 4, 1984, at p 185.

17 Some women are able to reconstruct their lives sooner and more effectively than others as a result of confronting their assailant in Court. (Anet Kate, memorandum to the author, fn 11, above). This does not mean, of course that the "confrontation" needs to be cruel and inhumane. The interests of those who are scarred by the Courtroom appearance for a second time and those who refrain from reporting or prosecuting a rape because of their fear or appreciation of this ordeal must also be considered.

18 The author, "The So-Called Right to Silence" (1991) NZULR 299.

19 Broadcast talk on Third Programme, UK, 1966, referred to by Edward Gardiner QC and Mark Carlyle MP in "The Case for Reform" [1966] Crim R 498, at p 502.

Transitional Retirement Benefit: A new type of income support for older people

By Ken Mackinnon, Senior Lecturer in Law, University of Waikato

Superannuation has been a highly contentious political issue for some 20 years. Changes made to the original scheme, as agreed to in the Accord of 1993 between three of the then four Parliamentary political parties, have necessitated certain transitional provisions. This has been more particularly so in respect of changing the age at which a citizen becomes entitled. This article considers the details of these transitional provisions. Mr Mackinnon is the author of the recently published title "Social Welfare" in The Laws of New Zealand.

The background

When introduced in 1977, National Superannuation was payable without a means test from the applicant's sixtieth birthday, and was taxed at the standard rate along with other income. Since then, it has undergone several name changes, and since 1 April 1994, has been known as New Zealand superannuation. (For New Zealand superannuation generally, see *Laws of New Zealand:* Social Welfare (Wellington: Butterworths, 1994) at paras 136 - 142.)

Since 1984, in recognition of the special status and costs of National Superannuation as a universal non income-tested benefit, an additional tax ("the surcharge") has been imposed on income the superannuitant might have in addition to superannuation — except in the case of a superannuitant with a non-qualifying spouse who has opted to receive superannuation at an income-tested married rate. (Income Tax Act 1976, Part XA.)

Furthermore, from 1990 the age of eligibility was — and continues to be — raised in stages. (Social Welfare (Transitional Provisions) Act 1990, s 3.) From 1 April 2001, the qualifying age will be 65. However those who, but for the increase in the minimum age requirement, would have been eligible for New Zealand superannuation are now able to apply for a new benefit, the transitional retirement benefit.

In its report, a Government-appointed Task Force on Private Provision for Retirement made certain recommendations in 1992 about the continued provision of public superannuation. (*Final Report: The Way Forward* (Wellington: Government Printer, 1992.) These issues were taken up and developed by a multi-party Parliamentary Group, which drew up an Accord on Retirement Income Policies.[1] It was as a consequence of this Accord that transitional retirement benefit was introduced and that certain other changes to public provision for retirement were made.

From 1 April 1994 the Minister of Senior Citizens has the power to appoint, after consultation with those Parliamentary parties who signed the accord on retirement policies, an independent retirement commissioner with a monitoring, educational and advisory role in relation to retirement income polices and issues.[2] Additionally, the Minister of Senior Citizens must commission periodic reports on retirement income policies at six-yearly intervals. The first must be prepared by 31 December 1997, covering as a minimum the trends and likely future developments which may affect retirement income policies, a commentary on the adequacy, efficiency, equity, sustainability and shortcomings of public and private provision of retirement income, and suggestions for adjustments to be made to retirement income policies. (Retirement Income Act 1993, ss 22, 23.)

Transitional retirement benefit

On 1 April 1994, a transitional retirement benefit was introduced to alleviate the effects of the raising of the age of eligibility for New Zealand superannuation. (Social Welfare (Transitional Provisions) Act 1990, s 7A(1), as amended by Social Welfare (Transitional Provisions) Amendment (No 2) Act 1993. The effect of this section is to implement clause 2.6.1 of the Accord on Retirement Policies.) Despite the name, it is not necessary to be retired in order to be eligible for a transitional retirement benefit. However because the benefit is income tested, most people in work will have a sufficiently high income as to exclude them from receiving the benefit. For people in their early sixties who planned to retire but who were deterred from doing so by the raising of the qualifying age for New Zealand superannuation, the new benefit may act as an incentive to leave the workforce or at least the full-time workforce. It will also permit unemployed people in their early sixties to transfer from unemployment benefit, leaving behind them not only the work test (the requirement that the beneficiary be available for and seeking employment), but also the stigma that

still adheres to unemployment benefit – though the benefit for unemployed persons over the age of 55 has been renamed "the 55+ benefit" and the need to register with the New Zealand Employment Service has been dropped for those over 55.[3]

As a transitional benefit with a "lifespan" of only ten years, the transitional retirement benefit has a limited application, but for the cohort of the population who will be eligible for it, knowledge of the features it has in common with New Zealand superannuation and the various differences between the two forms of income support may assist with informed retirement planning.

Residence qualification

The residence qualification for transitional retirement benefit is the same as for New Zealand superannuation. The applicant must be ordinarily resident in New Zealand at the time of application for superannuation and, to receive the full amount, generally, must remain so for the duration of payment of superannuation, and must have had at least ten years' residence and presence in New Zealand since reaching the age of 20 including period(s) of residence and presence totalling five years since reaching 50.[4] Certain periods of absence abroad are disregarded when calculating qualifying periods of residence and presence in New Zealand if the Director-General is satisfied that the applicant remained ordinarily resident in New Zealand: absences for special medical or surgical treatment or vocational training where the Director-General is satisfied that there were good and sufficient reasons for going outside New Zealand to obtain it, periods spent serving on a New Zealand owned or registered ship trading to and from New Zealand, periods spent serving in Commonwealth forces or attached thereto in wartime, and periods spent overseas as an accredited volunteer appointed by Volunteer Service Abroad Incorporated. A similar concession for periods of work outside New Zealand as a missionary or as the spouse of a missionary is granted to an applicant born in New Zealand or ordinarily resident in New Zealand immediately prior to the period of absence.[5]

Under reciprocal agreements entered into with Australia, Greece, Ireland, the Netherlands and the United Kingdom, time spent or social security contributions made in those countries may count as qualifying time for transitional retirement benefit.[6]

Age qualification

The qualifying age for transitional retirement benefit rises every three months from a qualifying age of 60 years between 1 April and 1 July 1994 to 64 years 9 months between 1 October 2003 and 1 January 2004.[7]

Exclusion

Transitional retirement benefit is not available to a superannuitant or someone whose (de jure or de facto) spouse is a superannuitant. (Social Welfare (Transitional Provisions) Act 1990, s 7A(1).) Entitlement to transitional retirement benefit ceases when the beneficiary becomes entitled to New Zealand superannuation or a veteran's pension (including as a dependent spouse). (s 7A(3).) The restrictions on the receipt of statutory accident compensation which exclude a superannuitant from receiving compensation do not apply with transitional retirement benefit.[8] However such compensation is treated as income for income-testing purposes. (Social Security Act 1964, subs 3(1), definition of "income" (b)(ii).

Where an applicant is entitled to an overseas benefit or pension, the equivalent New Zealand benefit may be refused or reduced. (Social Security Act 1964, s 70.)

Rate of benefit

The rate of payment is affected by the marital status of the beneficiary and whether there are any dependent children.[9] That the transitional retirement benefit is income-tested while New Zealand superannuation is not (unless the superannuitant has elected to receive a married rate of superannuation covering a spouse who is not entitled to superannuation in his or her own right) is the major difference between the two. (Social Welfare (Transitional Provisions) Act 1990, s 7A(4) and Fourth Schedule.) Thus once the annual income of the applicant and his or her spouse exceeds a threshold, the benefit is abated by either 30c in the dollar or 15c in the dollar (depending on the applicant's domestic circumstances); once income reaches a higher threshold (currently $4160), the abatement is 70c in the dollar (or in some cases 35c).[10] There is a special exemption from the income calculation for transitional retirement benefit: 50% of any amount received by way of pension from a registered superannuation scheme or by way of an annuity under a recognised life insurance policy is disregarded if the pension or annuity payments commenced before 1 April 1992 and at that time the recipient was between 55 and 59 and his or her spouse, being younger was over 55. (Social Security Act 1964, s 3(3). This exemption also applies to a superannuitant who includes a non-qualifying spouse in the superannuation and whose superannuation is therefore income-tested.)

An applicant who is a sole parent may have a transitional retirement benefit reduced if he or she fails or refuses to identify who is in law the other parent of a dependent child in his or her care, or fails to comply with certain requirements of the Child Support Act 1991. (Social Security Act 1964, s 70A. See *Laws NZ,* Social Welfare paras 59 and 119. New Zealand superannuation cannot be reduced for this reason.)

Transitional retirement benefit, while taxable, is not subject to the tax surcharge which is imposed on other income derived by a superannuitant (or his or her spouse). (Income Tax Act 1976, s 65(2)(d) (taxation of benefits) and Part XA (surcharge). As to treating a foreign pension as other income, see *Taxation Review Authority Case 86,* (1992) 17 TRNZ 600.)

The rates of benefit may be raised by means of an Order in Council, but the duty to make an annual adjustment to the rates of New Zealand superannuation to keep them in line with the consumer price index and within a band of percentages of the average time weekly earnings does not extend to transitional retirement benefit. (Social Security Act 1964, s 61H. Social Welfare (Transitional Provisions) Act 1990 s 13A.)

Commencement and duration

There is a waiting period (a stand down) of two weeks before a transitional retirement benefit is payable. It runs from the date when an applicant becomes eligible if an application for benefit is received

within 28 days of that date, or from the date of receipt of the application if the application is not received within the 28 days. An application can be made in advance, but it cannot be backdated. (Social Security Act 1964, s 80(1). The stand down can be reduced to one week in cases of serious hardship; s 80(2). For commencement of payments generally, see *Laws NZ*, Social Welfare paras 24-25.)

Regardless of the date of application, an applicant who has continued in employment after the age at which he or she could have become eligible for transitional retirement benefit cannot receive the benefit for any period before employment ceases if the income from the employment would have been high enough to prevent payment. (Social Security Act 1964, s 80(2B). This appears to be the case even if the assessment year is taken to start at a time after which those earnings fall below the maximum income cut-off point.)

An applicant whose employment ceases is not entitled to transitional retirement benefit for a prescribed period if his average net weekly income over the previous 26 weeks is greater than the net average wage[11] at the time his employment ceased plus $50. (Social Security Act 1964, s 80B(1). The high income disentitlement does not apply if the applicant is already disentitled under ss 60H, 60J, or 60N: s 80B(1)(c).) Such a person's average net income includes for these purposes any benefit or other allowance received and the net amount of any redundancy or retirement payment paid before or payable up to a year after that employment ceases. (Social Security Act 1964, s 80B(3).) The period of disentitlement, which runs from the effective date of cessation of work, varies with the size of the amount of excess, to a maximum of ten weeks. (s 80B(1).) High income disentitlement applies only to specified benefits, which do not include New Zealand superannuation – even where the option has been taken to receive an income-tested married rate of superannuation by including a non-entitled spouse.

If a beneficiary dies without leaving a spouse or dependent child, transitional retirement benefit ceases to be payable on the day following the pay day which immediately precedes the death (s 80(8)(b)). It continues to be payable for four weeks after the death if the deceased had a spouse or a dependent child at the time of death (s 80(8)(a)).

Absences overseas

(For the effect of absences overseas on benefits, see *Laws NZ*, Social Welfare paras 33 and 141-142.)

There are significant differences between the two types of retirement income in respect of the effect of a superannuitant or beneficiary going overseas (for example, for an extended holiday or for a visit to relatives). New Zealand superannuation remains payable for the first 26 weeks of absence from New Zealand at the full-rate if a superannuitant leaves New Zealand for a period of up to thirty weeks and returns at the end of that period, or if the Director-General is satisfied that any period of absence beyond 30 weeks was due to circumstances which were both beyond the superannuitant's control and not reasonably foreseeable before departure.[12] In marked contrast, persons in receipt of transitional retirement benefit can be absent for no more than four weeks before the benefit is forfeited from the date of departure, though there is similar provision for events beyond the beneficiary's control. (Social Security Act 1964, s 77.) Similarly there is no provision for transitional retirement benefit to be paid at a reduced (50%) overseas rate to persons leaving New Zealand to reside elsewhere as is the case with New Zealand superannuation, nor for a special rate payable to those resident on the Cook Islands, Niue or Tokelau.[13] However arrangements under the reciprocal agreements with Australia, Greece, Ireland, the Netherlands and the United Kingdom for the continued payment of a New Zealand benefit or for the payment of an equivalent benefit or pension when a New Zealand superannuitant or beneficiary leaves New Zealand to reside in the other country apply equally to both types of income support.[14]

New Zealand superannuation or transitional retirement benefit may be paid, in the Director-General's discretion, to someone, otherwise entitled to receive it, who is absent for not more than two years in total if that person, his spouse, dependent child or sibling is receiving medical treatment overseas for which the Department of Health is granting assistance. (Social Welfare (Transitional Provisions) Act 1990, s 17A(3); Social Security Act 1964, s 77(4).)

General

Transitional retirement benefit is a benefit for the purposes of the Social Security Act 1964, and hence the general provisions of that Act applying to benefits are applicable. There is a standard review and appeal procedure, which also governs New Zealand superannuation. (Social Security Act 1964, ss 10A and 12A - 12R. For the review and appeal procedure, see *Laws NZ*, Social Welfare paras 37-40.) □

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1 The Accord on Retirement Policies entered into by the Alliance, Labour and National Parliamentary Parties on 25 August 1993 is reproduced as the First Schedule of the Retirement Income Act 1993.

2 Retirement Income Act 1993, ss 5, 6. It was announced on 6 September 1994 that Mr Colin Blair is to be the first Retirement Commissioner.

3 Ministerial Direction, dated 17 March 1992, to Director-General of Social Welfare in the matter of s 5(2) of the Social Security Act 1964 (*NZ Gazette*, 26 March 1992, No 40, p 889). For 55+ benefit, see *Laws NZ*, Social Welfare para 68.

4 Social Welfare (Transitional Provisions) Act 1990, ss 7A(1)(a) and 4(1). A person working overseas but paying New Zealand tax on overseas earnings is deemed to be resident in New Zealand, as are his spouse and children: Social Security Act 1964, s 79. For residence requirements generally, see *Laws NZ*, Social Welfare paras 46 and 136.

5 Social Welfare (Transitional Provisions) Act 1990, s 4(2). Section 4(4) defines "missionary work". This concession is not to be deemed to be modified by any inter-governmental agreement regarding reciprocity of social security benefits.

6 Social Security (Reciprocity with Australia) Order 1990 (SR 1990/84); Social Security (Reciprocity with Hellenic Republic) Order 1993 (SR 1993/347); Social Security (Reciprocity with Ireland) Order 1993 (SR 1993/251); Social Security (Reciprocity with the Netherlands) Order 1990 (SR 1990/359); and Social Security (Reciprocity with the United Kingdom) Order 1990 (SR 1990/85). In each case the inter-governmental agreement is reproduced as a Schedule to the statutory regulation. Transitional retirement benefit is not one of the listed social security benefits in these agreements, but provision has been made for the automatic incorporation of new benefits. For reciprocity agreements on benefits, see *Laws NZ*, Social Welfare paras 180 - 185.

7 Social Welfare (Transitional Provisions) Act 1990, s 7A(2). The graduated increase in the qualifying age thus lags some 2-3 years behind that of New Zealand Superannuation, which is being raised in stages from 60 before 1 April 1992 to 65 from 1 April 2001: s 3. There is no provision for transitional retirement benefit to continue beyond 31 March 2004: s 7A is deemed to be repealed on that date by virtue of Social Welfare (Transitional Provisions) Amendment (No 2) Act 1993, s 3(3).

8 On the requirement for a person to choose either statutory accident compensation or New Zealand Superannuation, see Accident Rehabilitation and Compensation Insurance Act 1992, s 52.

9 The rates are set out in the Fourth Schedule of the Social Welfare (Transitional Provisions) Act 1990 [A previous Fourth Schedule setting out rates of National Superannuation has become a new First Schedule.] Unlike the rates for New Zealand superannuation there is no special rate for a beneficiary living alone, nor is there an option of including a non-qualifying spouse or not: any spouse is automatically included and the income (if any) of that spouse counts as assessable income.

10 Social Welfare (Transitional Provisions) Act 1990, Fourth Schedule. "Income" as defined in Social Security Act 1964, s 3(1), includes unearned income and is calculated in accordance with s 64. Income for social security purposes is not necessarily the same as for Income Tax purposes: see *Social Security Appeal Authority Decision No 94/93* (unreported, 13 October 1993). See also *Laws NZ*, Social Welfare paras 52-53.

11 "Net average wage" means, at any given time, the average ordinary time weekly earnings (all sectors, male and female combined) after deduction of standard tax, revealed in the most recently published Department of Statistics survey of salaries and wages: s 3(1), definition of "net average wage". In *Social Security Appeal Authority Decision No 68/93*, unreported, 17 August 1993, it was successfully argued that since high income is relative to average earnings, income earned overseas should be judged with reference to the average earnings in the overseas country rather than be converted directly into New Zealand dollars for comparison with the New Zealand average.

12 Social Welfare (Transitional Provisions) Act 1990, s 17A(2). If, under normal circumstances, the superannuitant does not return within thirty weeks, New Zealand superannuation already paid for the twenty-six week period becomes an overpayment and is recoverable by the Director-General. Longer absences may not affect the 26 week entitlement if they result from "aircraft breakdowns, industrial disputes or the incapacity of a spouse or relative": *Southern District Review Committee v Baird* [1993] NZAR 280 at 282. The 26 week entitlement was unaffected when the superannuitant was needed to represent his family in Rarotonga at a Land Court hearing which was postponed: *Social Security Appeal Authority Decision No 29/91*, unreported, 20 September 1991.

13 A special rate of New Zealand superannuation is payable to a superannuitant who leaves New Zealand to reside in the Cook Islands, Niue or Tokelau, if he is ordinarily resident and present in New Zealand and entitled to New Zealand superannuation before departing overseas, and intends to reside for more than fifty-two weeks in one of those countries. The special rate is also payable to a superannuitant who was already receiving National Superannuation at the overseas rate while resident in the Cook Islands, Niue or Tokelau on 30 June 1993. The special rate varies with the number of years the applicant has been resident in New Zealand: Social Welfare (Transitional Provisions) Act 1990, ss 17B and 17C.

14 Social Security (Reciprocity with Australia) Order 1990 (SR 1990/84); Social Security (Reciprocity with Hellenic Republic) Order 1993 (SR 1993/347); Social Security (Reciprocity with Ireland) Order 1993 (SR 1993/251); Social Security (Reciprocity with the Netherlands) Order 1990 (SR 1990/359); and Social Security (Reciprocity with the United Kingdom) Order 1990 (SR 1990/85). For reciprocity agreements on benefits, see *Laws NZ*, Social Welfare paras 180-85.

US armed intervention

Noriega and the invasion of Panama are the model of every US armed incursion into the world following the Cold War, whether orchestrated by interventionist conservatives or interventionist liberals. The only thing that distinguishes conservatives from liberals in this is that the former are willing to stretch to "parochial" American law, as the Bush administration did applying American drug laws in Panama, while the latter prefer "universal" international law. Either way, however, in every case of actual or contemplated intervention – Iraq, Somalia, Bosnia, or Haiti – America's interventionists, rather than making a calculation of the benefits versus the costs of enforcing politics by the gun, instead imagine themselves to be in pursuit of a criminal, after whom they send out a posse. Anyone hoping to understand the moral imagination behind American armed intervention abroad must understand that America does not see itself as making war in pursuit of interests – God forbid – but instead as enforcing the law. If it can bring back the miscreants and try them before judges like Judge Hoeveler, so much the better. Its troops are not soldiers, but policemen.

Among the many distinctions between these two, however, is that soldiers engage in mutual combat, whereas shooting at policemen is always against the law; those who shoot at policemen are by definition criminals. When the City on the Hill sends forth its angels, in the American interventionist imagination, therefore, they ought to be immune, truth their buckler and justice their shield. Hence the special anger at Somalia's General Aideed, for whom the United States went to the trouble of getting an arrest warrant from the Security Council, when he had his men shoot back at the UN forces on the forgivable assumption that he was at war.

This way of looking at things is, in my view, utter folly, whether imagined by interventionist conservatives or interventionist liberals. . . .

Kenneth Anderson
Lecturer in the Law of War
Harvard University
Times Literary Supplement
30 September 1994

Unfettered Judges?

I believe in the jury and in case law for the same reason, that they are both restraints on judicial supremacy. I see the value of discretionary power, but where it is to be used widely, I would rather it was spread upon the diversity of the jury than concentrated in judges sitting singly or in like-minded groups; and where it is to be given to the judiciary I would rather it was used in accordance with the corporate wisdom and accounted for accordingly, than left to the individual judge, but my obedience has been not to the individual, but to a college of men working together under the discipline of the law. I have never felt the tyranny of precedent. It is a tie, certainly, but so is the rope that mountaineers use so that each gives strength and support to the others. The proper handling of precedent is part of judicial craftsmanship; the judge must learn how to use it and in particular how to identify the rare occasions when it is necessary to say that what judges have put together they can also put asunder.

Lord Devlin
The Judge, p 201
Oxford Paperbacks

Reinventing the wheel: Criminal injuries compensation?

By Rosemary Tobin, Lecturer in Law, University of Auckland

Time, like the proverbial continuous drop of water, is notorious for wearing away the value of new things. Thus the Criminal Injuries Compensation Act 1963 is no longer a piece of social legislation since in fact it has been repealed. By confusing personal injury from criminal acts with personal injury by accident the Government has looked to ACC to provide compensation. The Government thus saves itself tax money by pretending that ACC levies are not taxes (as they are in effect being legally compulsory charges). In this article Rosemary Tobin argues that the issue needs to be reconsidered. She suggests the reintroduction of criminal injuries compensation legislation.

In 1963 New Zealand led the Commonwealth in introducing the first Criminal Injuries Compensation legislation: the Criminal Injuries Compensation Act 1963 (the CIC Act). Because it was an entirely novel piece of legislation the approach adopted was cautious but it was intended that if the legislation was successful then its scope would be extended over time. The Criminal Injuries Compensation Act was followed by corresponding legislation in England and then in Australia. Criminal injuires compensation is generally provided as an act of grace by the State. In the words of Jacobs J:[1]

> It is essentially humanitarian in motive; it recognises that many criminal offenders are without means and accordingly imposes the primary burden of compensation upon the State; but because the State has no liability in law to the victim, apart from the statute, compensation is in the nature of an ex gratia payment.

Do we need to re-enact corresponding legislation today?

Victims of violent crime

The Criminal Injuries Compensation Act covered the victims of those violent offences listed in its schedule; essentially those crimes such as murder and assault where there was a clear intent to cause injury, and sexual offences. It afforded compensation to victims injured or killed by the relevant criminal acts (s 17). "Injury" meant actual bodily harm and included pregnancy and mental or nervous shock, and "injured" had a corresponding meaning (s 2). The Crimes Compensation Tribunal had power to make an order for the payment of compensation to or for the benefit of the injured person, to any person responsible for the maintenance of the victim (s 17(1)). The amount was payable out of the Consolidated Fund from money appropriated by Parliament for that purpose. Not only did the Tribunal have a discretion to make an order directing the offender to refund the whole or any part of the amount of compensation payable to the victim, but the Criminal Injuries Compensation Act did not take away the common law right of the victim to sue the offender and recover compensation from him or her. The legislation was subsumed within the Accident Compensation Act 1972. (Accident Compensation Amendment Act 1974 ss 6 & 12, and Penal Institutions Amendment Act 1975 s 41B(2) and (3).) Under the 1972 and 1982 accident compensation legislation victims who suffered personal injury as a result of a violent crime had those injuries treated as personal injuries by accident and were eligible for compensation as provided in these statutes. That compensation included both Earnings Related Compensation, lump sums and, in relevant cases, counselling as well as the other assistance provided by the Corporation.

Then in the 1980s victims of crime began to receive further attention. In 1985 New Zealand was co-sponsor of the adoption by the United Nations of a declaration concerning the basic principles of justice for victims of crime. Two points are of real interest here:

First, the definition of victims included those who have suffered physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of the criminal law. This included, where appropriate, the immediate family or dependants of the direct victim and their rescuers.

Second, where compensation is not fully available from the offender or other sources the declaration confirmed that States should endeavour to provide financial compensation to victims who sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes. Again that included the family of persons who died or became physically or mentally incapacitated as a result of the victimisation. The establishment, strengthening or

expansion of national funds for compensation to victims was to be encouraged.

In that same year New Zealand enacted the Criminal Justice Act 1985 which does provides a sentence of reparation for victims so that they can be compensated both for emotional harm and where property has been stolen or damaged. But reparation does not assist if the criminal has no assets. Compensation for personal injury was deliberately excluded from this Act because of what was then a comprehensive no fault accident compensation scheme. (482 NZPD 10325 (8 July 1987) per Bill Dillon.) This Bill made provision for the establishment of a Victims' Assistance Fund, and would, if enacted, have amended the Criminal Justice Act 1985 and the Crimes Act 1961 to provide that any payments of compensation, reparation or restitution ordered by the Court must be paid into the fund. A surcharge was to be imposed on every fine levied by the Courts, and a minimum surcharge imposed where the accused was convicted but not fined or discharged without conviction. In this way every person who had committed a criminal offence would have made a contribution to the Fund. The Secretary of Justice, when such orders had been made, would then have been able to make immediate payment to the victim from the fund thus removing the need of the victim both to be drip-fed over a long period, and to pursue any further question of payment. The Bill did not pass but was superseded by the Victims of Offences Act 1987.

The definition of victim in the Victims' Rights Bill was carried through to the Victims of Offences Act where a victim is defined as

> a person who suffers physical or emotional harm, or loss of, or damage to property; and, where an offence results in death ... includes the members of the immediate family of the deceased (s 2).

This conforms with the definition in the UN declaration, and extends the concept of victim to those who might be termed "bystanders" or "secondary victims". The Criminal Injuries Compensation Act did not go as far as this although it was contemplated that some psychological damage to a bystander could occur. It did, for example, cover the limited situation where psychological damage was suffered by a child who observed criminal injury to a parent and that child by virtue of the psychological damage was prevented from sitting School Certificate. If this involved the father in additional expense because the child was held back a year at school the father could recover his financial loss pursuant to s 18(1)(d) of the Criminal Injuries Compensation Act. (337 NZPD 2637 (22 October 1963) per Hon JR Hanan, the then Minister of Justice.)

The Victims of Offences Act established principles to assist the victims of crime. Important among these is the requirement that victims be treated with courtesy, compassion and respect for their personal dignity and privacy (s 3). Victims must be kept informed of the progress of any investigation of the offence and the outcome of any Court proceedings (s 6). The sentencing Judge is now made aware of the impact of the offence on the victim through the victim impact statements. The Act set up a Victims Task Force, with a sunset clause, to oversee the rights of victims.

But then in 1991 the tide began to turn. First the Government advised that it was concerned about the development of the phrase "personal injury by accident" in the accident compensation legislation to cover situations far beyond that which most people would regard as an accident.[2] The Government announced its intention to reform the scheme both in terms of fairness and affordability. The Government did not intend that claims for common law damages would be reintroduced. (Birch: *Accident Compensation: a fairer scheme*. Introductory statement by the Minister.) The result of the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act) has been to reduce the number of people who can receive cover and the level of compensation awarded them, and this includes those who are victims of violent crime. Indeed there are victims of crime who now receive no cover whatsoever under the legislation. By reducing the level of compensation available, and by incorporating so many definitions in the legislation (almost every possible term is defined) there are now certain areas where it will be possible to maintain an action for common law damages.[3] Unfortunately these will be unlikely to benefit a victim of crime. And then in 1993 the Victims Task Force went out of existence, with no sign of anything tangible to take its place.

Cover for personal injury

Cover under the 1992 Act now extends to personal injury only if it arises as a result of the four situations posited in s 8(2) – an accident (as defined), gradual process disease or infection arising out of employment (as defined), medical misadventure (as defined) and treatment for personal injury. That is, like the previous legislation, there is no specific category of criminal injury. Any criminal injury is covered only if it falls within one of the four defined categories. The Minister further noted that the working party which had been set up by the Government to evaluate the scheme recommended that physical injury should be present before mental injury was covered. (*Accident Compensation: a fairer scheme* (1991) 32.) This led to a personal injury being defined as the "death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries" (s 4(1)). That is a mental injury alone is not a personal injury. And the 1992 Act now defines mental injury. It is "a clinically significant behavioural, psychological or cognitive dysfunction." (s 3 definition of mental injury).

Victims of a technical battery such as spitting, grasping by the shoulder and other forms of unwanted touching, are all examples of batteries which do not result in a physical injury. As there is no physical injury there is no cover for any mental consequences and the bar against an action for damages will not apply.

This definition of personal injury is in conformity with an earlier statement by Holland J in the High Court (*ACC v F* [1990] NZLR 492, 499) where his Honour said that where there had been no physical injury "even by the merest physical touch" it could not be said that a personal injury by accident had been suffered. In two important but quite different decisions his fellow Judges disagreed. First in *ACC v E* [1991] 2 NZLR 228 (HC);]1992] 2 NZLR 426 (CA) (mental injury suffered as a result of attendance at a management course) Gault J thought "it would be

a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not physical injury however slight also is sustained (p 434). And then in *Cochrane v ACC* [1994] NZAR 6 (mental injury suffered after son's murder) Greig J thought that

> as with common law claim[s] for nervous shock a person may be covered and what occurs to that person or what that person suffers may be personal injury within the meaning of personal injury by accident when she comes upon an accident or is involved in the result of an accident" (p 9).

Now however not even the merest physical touch will suffice. What is required is wounds, lacerations, contusions, sprains or strains, fractures, amputations, dislocations and blindness. (*Cover Personal Injury and Accident Explained* ACC (1992).)

Not only that but for any mental injury claim to be successful that mental injury must be an outcome of the physical injury. Consider X, a victim of crime such as a bank robbery. X is punched in the face by the criminals because he is slow to follow their orders. The criminals then lock him in the bank vault. X suffers from claustrophobia and as a result of this experience is unable to return to work. X's bruises soon heal, indeed they do not require medical attention. The problem is his mental injury. It is not an outcome of his physical injuries, the punch in the face, – it is an outcome of being locked in the vault. X is not covered, and will not receive any compensation, counselling or otherwise for his mental injury.[4]

How then do those who suffer injury due to violent crime now fare under the 1992 Act? Those who suffer a physical injury such as lacerations or contusions will be covered, and this is the majority, but what of the others?

Rape victims

The only exception to the prohibition on mental consequences as personal injury is where the mental consequences, specifically mental or nervous shock, are the result of the criminal acts listed in the first schedule to the Act (s 8(3)). In *G v Auckland Hospital Board* [1976] 1 NZLR 638 rape was held to be a personal injury by accident and the plaintiff denied the right to sue the Hospital Board for compensatory damages at common law. The action was for damages against the Auckland Hospital Board for negligently employing the man who raped her. The date of the rape was 2 April 1974, the day after the 1972 Act came into force. The issue of whether rape was a personal injury by accident had to go before the Court because although the amendment to the 1972 Act incorporating the Criminal Injuries Compensation Act gave a right to recover under it for mental or nervous shock caused by rape the amendment did not come into force until 1 April 1975. Some years later *A v M* [1991] 3 NZLR 298 confirmed that a victim of rape could sue the wrongdoer and receive an award of exemplary damages. This, in practice, may be of very little help to the rape victim – unless, that is, the criminal has substantial assets.

When the 1992 Act was foreshadowed by the Minister he advised that the Government was concerned with the "small" group of criminal injury victims who suffered mental injury but no physical injury. Those who he had in mind were the victims of sexual offences, and this led to the enactment of s 8(3). For some reason s 8(3) follows the earlier Criminal Injuries Compensation Act, and appears to draw a distinction between mental injury and mental or nervous shock. Mental injury is defined but there is no definition of mental or nervous shock. This would seem to indicate that mental or nervous shock could be something less than mental injury or it could be a drafting error. The rather imprecise term nervous shock[5] is found in case law. (From *Victorian Railways Commissioners v Coultas* (1988) 13 App Cas 222 to *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.) It is something more that emotional distress, anxiety or grief. It can be an anxiety neurosis or a reactive depression; that is a recognisable psychiatric illness. (See Lord Scarman in *McLoughlin v O'Brien* [1983] AC 410). So long as a rape victim suffers some recognisable psychiatric injury cover will follow.

Before the 1992 Act rape victims could receive the necessary counselling, and lump sum payments of up to $17,000 where there was permanent impairment, and up to $10,000 for pain and suffering and loss of enjoyment of life. Where there had been multiple acts of abuse higher awards are possible.[6] Now pursuant to s 8(3) a rape victim, suffering no physical injury but instead mental or nervous shock, is entitled to counselling to the extent provided in the regulations, and where her disability (or his as the case may be) is assessed at 10%, to an independence allowance of $4 a week payable every three months, and reassessed every five years. Contrast that with the situation in England. If that rape victim lived there she would be eligible for compensation from the Criminal Injuries Compensation Board: See *Re E, J, K and D* ([1990] CLY para 1596). These four children were all members of the same family and were aged nine, eleven, seven and five years respectively when they each disclosed serious allegations of sexual abuse by their parents and others. All were in need of long term psychotherapy, and there was evidence that two at least would be emotionally affected for the rest of their lives. Damages were awarded of £17,500, £15,000, £12,500, and £12,500 respectively.

Assault victims

Because most victims of crime suffer physical injury they are covered by the 1992 Act. But what of those who suffer mental injury alone? A tortious assault, the apprehension of a battery, involves no physical touching and hence the victim of an assault has no cover under the 1992 Act. The victim may suffer emotional upset through mental or nervous shock to mental injury as defined. In *Kennedy v ACC* [1992] NZAR 107 the appellant claimed personal injury by accident after he was threatened with a double-barrelled shot gun during a robbery at his work place. He alleged stress following his involvement in the hold-up. Although his medical evidence did not support his claim the Appeal authority left the door open if he should subsequently suffer some sort of delayed reaction to the traumatic events of the hold-up.

Kennedy, having no cover now, is left to his common law remedy, if any. It will only be in those rare cases where the criminal is known and solvent and the victim has the wherewithal to pursue a common law

claim that this will be of any use. An alternative may be Kennedy's employer. It may be that if Kennedy's employer was aware of the dangers of an armed hold-up and took no measures to ensure Kennedy's safety that the employer will be liable. For example if Kennedy worked in a bank which had been itself the subject of previous armed robberies where bank employees were threatened, then a cause of action may lie based on a duty of care owed by the employer to the employees to provide a safe work environment for them. Under a criminal injuries compensation system Kennedy is entitled to counselling and if his mental consequences are sufficiently severe, damages.

Consider *Re Cunningham* [1990] CLY para 1588. Cunningham was a bank employee who was a victim of a bank raid where masked men pointed a shotgun at him. He was told that if he moved his head it would be blown off. After the thieves left the bank they were pursued by the police, and fired shots at them which were heard by Cunningham. He suffered nightmares, felt jumpy and self conscious. Within two weeks of the incident he heard a noise which caused him to have hysterics. However he was not off work and after the trial of the robbers his symptoms improved. His ability to work was not affected and nor were his social activities. He was awarded £1000 by the Criminal Injuries Compensation Board.

Secondary victims of a criminal act

In those countries with a criminal injuries compensation system victims of violent crime such as the relatives of a murder victim receive cover under the relevant criminal injuries legislation. Yet in New Zealand some who are victims of violent crime as defined in the Victims of Offences Act 1987, and victims as defined in the UN declaration, are now unable even to receive counselling as they have suffered no personal injury as defined.

The accident compensation legislation came about because of the desire to overcome the vagaries of the common law negligence action. The intention behind the accident compensation legislation was that all personal injury negligence claims would be barred in New Zealand. (*Royal Commission on Inquiry on Compensation for Personal Injury in New Zealand* (1967) (The Woodhouse Report) 39.) Negligence claims in the common law extend to secondary victims of accidents, such as the immediate family, where the relationship is sufficiently proximate (*McLoughlin v O'Brien* [1993] 1 AC 410, 422 Lord Wilberforce) and to rescuers (*Mt Isa Mines v Pusey* (1970) 125 CLR 383). They may even extend to bystanders (*Alcock v Chief Constable of South Yorkshire Police*]1991] 3 WLR 1057, 1106 (Lord Ackner) and 1118 (Lord Oliver). Lord Wilberforce made the following observation in *McLoughlin v O'Brien* [1983] AC 410, 418:

> Whatever is unknown about the mind-body relationship . . . it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact.

That the Corporation in the 1980s took cognisance of this development in the common law is evidenced by the following extract from the booklet published by it.

> A claim may also stand for "mental consequences" as a result of witnessing an accident, or as a result of being advised of the accident shortly thereafter. In these two latter cases, factors such as the closeness of the relationship between the claimant and [the] injured person, the way the claimant perceived the accident and its immediate effects, the time gap between the accident and perception, and the nature of the injuries sustained, will be considered in determining the claim. (*Unintentional Injury: New Zealand's Accident Compensation Scheme*, 16.)

Consider the case of Mrs Cochrane (*Cochrane v ACC* [1994] NZAR 6). She was called to the hospital after her brutally beaten son was dumped at the door of the hospital. He did not regain consciousness, and she remained at his bedside until he died. Her claim under the 1982 Act was for mental injury as a result of her son's death. Her argument, based on such cases as *McLoughlin v O'Brien* and *Alcock v Chief Constable of South Yorkshire Police*, was accepted, and subject to medical evidence she is entitled to lump sum compensation under the 1982 Act. And in the latest case of a secondary victim (*Thomas v ACC* Accident Compensation Appeal Authority, 2 May 1994, decision 144/94. B H Blackwood) the Appeal Authority opined that even if the medical evidence fell short of showing a recognisable psychiatric illness, as required in the common law nervous shock claims, this would not prevent cover in terms of the "generous unniggardly" approach taken under the 1982 Act. But under the 1992 Act Mrs Cochrane has not suffered a personal injury, and nor has she experienced an accident. This leaves her to her common law claim, if any. On the assumption that she has a solvent defendant to sue what then?

The problem faced by the secondary victim of a crime, or an accident, who suffers mental consequence as a result of witnessing the crime or the accident or its aftermath is the interpretation of s 14. The bar applies to proceedings for damages arising directly or indirectly out of personal injury covered by the Act. In most cases the primary victim will have suffered the requisite physical injury and hence have cover. Thus the argument against the secondary victim is that although he or she does not have cover any action brought arises at least indirectly, but possibly directly, out of a personal injury (that of the primary victim) covered by the Act. This interpretation is borne out by the words . . . "whether by that person or any other person . . ." in the section. If this interpretation is the one preferred by the Courts the result will be that the secondary victim who would have had a claim at common law has lost that common law right and been left with nothing in its place. The Court should be slow to accept such an interpretation of the section. However if s 14 is read so that the bar does not apply to the secondary victim, by adopting a fair, large, liberal interpretation of it, and reading in the words "by that person" after "shall be brought", so that the bar applies only to the person suffering the injury, then a further anomaly arises. The primary victim is covered; the secondary victim is not. The primary victim receives the

paltry benefits available under the legislation;[7] the secondary victim, once they prove their cause of action in Court, can receive personal injury damages far in excess of the benefits available to the primary victim. (See *Petersen v Petersen* (unreported, High Court, Rotorua A 92/85 Anderson J, 19 December 1990. A total of $780,000 was awarded for the loss of potential earnings, the loss of bodily function and the loss of enjoyment of life.)

So far s 14(1) has been considered briefly by two cases. *Kingi v Partridge* (High Court, Rotorua, 2 August 1993 (CP 16/93) Thorp J) was a claim for emotional harm suffered by the family of a patient who died in hospital. The action was against the surgeon who attended her, the medical adviser and the Area Health Board having responsibility for the hospital. The claim was for both general and exemplary damages and based on the defendants' alleged failure to exercise due care on the family's behalf. Thorp J thought that on the ordinary construction of the relevant Accident Compensation legislation (s 27(1) of the 1982 Act) the plain language of the provision covered the family's claim. Unfortunately the Judge did not devote much time to this argument as in his opinion the plaintiffs failed to prove the necessary propinquity and relationship such as to bring them within the *Alcock* test. Even if the evidence at the trial disclosed the necessary close relationship as required by *Alcock* they would still have failed. His Honour pointed out that the family were not present in time and place to an event which could have had the necessary violent impact on the mind. It is axiomatic that evidence of repeated disappointments and concerns is not enough (*Jaensch v Coffey* (1984) 54 ALR 417). His Honour also noted that as this case involved finding a duty of care in a novel fact situation policy reasons negated finding such a duty. The policy considerations were as follows:

(a) The circumstances of the health system in this country. There was not enough money as it was to provide all those who were in need of care with the assistance required, and adding to the system's financial obligations would further reduce its ability to assist living patients who still required its care.

(b) The fact that if a duty of care was to be found it would mean additional duties of care would be owed such as those to the family of the victims of car accidents.

(c) Finding a duty would run contrary to the principles and policies of the Accident Compensation legislation.

(d) The grant of monetary compensation to the family of victims might not be an unqualified benefit.

His Honour thought the only policy consideration pointing towards a duty was the fact that the claimants had no other means to recover for their loss. The application was struck out.

The policy reasons are, with respect, not persuasive. A health system must be accountable in some form when it has failed to maintain an appropriate standard of care. If nothing else the system can insure against the negligent actions of its health providers. Secondly the common law does already hold the negligent driver of the car responsible for the damage he or she causes, and that includes damage to the family member who suffers the aftermath of the accident, provided they are sufficiently close in time and place to it. As to the fourth point, in many cases it is not the financial compensation that is so important to the victim, but the fact of the marking of the wrong by the award. And even so far as the principles and policies of the accident compensation system are concerned the fact is that these have changed. The Act is now, as its name emphasises, an insurance based scheme. It does not provide real compensation, nor does it provide comprehensive coverage.

McDonnell v Wellington Area Health Board (High Court, Wellington, 16 December 1993 (CP 250/93) Master JCA Thomson) was the second case to consider the statutory bar. This action for damages for nervous shock was by a husband against the Wellington Area Health Board, and two medical practitioners, for alleged negligence in the treatment of his wife over a short period of time. The plaintiff had been advised that there was no concern over his wife's health but shortly afterwards she began coughing up blood and died. He was claiming both general and exemplary damages for mental and nervous shock. The defendants relied on *Kingi*, and sought to have the proceedings struck out. The Master considered that, if the facts were as pleaded, this plaintiff, unlike *Kingi*, could establish a common law claim for nervous shock. Not only was there the necessary close relationship but the plaintiff had been present and witnessed a horrifying event to a loved one. The Master expressed "considerable reservations" as to whether it was appropriate to apply the policy considerations of *Kingi* "against a background of reduced rights to compensation resulting from the recent Accident Compensation Acts passed" (p 7) He was concerned that if *Kingi* was correctly decided then persons like Mrs Cochrane, discussed earlier in this article, would have no rights at all.

The Master pointed out that subject to statutory restrictions it was a basic tenet of the common law that where there was a right the Court would provide the remedy. He adverted to the fact that the plaintiff here still had to establish the necessary duty. Once established, even subject to the Accident Compensation legislation, exemplary damages were available. These do not run counter to the accident compensation legislation. Since *Donselaar v Donselaar* [1982] 1 NZLR 97 was decided exemplary damages have been available to plaintiffs in appropriate cases as they do not arise directly or indirectly out of the accident or the injury, but out of the conduct of the defendant. As to the first of Thorp J's policy reasons negating a duty of care the Master disagreed. He thought that the Courts would be vigilant to mark disapproval of acts of gross negligence in, for example, a hospital for if they were not this would lead to a falling off in standards. Imposing a duty could accordingly be of benefit both to the health system and the country. As to Thorp J's fourth policy reason that was many sided and the subject of widely diverse opinion. Whether common law damages were available was a different matter:

> As I understand the argument, the result of specifically removing a right to Accident Compensation for some specific injury (here nervous shock) results in the suffered being able to claim for common law damages. That

> argument seems to me to be against the whole spirit and intendment of the Accident Compensation Act . . . The issue has yet to be tested, I should say that if the legislative result is to allow claims for common law damages in those cases, that alone would be sufficient reason, in my view not to rule out such claims for reasons of policy, even though the result might be to place hospitals at greater potential risk than would be the case if litigants were confined to claims for exemplary damages. (p 11)

He refused to strike out the claim.

But, as already stated there has been a fundamental policy change with the enactment of the 1992 Act. A claim for general damages for mental injury would have been against the spirit and intendment of the 1972 and 1982 accident compensation legislation based as it was on the five guiding principles of the Woodhouse Report. (Community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.) These principles are not all espoused by the 1992 legislation, which is an insurance based scheme. A claim for damages for the mental injury of a secondary victim should be permitted to proceed.

The real difficulty caused by a refusal to allow nervous shock as a personal injury for the secondary victim, or even the primary victim in certain cases, was drawn to the attention of the Government. (522 NZPD 7079 (19 March 1992) Lianne Dalziel.) They were warned that there was nothing in the Bill, as it was then, that would enable the victim to receive the counselling needed in such cases let alone obtain the long-term compensation for the post-traumatic stress suffered. The warning was ignored. Not only that but the Labour Committee which reviewed the Bill reported the concerns of the committee as to how the proposed legislation dealt with the victims of crime. (Ibid, 7062, Max Bradford.)

> No change to the provision by the Accident Compensation Corporation of counselling and other services for sexual abuse cases is suggested, but the committee is concerned that many aspects of dealing with victims of crime do not fit easily within an accident compensation scheme. Accordingly the committee strongly recommends that the Government conduct an urgent review of ways of dealing with victims of crime outside the accident compensation scheme, with the possible option of separate empowering legislation. The Accident Compensation Corporation may continue to manage part or all of the counselling and rehabilitation process, but compensation – if there is to be any – should be taken care of outside the accident compensation scheme.

Very little appears to have been done. This all illustrates the real difficulties in attempting to have one statute cover both a criminal injuries compensation scheme and an accident compensation scheme, especially when it is also trying to incorporate a workers compensation scheme and a motor vehicle accident scheme as well.

Conclusion

In the first instance the legislators need to seriously consider the definition of personal injury in the 1992 Act. Even if nothing else is done that definition needs to be amended so that those who are defined as victims of crime in the Criminal Justice Act, and the UN declaration, can receive Corporation funded counselling for any mental injury incurred as a result of the violent death of a family member.

Second I believe that we must recognise the need to compensate adequately the victims of criminal injuries. I acknowledge that such injuries do not fit easily in an insurance-based accident compensation scheme. But while they remain there, if personal injury were to encompass mental injury, the victim of a crime who suffers only mental injury would at least receive counselling costs.

However in my opinion we need to give serious consideration to the reintroduction of criminal injuries compensation legislation, even if it is only to comply with our international obligations. But more than that we need to ensure that New Zealand, once a Commonwealth leader in this area, does not fall too far behind in our treatment of victims of violent crime. Reparation though available under the Criminal Justice Act is of no assistance where the offender has no assets. A fund such as that proposed in the lapsed Victims' Rights Bill would mean no extra cost to the taxpayer and would allow reparation or compensation to those who are victims of crime. □

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1 *Kingston-Lee v Hunt* (1986) 42 SASR 136, 141. For a discussion of the New Zealand legislation see Hanson *Compensation for Criminal Injuries* (1969) unpublished dissertation held at the Davis Law Library, University of Auckland.

2 It is clear from the definitions in the new Act that the Government was concerned with the discussion of the phrase personal injury by accident in *Green v Matheson* [1989] 3 NZLR 564 and *Willis v AG* [1989] 3 NZLR 574, and with the result of the following cases: *ACC v E* [1992] 2 NZLR 426; *ACC v Mitchell* [1992] 2 NZLR 436; *Polansky v ACC* [1990] NZAR 482.

3 For a discussion of these see Harrison *Matters of Life and Death: the Accident Rehabilitation and Compensation Insurance Act 1992 and Common Law Claims for Personal Injury* Legal Research Foundation (1993); Todd and Black "Accident Compensation and the Barring of Actions for Damages" (1993) 1 Tort LR 197; Miller and Rennie, "Common Law Damages Claims" Supplement to *Brookers Accident Compensation in New Zealand* (1993); Miller "Accident Victims: niggardly approach likely to lead to upsurge in damages claims" 406 *Law Talk* (1993) 25.

4 Similarly the plaintiff in *King v ACC*]1992] NZAR 65 who suffered, inter alia, minor abrasions, but whose smoke phobia developed as a result of a number of factors including smoke inhalation, and moving a fridge during a fire bombing attack, would not get cover for the smoke phobia. It was not an outcome of *the* physical injuries. See also *Hand v ACC* [1994] NZAR 61 where the mental injury was the result of looking after his incapacitated wife not the accident per se.

5 The term has been described as "misleading and inaccurate" *Attia v British Gas Plc* [1988] QB 304,317 per Bingham LJ, who preferred the term psychiatric damage.

6 See Mackenzie "Lump Sums or Litigation Compensation for SexualAbuse: the case for reinstatement of a compensation for criminal injuries scheme" (1993) 15 NZULR 367, and Evans & Mackenzie "More Sirens: variation on a theme" (1993) 113 New Zealand's Suffrage Centennial Women's Law Conference papers.

7 Earnings Related Compensation if they are eligible, an independence allowance of up to a maximum of $40 per week if they are 100% disabled, if they are eligible, and, depending on their degree of disability, whatever they are eligible for under the regulations.

Adoption and surrogacy

By Gordon Stewart, Lecturer, Victoria University of Wellington.

The technological developments related to conception and pregnancy have inevitable legal implications since the relationship of parent and child, in terms of biology and of nurturing, is such a unique and fundamental one. Surrogacy raises related issues of adoption law. In this article Mr Stewart considers two cases where there were payments made, but the Courts strained to avoid the baby-farming prohibitions in ss 22, 25 and 26 of the Adoption Act 1955. The author suggests that the two cases so far decided will not necessarily be applicable in future in cases that may be contested.

Introduction

Re P (adoption: surrogacy) [1990] NZFLR 385 was the first reported case dealing with some of the adoption issues raised by the practice of surrogacy in New Zealand.[1] The judgment in that case did not (and on its facts, could not) clearly indicate the future direction of the law. *In re G* (unreported judgment, Adopt 6/92, District Court Invercargill, 3 February 1993, Judge Neal) raises again some of the issues of its predecessor and provides us with the next chapter in this debate. Curiously, *In re G* makes no reference at all to the earlier case. Even though the two are distinguishable on the grounds of the method by which impregnation occurred and therefore differ on the applicability of the Status of Children Amendment Act 1987, both cases address s 25 of the Adoption Act and the issue of payment in adoption/surrogacy arrangements. *In re G* also considers s 6 of that Act – not in issue in the earlier case and the question of its possible breach.

This case note considers the two cases together, in the hope that the parallels and the divergences of the two judgments might give some indication of the approaches which the Courts, in the absence of specific legislative direction, could be expected to take in future cases.

Summary

Re P indicated a definite reluctance to find that breaches of the Adoption Act had occurred – in that case, breaches of ss 25 and 26 – despite arguably strong evidence to that effect. Counsel had successfully argued that those sections went to the suitability of the adopting parents, and one might assume that the finding of no breach was based on a reservation that a contrary finding would preclude the making of an adoption order. *In re G* is at times ambiguous on this point, but the judgment makes it clear, in the end, that breaches of the Act will not preclude the making of an order; they will simply be weighed along with all other relevant evidence. That said, *In re G* still indicates a marked reluctance to find that breaches have occurred.

Re P found no breach of the s 25 prohibition against payments for adoption on the grounds that (a) the surrogacy agreement contained no reference to adoption, and (b) there was no element of profit in the payments.[2] *In re G* found no breach of s 25 on the grounds that (a) the parties had been focusing on surrogacy, not adoption, when the payments were made, and possibly (b) there was an air of compensation rather than profit in the making of the payments. As to the first of those grounds in *In re G*, however, the evidence also showed that adoption at a future date *had* crossed the parties' minds at the time of the surrogacy arrangements, a point which supports the suggestion of reluctance in finding breaches to have occurred.

Background

Mr and Mrs W had been married for 14 years, but Mrs W was unable to bear children. They had considered adoption, but on the two occasions when they applied to adopt, the Department of Social Welfare had not placed them in the top category as prospective adopters, apparently on the basis of financial problems which Mr W then had (but which had since passed). Mr and Mrs W consequently turned away from adoption and looked towards surrogacy. Their first attempts at impregnation through artificial insemination failed, but the surrogate in that exercise introduced the Ws to Mrs P, with whom a new surrogate arrangement was entered into. Under that arrangement, Mr W would be the semen donor, Mrs P the surrogate mother, pregnancy would be achieved through artificial insemination, and $12,000 would be paid to Mrs P. Mrs P's husband agreed to the arrangement. The exercise was successful: G was born in September 1991, and has been with Mr and Mrs W since her birth.

In 1993, Mr and Mrs W applied to adopt G. The Department of Social Welfare recommended that G remain with the Ws under a guardianship order.

Application of the Status of Children Amendment Act 1987

In re G is immediately distinguishable from *Re P* on the basis of the manner in which conception occurred: in *Re P* it was by natural intercourse, in *In re G* it was by artificial insemination. Under s 5(1) of the Status of Children Amendment Act 1987[3] Mr P was the legal father of G, and Mr W was not, with the result that Mr W (and Mrs W, of course) had to adopt G if there were to be legal links between them. Both *Re P* and *In re G* confirm the suggestion that s 5 is not in step with the likely intent of many of the parties involved in surrogacy arrangements, namely that it is generally the commissioning couple, not the surrogate and her partner, who intend to be the eventual parents of the child. (See Rotherham (1991) 7 *Otago Law Review* 426 at 435. On the basis of the only two cases to

date, this generalisation has proved correct, regardless of whether artificial insemination or natural intercourse occurred.) The Ministerial Committee on Assisted Reproductive Technologies[4] noted that some may see as "cumbersome" the consequent process which requires the commissioning couple to apply for an adoption order, and that the refusal to grant an order would be an "unnecessary burden" for the child (at p 117). To simplify that process, the Committee has suggested that consideration be given to the English provision whereby a child born through surrogacy may be treated as the legal child of the commissioning couple.

In the meantime — assuming it is correct that it is usually the commissioning couple that intends to be the eventual parents — because the natural father (and his partner) in a surrogacy arrangement will always have to apply to adopt if they wish to form the strongest possible legal links with the child, the question of whether or not there has been payment for adoption will continue to arise wherever the surrogacy arrangement involved payment or reward. This (and the "cumbersome process" referred to by the Committee) could be overcome in the short term by amending s 5 to take full account of the alternative possible parenting intentions of the parties involved.

Issues addressed in *In re G*

There were four matters which Judge Neal had to address

- the breach of s 6 of the Adoption Act
- the breach of s 25
- the untruthful statements made by the Ws to the social worker and
- the combined effect of those three matters on s 11 and the question of the fitness of the adopters.

Breach of section 6

Subject to limited exceptions, s 6 prohibits the placing or receiving of a child under 15 in the home of any person for the purpose of adoption. G had been placed with the Ws since her birth (although, apparently in response to Department of Social Welfare concern that the child could not leave the hospital without the birth mother being present, Mrs P attended the hospital for that purpose), and on the facts it is accepted that Mrs W always intended to apply to adopt G.[5] There being no approval by a social worker nor an interim order for the proposed adoption, (Adoption Act 1955, s 6(1)(a) and (b)), the only possible exceptions to the prohibition were that the child was placed in the home of one of her parents and a step-parent, s 6(4)(c), or that the child was placed in the home of a relative (s 6(4)(d)). All that Judge Neal had to say on that point was that:

> . . . technically the provisions of subsection (4) which provide exceptions do not apply unless one treats the father as being a relative of G which, of course, he is apart from the provisions of the Status of Children Amendment Act. I should say if there has been a breach of section 6 it is perhaps mitigated by the overall circumstances of this case and the fact that the father is the biological father. (*In re G*, at p 6.)

Judge Neal's comments illustrate vividly the friction between fact and legal fiction caused by legislation of this type. Mr W is a biological relative of G but not a legal relative of G; Mr W is the biological father of G but not a legal parent of G. In what should the Courts put store: the fact or the legal fiction? The original state of affairs or the state of affairs created by s 5? The general answer must be that the legal fiction prevails, regardless of how much one may be tempted to adopt a "realist" stance. Any other approach would negate the intended effect of legislation, and be beyond the capacity of the Courts. That said, *In re G* seems to vacillate on this point. Consequently, it is not clear from the judgment

- whether s 6 was breached or not, and
- if breached, whether either of the two possible s 6(4) exceptions applied, and
- if the exceptions did not apply, what the effects of that breach would be.

As to the first point, all that is said is that there is a "possible breach of section 6" (at p 5) and "if there has been a breach of section 6" (at p 6). As to the second, there are only the ". . . technically . . . but . . ." comments cited above. This is a pity because, unlike the Adoption Act, the Status of Children Amendment Act raises an interesting question here: is the semen donor a "relative" of the child? The Status of Children Amendment Act deems the surrogate's husband to be the father of the child (s 5(1)(a)) and the semen donor not to be the father (s 5(1)(b)), but it does not preclude the argument that the donor is a relative,[6] probably because the relationship between that section and s 6(4)(d) of the Adoption Act was not foreseen at the time of drafting. An argument along those lines might have provided a more convincing basis for dealing with the possible breach of s 6.

As to the effects of a breach of s 6, the judgment is ambiguous:

> . . . the Adoption Act 1955 does not contain a prohibition on an adoption order being made if there are breaches of the Act, . . . (*In re G*, p 5.)

> Notwithstanding there may be some matters of public policy involved whereby the Court could police breaches of the Act, I do not consider that this is a case where that should be done. Quite clearly to do so would mean not making an order (p 8).

On the strength of *Re P* and now *In re G*, there seems to be a clear reluctance for Courts to find that any offence has been committed under the Adoption Act, despite the fact that such offences do not necessarily require that the adoption order be withheld.[7] In *Re P* there was an express finding that no offence (re ss 25 and 26) had been committed; in *In re G* the matter (re s 6) seems to be left vague.

Breach of section 25

Section 25 prohibits the giving or receiving of payment or reward in consideration of an adoption. Attention to this section in a surrogacy/adoption case should require that two questions are answered:

(i) was there a payment or reward?
(ii) if so, was it a payment for the surrogacy or for the adoption?

There are two possible interpretations of "payment or reward" (for a fuller discussion of these arguments, see Rotherham (1991) 7 *Otago Law Review* 426, at 440-443): first, that "payment" must be read in the light of "reward", with the effect that only payments in the nature of a reward – ie involving profit – are prohibited, but payments in the nature of compensation are not; or second, that "payment" refers to monetary payment, and "reward" refers to payments of any other kind, regardless of whether or not it could be argued that there was any element of compensation in the payment. Rotherham has strongly argued that the second interpretation is the correct one (at pp 442-443.) However, in noting that Mrs P, in *In re G*, "had to cease work and wished to take her family on a trip" (at p 3), that judgment seems to suggest that the profit/compensation argument might still have some life in it. Unfortunately, this aspect of the issue is not taken any further in the case, so the point remains without express resolution. It can be inferred, however, from the fact that the Court went on to address the second of the two questions above, that there had been "payment or reward".

Was that payment or reward made in consideration of adoption? In *Re P* that question was easily resolved on the basis of the clever drafting of the surrogacy agreement: ". . . it is most important to remember that the agreement contains no provision relating to adoption in any of its clauses" and so the "payments are not in breach of s 25" (*Re P* [1990] NZFLR 385, 387). In *In re G*, no reference is made to any written, detailed surrogacy agreement, and so Judge Neal did not have the convenient and helpful resource which Judge McAloon had on this issue. Instead, there are four references in the judgment to the parties' intention regarding the payments and/or adoption:

(i) The applicants saw the amount as being payment for the surrogacy services and were willing to pay it to her. (*In re G*, p 3.)

(ii) It had always been intended that Mrs W would in due course apply for an adoption order, although that was seen as something ancillary to the surrogacy procedure. (p 4.)

(iii) Whilst it might be thought by implication there could be said to have been involved in the $12,000 payment a payment or reward in consideration of the adoption or proposed adoption, the evidence of Mr and Mrs W was that they had not put their minds to that aspect of it but rather were centering on the surrogacy itself. In particular, it seems they were under the impression that the child to be born would be the father's legally and if any application had to be made it would be simply in due course the mother applying to adopt. (p 6.)

(iv) I am satisfied that they did not put their minds to the question of adoption at that early stage except in the restricted terms I have referred to and the payment made was for the surrogacy as opposed to the adoption. (p 6.)

In the English case of *Re an Adoption (Surrogacy)* [1987] 2 All ER 826, Latey J had accepted that because the parties had not thought about adoption at the time of the surrogacy, and did not consider adoption until after the payments had been made, those payments did not breach the equivalent English prohibition against payments in consideration of adoption. Rotherham, however, has suggested that "in the surrogacy context instances where no thought has been given to adoption may be relatively rare" (1991) 7 *Otago Law Review* 426, 439) in the light of extract (ii), and the rather self-contradictory (iii) and (iv) above, *In re G* does not seem to be one of those rare instances.

Further, Rotherham suggests that "it is difficult to avoid the conclusion that, in cases where payments are made by commissioning parents who intend to adopt subsequently, at least part of the payment is made in consideration of the adoption" (at 438) particularly if one of the commissioning couple has no parental rights at all in relation to the child – as the parties thought the position to be in *In re G* (see extracts (ii) and (iii) above).

Despite that evidence and those arguments that might lead to a conclusion that there was a breach of s 25 in *In re G*, Judge Neal held that the payment made was for the surrogacy as opposed to the adoption (at p 6.) This adds support to the proposition that there seems to be a reluctance to find breaches of the Act to have occurred, perhaps in the continued belief that such a finding will go to the fitness of the adopters and necessarily preclude the making of an order. Contrary to that proposition, however, is the clear indication that Judge Neal intended to simply weigh any breaches of the Act along with any other information when considering whether the parents were fit and proper people to have custody of the child; the finding of a breach, in itself, would not determine the matter. (pp 5 and 7.)

Bearing that in mind, the proposition may instead be that the Courts are reluctant to find breaches to have occurred because, while that will not preclude the making of an order, it might hinder it, and in cases where an order is the clearly desirable outcome, any hindrance should be avoided.

Untruthful statements made to the social worker

Little is said on this matter in the judgment, and it appears that the statements may have had something to do with aspects of advertising by the first surrogate mother candidate or by Mrs P. (p 6.) It can be inferred that the Ws made true statements about the fact of the surrogacy itself, but that they were untruthful about any details that might have affected the confidentiality of the surrogacy and the surrogate parents. (pp 4 and 6.) The motive behind the false statements, and the stress under which the Ws were operating at the time, were accepted as justifications for those statements.

The concealment of information regarding the surrogates, however, is a step towards the scenario painted by Rotherham:

> Parties to a surrogacy arrangement who try to conceal the fact when seeking to have the commissioning parents adopt the child will inevitably also mislead the Department of Social Welfare, an unfortunate

> circumstance given that the Department is responsible for safeguarding the welfare of the child in question. On occasion the parents are likely to be persons who have been rejected by the Department as prospective adoptive parents and who have turned to surrogacy as an alternative ((1991) 7 *Otago Law Review* 426, 449.)

Certainly, the Ws did not conceal the fact of surrogacy, but the presence of *any* concealment, or indeed the apprehension on the part of adopters that there needs to be some concealment, supports Rotherham's suggestion that there could be latent problems here. Many of those problems might be removed, however, if it were clear that the Department had no reservations regarding surrogacy, its legality or its effects. On that point, there is much riding on the responses to the recent recommendations made by the Ministerial Committee on Assisted Reproductive Technologies.

Section 11: the fitness of the adopting parents

As noted above, Judge Neal made it clear that the breaches, "if there were any" (*In re G*, p 5), were to be weighed along with other information before the Court when considering the fitness of the applicants to adopt. On balancing the evidence, his Honour was satisfied as to the fitness of the Ws, satisfied as to the future welfare and interests of G were the adoption order to be granted, and indicated a preference for the security of an adoption order, rather than the guardianship order recommended by the Department of Social Welfare.

***Re P* and *In re G* in future**

As noted by Judge Neal, surrogacy is not currently illegal in New Zealand, nor (aside from the 1987 Amendment Act) is there legislation dealing with it. On the question of the need for legislation, the Ministerial Committee has drawn a clear distinction between the extremes of the surrogacy spectrum: it discourages commercial surrogacy, where profit is the primary motive (*Assisted Human Reproduction*, p 108), but sees "no overwhelming objections to IVF compassionate surrogacy." (p 118.) The Committee has also indicated that surrogacy is not yet so prevalent in New Zealand that legislative controls are warranted. The Report, then, has no immediate impact on cases such as *Re P* and *In re G*, although it does recognise their impact:

> Between those two categories [ie commercial and compassionate surrogacies] there may be different shades of arrangement, eg where an essentially altruistic arrangement involves some monetary exchange to cover loss of income. (p 103.)

The Committee does, however, recommend the establishment of a Council on Assisted Human Reproduction, one function of which will be to monitor the need for legislation (pp 44-46.) It may be good luck rather than good planning that the two cases to date involving surrogacy have not given rise to more difficult issues for the Court to resolve; the agreements have been honoured, the parties have been acceptable adoptive parents, the welfare and interests of the child would be promoted by the adoption, and blatant commercialism has not been a feature. It cannot be imagined that that will always be so, and the Committee's proposed Council represents a sound step in preparing for that future. □

1 For a comprehensive discussion of those issues, see C Rotherham, "Surrogate motherhood in New Zealand: A survey of existing law and an examination of options for reform" (1991) 7 *Otago Law Review* 426. On the case itself, see C Rotherham, " 'Baby C': An adoption following a surrogacy arrangement" [1991] NZLJ 17; LJ Caldwell, "Casenote: Re P: (adoption: surrogacy)" [1991] *Family Law Bulletin*, 151; G W Stewart, "Adoption and surrogacy in New Zealand" (1991) 21 VUWLR 131.

2 Tied in with this, but not elaborated upon in the case, is that the father was potentially liable for maintenance payments: pregnancy had occurred through natural intercourse, the Status of Children Amendment Act 1987 did not apply, and the semen donor was the legal father. That liability would have supported a finding that there was no profit element in the payments, and that they were "maintenance properly so called" (*Re P* [1990] NZFLR 385, 387).

3 Section 5(1) deems the husband of the surrogate, if he has consented to the surrogacy, to be the father of the child, and the semen donor not to be the father.

4 *Assisted Human Reproduction*, Report of the Ministerial Committee on Assisted Reproductive Technologies, July 1994. On surrogacy generally, see pp 102-118.

5 *In re G*, at p 4. The Ws were under the impression that Mr W would be the legal father of G, and, therefore, had not foreseen nor initially intended that Mr W would apply to adopt G: p 6.

6 Nor does it expressly preclude the argument that the donor is "parent", who therefore falls within s 6(4)(c) of the Adoption Act, but that may be a rather more difficult argument to run in the face of the provision stating that the donor is not the "father".

7 Section 27 lays down the penalty for offences. An order could be withheld if the offence were such that the fitness of the adopting parents was consequently in doubt, but the commission of an offence does not automatically render the adopting parent unfit, despite the arguments to that effect in *Re P*.

Judges as lawyers

The judicial function is not just to render a decision. It is also to explain it, wherever explanation is possible, in words which will carry the conviction of its rightness to the reasonable man whom in his mind the judge should always be addressing. In its purest form, which inevitably is rare, it should lack the personal element; it should be simply an exposition of how the law affects the facts of a particular case. Such an exposition cannot help being case law. A judiciary which fails to make case law in this sense sentences itself to extinction. For the failure would destroy the claim that judges must be lawyers. Men and women are not made judges simply because they can 'detect the specious, the irrelevant and that which is intended to deceive'. There are many disciplines which train men to do that. There are many types who can administer orderly-room justice in a minimum of words. It is comparatively easy to decide what is just in the particular circumstances of a case and to say Guilty or Not Guilty as jurymen do, according to whether the stuff is quality or shoddy. This is justice, but without the lawyer it is not justice according to law. What the lawyer is uniquely trained to do is to produce the just decision out of the law and to expound the reasons for it in terms that conform with the law and add to it. This is justice according to law and, if it is not what is wanted, lawyers are not needed. There are always plenty of people who would like to get rid of them.

Lord Devlin
The Judge, p 198
Oxford Paperbacks

The Rashomon of science: The legal position of the foetus in New Zealand

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The new birth technologies are a legal minefield. In this article Susan Watson discusses the legal status, or lack of it, of a foetus. She recognises the inherent ethical clash of views within the community on the issue, but considers that some legislative action would be better than the present inaction.

One of the features of the news over the 1993/1994 "silly season" was the furore surrounding reported plans by Edinburgh University researchers to create babies from the eggs of aborted foetuses (*The New Zealand Herald*, 3 January 1994.) Accusations of "womb robbing" echoed criticisms of nineteenth century resurrectionists robbing graves to provide body parts for the growing science of anatomy. The use of aborted foetuses for any purpose though, is a legal and ethical minefield which, if it cannot be resolved, will at least need to be addressed urgently by legislation. That the Government is beginning to recognise this can be seen by promises by the Minister of Justice that 1994 will be a year of decision on assisted reproduction issues. (*Sunday Star*, 9 January 1994.) Hamilton East Labour Member of Parliament Dianne Yates used her maiden speech in Parliament to urge fellow politicians to confront issues raised with artificial reproduction technology such as the use of foetal tissue. (*The New Zealand Herald*, 15 March 1994.)

The sensitivity of the issues surrounding use of foetal tissue is illustrated by the experience in the United States where debate has involved successive Presidents on a personal level. Both the Reagan and Bush administrations banned the use of federal funds for foetal tissue research, with President Bush, in 1992, vetoing a compromise Bill passed by the House and Senate. On taking office, President Clinton sparked nationwide controversy by lifting the ban.

Definition of "humanness"

At the centre of the discussions, and the reason foetal tissue use is the cause of so much impassioned debate, is that it raises the question of when human life begins, and what constitutes a human being. Some argue that in determining "humanness" we should analogise from the definition of death.

> After all the definition of death is, in effect, a statement about life itself since it is concerned with determining when those factors and qualities which amount to humanness are absent, such that the person may be pronounced dead, though, of course the organism continues to live in parts. (Ian Kennedy, *The Times*, 26 May 1984.)

Proponents of this view state that merely being a member of the species does not convey humanness and instead focus on such human qualities as the ability to feel emotion, think rationally, communicate with others and form relationships.

Those who favour this test of humanness say that there should be a graduated approach. When a certain level is reached, the embryo becomes entitled to a degree of respect and protection and develops moral status, although not as much moral status as a "human being". These entitlements increase as the embryo grows. Before the embryo attains the minimal quality of humanness, it is merely fallopian and uterine material, a "blastocyst". "I don't know whether a blastocyst is a 'thing' but I know it is not a person, not a human being". (Rodell, "The Brain Cell dilemma", *Melbourne Herald*, 6 May 1988.)

Following this line of reasoning, there are therefore many instances where a woman, who inherently has moral status, is justified in aborting a blastocyst. The use of that foetal tissue is furthermore justified so long as the rights of the woman over her tissue and over the nature of the abortion are protected. Tests applied to protect these rights would resemble closely those used to protect any individual whose tissue is removed and then required for research or therapeutic treatment for others.

Research and experimentation

Could and should blastocysts be used for experimentation or transplantation on the rationale that such work will benefit the whole of mankind? Some doctors point out that in discarding embryos, experimenters are doing nothing more

than women who use IUD devices. However others would say that is not necessarily an argument in favour of experimentation but one against intrauterine devices. It is generally asserted though that

> in a society that sanctions the abortion of a fully formed foetus, the discarding of a minute, undifferentiated embryo should be acceptable to most people. (Rodell, supra.)

What, though, of the position of blastocysts which have reached a certain level of humanness; what we will call "embryos". If no differentiation is made between blastocysts and embryos, a surgeon ought to allow a woman to provide her husband with tissue from a foetus conceived for that purpose and aborted at six months. It was reported that the daughter of a man suffering from Alzheimer's disease asked to be impregnated with her father's sperm in order to provide him with foetal tissue for a neural transplant. Being consistent there could be no objection to this! The sale of human embryos for cosmetics production has been reported, and kidneys for transplantation from live foetal donors have been advertised for sale in India and Brazil. Logically, following the "no problems" line, such sales should be of the same but no more concern than sales by individuals of other of their body parts for financial reasons. Indeed, it could be argued that sale of foetal tissue is of less concern since it is, from the mother's point of view, a renewable resource. There would also be no objection to the proposal by Edinburgh University that the eggs of female embryos be harvested. However, proponents of the humanness criteria while saying the embryo always has inferior moral status to the mother, do not completely deny it any moral status. Therefore, they would argue, the foetal tissue should only be used for certain purposes.

An additional difficulty lies in the area of consent. If the embryo has some legal rights, albeit limited, who has the authority to give consent on its behalf? The individual giving consent must step into the shoes of the foetus and act in its best interests. Many have difficulties with the assertion that the mother can do this since she has made the decision to end the "life" of the foetus and may, therefore, have forfeited her tutelary powers.[2] The doctor who carried out the abortion would be equally disqualified as the person who ended the foetus's life. Arguably the State would also be derelict in making a decision which, through allowing research, legitimised the ending of an individual's life. Some argue that quasi-guardians should be appointed for the foetus. However, they could also never give consent since the transplantation could never be in the interest of the foetus.

A major problem with setting a standard of humanness is the difficulty in determining when the blastocyst reaches the minimal level of embryo and when in turn, that embryo attains the full moral status of a human being. If we were to set a certain arbitrary age of, for example, four weeks for a blastocyst to become an embryo, we would need to permit, without restriction, ectogenesis. This is where a blastocyst is grown outside the human body without the need of a womb at any time. (An ectogenic embryo was sustained for fifty nine days as early as 1961 in Italy. Its existence ended owing to a laboratory mistake.[3]) If the blastocyst is just fallopian and uterine material, researchers would be permitted to use ectogenic blastocysts for any purpose whatsoever, provided they were destroyed before they attained the arbitrary age. Such lack of restriction may be objectionable to many. There would be similar difficulties in determining when the embryo attained full moral status. Many commentators favour a test of independent viability. However, with the latest possible date for an abortion now overlapping the current earliest possible date a low birth weight baby can be kept alive, and with technology and success in this area improving yearly, such an approach may be unsatisfactory. Premature or low birth weight babies can be and are saved, at a great expense when they are as young as twenty four weeks old with close and sophisticated care. This care is now so advanced that only seven percent of low birth-weight babies who survive are handicapped. However, the aborted foetus has no legal status; the premature baby has full legal status, yet the aborted foetus may be at a more advanced level of development.

It can be argued setting criteria for humanness is unnecessary and the use of foetal tissue is acceptable on pragmatic grounds even if abortion is wrong, because the two are quite separate. The tissue might as well be put to some good use rather than being disposed of as waste. This analysis, which is favoured by some doctors and researchers, means that it is vital that the procurement of the tissue and its eventual use be kept separate.

In order to be consistent, proponents of this "pragmatic" view argue that foetal tissue must not be sold, since if it were it could provide an incentive for women to have abortions and thus break down the barrier between procurement and use. For the same reason, foetal tissue must not be donated to a specified or known individual and the medical teams performing the abortion and the transplantation must be different. The timing and method of abortion should also not be carried out so that it fits in with the requirements of the transplant team.[4]

Critics of the "pragmatic" view say that it is morally inconsistent to say abortion is wrong but that it is acceptable to make use of the results of the wrongdoing. A popular analogy with critics is to compare these doctors with the so-called Nazi doctors at Auschwitz. In both cases, say the critics, the State has condemned individuals to die. In those circumstances the doctors, although perhaps personally opposed to the deaths, saw nothing wrong with using the opportunity to carry out experiments on the individuals which would not have been possible were they not condemned to die. The rationale was, of course, that they were going to die anyway and in this manner their deaths could benefit society. Others argue that the analogy is not sound since the experiments were carried out on non-consenting adults in secret. This does not destroy the analogy, since the critics are arguing from the viewpoint that the foetus is a living person and therefore has equal rights to an adult. More damaging to the analogy is the fact that the Auschwitz victims were living when the experiments were carried out. Most aborted foetuses are clinically dead, killed by the abortion and therefore the experimentation is not

the cause of their death. More problematic and consistent with the analogy is the question whether scientific or medical information obtained from the studies should be used. (See Robertson, "Fetal Tissue Research is Ethical":(1988) 10 IRB A Review of Human Subjects Research 5, 7.)

It can be argued that it is impossible to separate our treatment of remains from our attitude towards the deceased. For example Mussolini's body hanging from a lamppost by the heels was a potent symbol of the contempt held towards him by the partisans. Another analogy is ofted used. If you consider abortion to be wrong, then you consider it to be legally sanctioned murder. If you consider foetal transplantation to be acceptable would you, on the same basis, accept the liver of a sixteen-year-old girl executed in Rio? Pragmatists may answer yes, on the basis that it is showing no disrespect to the dead girl to use her tissue to benefit others and that using her liver for transplantation may, in fact, show more respect to her remains than simply disposing of her body. It neither validates or worsens the initial wrongful act of execution, just as using organs from homicide or accident victims in no way legitimises or is likely to make more prevalent those events. Pragmatists argue that, just as a murder does not occur because the organs will be used for transplantation, the link between a decision to have an abortion and the use of the foetal tissue is tenuous. "Women may feel less guilt and thus abort more easily if they know some good may accrue to others by donating fetal remains. Yet the main motivation for abortion will be the desire to avoid pregnancy and motherhood." (Robertson, supra, at 8.)

Opposition to experimentation

Despite the general acceptance of embryo research in the scientific community, there is still widespread opposition among the general community. This is mainly from those who see embryos as potential human beings. "Many believe that whether the conceptus is called human life, prehuman life or potential human life, it is life and it is species homo sapiens." (Streeves, "Artificial Reproduction – Legal Problems Presented by The Test Tube Baby", (1979) 28 Emory Law Journal 1045, 1051.) They see the unborn as the last disenfranchised minority in our society and argue their interests should not be sacrificed for another individual, be it a parent or other members of society.

Those who counter this argument say the fertilised egg needs a womb in which to develop. Just because it exists does not mean it has the necessary criteria to become a human being. This is the viability argument. In the American case of *Planned Parenthood v Danforth* 2 428 US 52 (1976) the Court upheld a Missouri statute definition of viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems" (*Planned Parenthood*, 63). As pointed out above, the successful experiments in keeping fertilised eggs alive ex-utero means that, within the *Planned Parenthood* definition, blastocysts may be viable in the near future. Ironically, it is only experimentation which will make ectogenesis possible and fertilised eggs viable. Those scientists who argue blastocysts are not human and thus can be used for experimentation may be bestowing humanness upon the blastocysts by their own successful experimentation.

Ian Kennedy, in an article in *The Times* (26 May 1984) opposing experimentation on embryos argues that, since every fertilised egg has the potential to become a human being, all should be given the opportunity to do so. Even though nature "wastes" many embryos (eg spontancous abortions, miscarriages), it does not follow that man should do so. "It is the chosen aim of medical science to allow man to come to terms with his nature rather than to be subject to its whims." He points out that if scientists wanted to create a human without a brain or a nervous system, there would be moral outrage from the community. "On analysis, such outrage would be seen to rest on the wrongness of interference with the potentiality of the embryo to develop further." Instinctively, we do not associate a human embryo with hamster tissue or a frog's embryo. This may be because, as Kennedy points out, in every blastocyst we see a potential human being.

New Zealand situation

One of the criticisms levelled by doctors and scientists dealing with embryos in New Zealand is delays in decision making by the National Interim Ethics Committee on Assisted Reproduction Technology. The Committee defends itself by pointing out it does not as yet have Health Department indemnity against legal action and so therefore is reluctant to move. Such caution seems entirely reasonable, when the legal vacuum existing means those involved could by default, face criminal liability.

Section 182(1) of the Crimes Act 1961 reads

> [e]veryone is liable to imprisonment for a term not exceeding 14 years who causes the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being.

The Act is read subject to the Contraception, Sterilisation and Abortion Act 1977. The meaning of the section was considered in *R v Henderson* [1990] 3 NZLR 174 by the Court of Appeal in 1990. In *Henderson,* the appellant kicked a woman who was carrying his child repeatedly in the stomach with the intention of killing the unborn child. Four days later, a stillborn child of approximately twenty-six weeks gestation was delivered. The trial Judge stated that in order to order to obtain a conviction under s 182, the Crown would have to establish that the child had been capable of being born alive. The word "child" is not defined in the Crimes Act; importantly the Court concluded that the ordinary and natural meaning of the word "child" included foetus. In fact the Judge need not have established a test of capability of birth. Because, though, the appellant had not been prejudiced by this requirement, the appeal was dismissed.

The case is significant because it shows that it is an offence under s 182 to kill a child in the womb or while it is in the process of being born.

> In effect, it declares that there is no time between conception and birth

> when the deliberate and unlawful destruction of an unborn child will not constitute an offence, whether under section 182 or section 183". (Brookbanks "Offences Against the Person" [1990] *NZ Recent Law Review* 306.)

Section 183 is the section which makes it unlawful to procure a miscarriage and imposes a maximum penalty of fourteen years' imprisonment. Thus, clearly within New Zealand, if a researcher or doctor were to carry out an abortion unlawfully, he or she could face a maximum penalty of fourteen years in prison. Section 187A states the grounds on which an abortion will be lawful. These include where the pregnancy would result in serious danger to the life, or to the physical or mental health of the woman or where there is substantial risk that the child will be seriously handicapped. Thus, a doctor who aborted a foetus at any stage of development with the purposes of using the tissue for transplant or for experimentation, would, in the absence of the factors set out in s 187A, be liable under ss 182 and 183.

This is not the case with embryos conceived outside the womb. The law in New Zealand is at present clear. It is an offence to procure the miscarriage of any woman or girl (Crimes Act 1961, s 183(1) as amended by Crimes Amendment Act 1977, s 4). Miscarriage is defined as "the destruction or death of an embryo or fetus after implantation". (Crimes Act 1961, s 182A(a) as amended by Crimes Amendment Act 1977, s 3.) Abortion has the same definition in s 2 of the Contraception, Sterilisation and Abortion Act 1977. Therefore, destruction of ectogenic embryos is outside the control of the law. As long as the embryo remains outside the body, implantation cannot, by definition, have occurred. This is not, of course because of any legislative intent, but because when the statutes were passed, the possibility of fertilisation outside the womb had not been contemplated by Parliament or the public at large.

As early as 1973, a Medico-Legal Committee reviewing the Accident Compensation Act 1982 suggested the legislation be amended to cover ante-natal injuries. It was proposed the definition of personal injury by accident be extended to include "personal injury to any person caused or contributed to by accident before or during the birth of that person". Despite support from the Department of Justice and, in principle, from the Statutes Revision Committee, the amendment was never made. It therefore appears that by default a tortious action for ante-natal injuries may survive if the injury was suffered before birth.

Tort law

In tort law, there has been a tendency for Courts to allow actions for injuries sustained whilst en ventre sa mere. Examples are the oft-cited Australian case of *Watt v Rama* (1972) VR 353, Vict SC and the similar Canadian case of *Duval v Sequin* (1972) 26 DLR 30418, (Ont HC)). The English Courts recently considered the point in *B v Islington Health Authority* [1991] 1 All ER 825 (QBD)). In that case, the defendants carried out a gynaecological operation on the plaintiff's mother not realising that she was six weeks pregnant with the plaintiff. The plaintiff was born with numerous abnormalities, including the inability to have children. She brought an action against the Islington Health Authority, arguing that the operation should not have been carried out on her mother while she was pregnant and alleging that the staff of the hospital had been negligent in operating without first checking that her mother was pregnant. The defendants sought to have the action struck out, arguing that at the time the alleged negligence took place and the injury occurred, the plaintiff had no legal status as a six-week-old foetus and therefore no duty of care was owed to her. The defendants used as their argument the argument of the (unsuccessful) defence in *Watt v Rama*. The argument was summarised:

> . . . the defendant owed no duty of care to the infant plaintiff she being at the time of the collision en ventre sa mere, not an existing person and merely a part of her mother. When an act or omission involving fault which otherwise might be regarded as founding an action occurs, there must, in order for such act or omission to be regarded as negligent, be then and there in existence some legal person to sue or be sued. There must then and there be in existence a legal person having a legal right and another legal person having at that very time a corresponding legal duty. Since the infant plaintiff was at the time of the accident en ventre sa mere she was not then a person or human being in esse and in fact had no separate legal existence apart from her mother. Accordingly she was not a legal person to whom a duty of care could be owed.

In his judgment, Potts J said that the status of the unborn child at common law was clear. He quoted at length from the judgment in *Paton* ([1978] 2 All ER 987) in *Islington* at 829.

> The foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother. This permeates the whole of the civil law of this country (I except the criminal law which is now irrelevant) . . . For a long time there was great controversy whether after birth a child could have a right of action in respect of pre-natal injury . . . [I]n order to have a right the foetus must be born and be a child. There was one known possible exception . . . An American case, *White v Yup* (1969) 85 Nev 527, where the wrongful death of an eight-month-old viable foetus, stillborn as a consequence of injury, led an American Court to allow a cause of action, but there can be no doubt, in my view, that in England and Wales, the foetus has no right of action, no right at all, until birth.

The Judge continued by stating that the duty of care for physical injury and consequential loss was the foresight of a reasonable man. In this case, the Judge said that the defendant's staff should

> reasonably . . . have foreseen that an embryo then being carried by the mother in her womb was liable to be damaged in the procedure with the result that the living child was liable to be born injured. . . The fact that the negligent act which caused the injury was not contemporaneous with the injury itself is not a bar to recovery. At the time the breach of duty of care took place, there was a contingent

> duty which crystallised into an actual duty when the baby was born.

Thus the defendants were not successful in their motion to have the action struck out.

In civil cases, the Courts are clearly extending the scope of tort. However, actions are brought in the child's name after birth when it has obtained a legal personality. For the purposes of the tort, the damage is taken to have occurred at birth. This means, from a tortfeasor's point of view, it is better to cause the death rather than injury of a foetus. To prevent such an offensive anomaly, the Courts or legislature may decide that a foetus has legal personality before birth. This would change the status of the foetus from being before birth legally part of the body of its mother, to being a living legal entity. Any change in determining in essence when life begins could bring tort law into conflict with abortion law. However, as stated in *Islington*

> [e]ven if the foetus was accorded legal personality from conception for some purposes in law (assuming the moment of conception can be determined) this does not mean that legal personality is an inherent characteristic of the foetus from the time of conception onwards . . . Thus for the purposes of tort law the foetus may be granted legal personality retroactively only if born alive. For the purposes of abortion law, the foetus may be denied legal personality until some stage in its development when this status is arbitrarily granted.

In an Accident Compensation Appeal Authority decision in March 1994 (*O'Rourke v Accident Compensation Corporation* Decision No 76/94, 14 March 1994), the Authority considered that the failure of the legislation to include ante-natal injuries in its definition of personal injuries by accident may be because it considered such injuries already fell within the Act. It was the view of the Authority that a civil claim for personal injury was statute-barred because of s 27(1) of the Accident Compensation Act. That section reads (in part)

> . . .[W]here any *person* [my emphasis] suffers personal injury by accident in New Zealand . . . no proceedings for damages arising directly or indirectly out of the injury shall be brought in any court in New Zealand independently of this Act, . . . under any rule of law or any enactment.

The Authority said "on the plain wording of that provision I consider that it is highly unlikely that Amberle could sustain any action in a New Zealand Court". (at 8.) That statement presupposes that Amberle is a "person" at the time she suffered the personal injury by accident. The Authority said

> [T]he Act does not state that injuries must arise contemporaneously with the accident. The Appeal Authority has dealt with many cases where injuries have arisen some time after an accident . . . In this case the injuries emerged upon the birth of Amberle. The cover which she seeks under the Act is to compensate her for the problems suffered since birth.

The reasoning used is the same as that used by Potts J in *Islington.*

As support for its view, the Auhority quoted the Court of Appeal case *Mitchell (Accident Compensation Corporation v Mitchell* [1992] 2 NZLR 436) where Richardson J said there should be "a generous unniggardly interpretation of personal injury by accident." The Authority therefore concluded that, although the accident happened to Amberle prior to her birth, she suffered the injuries from her birth and was entitled to cover under the Act. Because the decision involved a question of law of some importance, leave was given to appeal to the High Court.

Although few would argue that a baby in Amberle's position should be compensated, cover under the Accident Compensation Act 1982, necessarily means no potentially lucrative tortious remedy exists. Granting a remedy under the Act is also clearly questionable when ante-natal injuries were deliberately excluded from the definition of personal injury by accident. As stated by the Authority, the position is by no means clear and whether the High Court allows cover under the Act or permits a tortious action will have wider implications.

In the future, the estate of a child which has been aborted by means which ensure it is born alive which is then used for research or transplantation, may have a possible action in tort against a hospital or doctors. It may alternatively have an action under the Accident Compensation Act 1982. Even though a scenario leading to such an action arising seems highly unlikely, the uncertainty caused by the possibility once again highlights the importance of legislative intervention setting out the legal status of the foetus in various stages of development.

Advances in both ectogenesis and use of foetal tissue for transplantation, are certain to continue and probably to accelerate. Therefore legislation, no matter how pro-active, can not foretell future advances. In addition, legislation must reflect community attitudes. Necessarily, legislation must have an ethical underpinning which ideally reflects the considered views of the majority of the community; difficult first, since those views are based on sensitive and fundamental beliefs on when life begins and secondly, because attitudes vary so greatly within the community. What is clear, though, is that some legislative action, no matter how short-term, is better than the present inaction. □

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1 Lewin, "Medical Use of Fetal Tissue Spurs New Abortion Debate," *The New York Times,* 16 August 1981 in Fine, "The Ethics of Fetal Tissue Transplants" (1988) 18 Hastings Center Report 6.

2 See for example, Burtchaell, "University Policy on Experimental Use of Aborted Foetal Tissue, (1988) IRB: a Review of Human Subjects Research 5, 7.

3 Dickens, "The Ectogenic Human Being: A Problem Child of our Times" (1979) 18 University of Western Ontario Law Review 241, 250.

4 See for example, Gillam, "Foetal Tissue Transplantation: A Philosophical Approach," Monash University Centre for Biothics, Conference, The Fetus as Tissue Donor: Use or Abuse, 57.

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