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Child abduction

The editorial in the December issue of *The New Zealand Law Journal*, [1994] NZLJ 433 discussed critically a decision of the High Court of Australia on the issue of child abduction by one parent in *ZP v PS* [1994] 122 ALR 1. There was a short addendum to the editorial noting a newspaper report that the Court of Appeal in New Zealand had given a judgment that appeared to adopt a different attitude to that of the High Court in Canberra.

The Court of Appeal decision is now to hand. There was a full Bench of five Judges who heard the appeal namely Cooke P, Richardson, Hardie Boys, McKay and Tompkins JJ. The decision of the Court was unanimous in allowing the appeal.

The issue before the Court was expressed by the President as follows:

> An application by the father of a daughter now aged eight years for an order for her return to him in Arizona was made under the Guardianship Amendment Act 1991, s 12. The father's contention is that the mother removed the child from another Convention State, namely the United States, in breach of his rights of custody in respect of the child. The application was dismissed for want of jurisdiction by Judge Whitehead in the North Shore District Court. The Judge expressed regret that his decision appeared to defeat the child's rights under the Convention, but he regarded the terms of the New Zealand legislation as requiring that result.
>
> The child had arrived with the mother in New Zealand on 25 September 1993. The District Court Judge's decision was delivered on 27 April 1994. There was an appeal to the High Court and by an order sealed on 21 September 1994 Fisher J ordered by consent that the appeal be removed into this Court. The reason for the removal was that the District Court Judge had adopted the same interpretation as was subsequently upheld by Gallen J in *F v T* [1994] NZFLR 565, where that High Court Judge had dismissed an appeal from a decision of Judge Inglis reported in 11 FRNZ 378. It may be noted that Gallen J expressed more doubt about part of the question than may have been entertained by Judge Inglis.

The factual situation concerning the parents and the child is succinctly expressed in the judgment of McKay J as follows:

> By decree of the Lake County Superior Court of the State of Indiana dated 29 March 1990, the respondent wife was awarded the sole care and custody of the child of the parties, and the husband was given reasonable rights of visitation with the child to include every other weekend, alternating holidays and summer vacation. The father alleges that the wife wrongfully removed the child to New Zealand from Arizona in the United States, contrary to the Hague Convention and to the Guardianship Amendment Act 1991.

This present New Zealand case has notable similarities with the Australian case of *ZP v PS* referred to earlier. In both cases the mother had custody subject to access rights by the father in terms of a Court order. In both cases the mother removed the child from the jurisdiction of the Court in which the order was made. One possibly significant distinction, is that in the Australian case Greece had not acceded to the Hague Convention while in the New Zealand case the United States, as the country of original jurisdiction had. In Australia the decision turned on the issue of the best interests of the child as being the relevant test. Here, that issue was not even referred to by the Court of Appeal, despite the decision in the famous, or infamous, *Foretich* case.

Section 12 of the Guardianship Amendment Act 1991 provides that, subject to s 13, a child is to be returned to the country of original jurisdiction

> Where any person claims—
> (a) That a child is present in New Zealand; and
> (b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and
> (c) That at the time of that removal those rights of custody were actually being exercised by that

person, or would have been so exercised but for the removal; and

(d) That the child was habitually resident in that Contracting State immediately before the removal

The issue that was argued before the Court of Appeal was the meaning of the word "custody" as it appears in s 12. It was contended that s 2 distinguished between rights of access and rights of custody so that the two were exclusive of one another. Consequently a party with rights of access did not come within the terms of s 12. The Court unanimously rejected that argument. Their Honours all held that the definitions overlapped rather than being exclusionary.

McKay J stated:

> Mr Harrison argued that the Act and the Convention are careful to distinguish rights of custody and rights of access, each being treated separately. While this is true, the respective definitions appear to overlap rather than to be mutually exclusive. The fact that a right of access includes a right to take the child for a limited period of time to a place other than the child's habitual residence, does not preclude that right being also a right of custody if it satisfies the requirements of section 4.

The President, in his judgment put the matter in these terms:

> In my view, notwithstanding the argument of Mr Harrison to the contrary, those definitions are not mutually exclusive. A right of intermittent possession and care of a child will fall within s 4(1)(a) and to that extent will fall within the definition of rights of custody also. No doubt it may also fall within the definition of rights of access, so there is a possibility of overlap. But no convincing reason has been given in argument for postulating a sharp dichotomy between the two concepts. Nor has anything to suggest mutual exclusiveness been derived from the Convention. Some rights under the Act or the Convention will attach to custody, some to access. The circumstance that remedies may in a given case be open under either head is unimportant on the question of interpretation. Here, because of the nature of the application made to the Court, we are concerned with custodial rights only. Incidentally the concept of shared care, which as counsel informed us from the bar currently features in Family Court practice in New Zealand, is consistent with this approach.

This decision is to be welcomed. The practice of child abduction is a very serious one. The District Court Judge at first instance had stated that he regretted that his decision not to order the return of the child appeared to defeat the child's rights under the Convention. This is an important point of the right of the child not to be abducted in the first place, that can be too easily overlooked. There is also the issue of a proper recognition of the standing of foreign Courts and the orders they make in custody matters.

P J Downey

Correspondence

Sir,

re "Justice for 'Criminals' " [1994] NZLJ 393

The Auckland District Law Society Public Issues Committee trots out all the usual excuses for the legal system's failure to deal properly with crime. The Bill of Rights points require lengthier response but the Committee's arguments on sentencing are easily dealt with.

First, the old argument that the judges know more about the circumstances of the offender and offence than the television viewer. The point precisely is that the public is tired of the individualised, ex post sentencing that the requirement for this knowledge implies. The public want to see a level of sentencing that acts as an effective deterrent ex ante and which ensures that criminals do not live better than the honest. Current levels of sentencing signally fail to achieve these goals. In fact current practices relating to some sentences involve discounts for greater offending. Detailed knowledge of the offender (collected at great expense to the taxpayer) is only required if one is adhering to outdated and ineffective rehabilitative ideas.

Secondly the argument that judges are constrained by Court of Appeal decisions is just fatuous. The public cannot be expected to know the institutional details. It does not take much imagination to read the criticism of individual decisions by trial judges as criticism of the Court of Appeal's guidelines.

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Case and Comment

The Law Reform (Testamentary Promises) Act 1949

In *Re Collier-Cambus (Dec'd); Olsen v Cambus* [1994] NZFLR 520 the High Court had to consider the amount to award following a successful application made pursuant to the Law Reform (Testamentary Promises) Act 1949. The case is of interest because it considers whether a sum greater than the amount promised can be awarded.

The facts

Thomas John Collier-Cambus died on 9 November 1991. He left an estate valued at approximately $80,000. The plaintiff, Bill, was one of the deceased's stepsons. He brought his claim under the Law Reform (Testamentary Promises) Act 1949 seeking an award of $40,000. The plaintiff contended that he performed services for his stepfather and that his stepfather promised to reward him by testamentary provision and failed to do so.

The plaintiff's stepfather, Tom, had married for the first time at the age of 53. Lorraine, his wife, who had been previously married had four children; the plaintiff (Bill) being the eldest of the four. He was in his early twenties when his mother remarried. Tom and Lorraine were apparently happily married and when Lorraine died in 1982 Tom was shattered and never really recovered. He lived, however, for another nine years. Bill stated that between his mother's death in 1982 and late in 1987 he provided services to his stepfather Tom primarily by way of companionship and support.

Tom's last will, dated 2 September 1965, which was made shortly after his marriage, left everything to his wife Lorraine. As she died first there was an intestacy. Under the Administration Act 1969 everything would go to Tom's half-brother John. John was the defendant, he opposed Bill's claim. Whilst accepting that Bill provided services and made testamentary promises he argued that the promises were not in the circumstances promises "to reward" Bill for his services.

Tipping J considered a number of circumstances relevant.

1 There was conflicting evidence concerning the extent of the support given by Bill to Tom. His Honour held that Bill was a reliable witness and that he preferred Bill's evidence.
2 It was found that Tom had effectively "adopted" Lorraine's family as his own. Tom regarded his wife's children as his children and there had been a close relationship between Tom and Bill.
3 After Lorraine's death Tom needed emotional and other support and this Bill had provided.

The promises which Tom made came about as follows. He wished to be buried beside his wife and Bill suggested that he should make a will expressly providing for that to happen. For whatever reason Tom did not think it necessary and had become angry when the subject of making a will arose, as it did more than once. Tom told Bill that he did not need to make a will, adding "you are my children".

The Law Reform (Testamentary Promises) Act 1949

Section 3(1) Law Reform (Testamentary Promises) Act 1949 states:

> Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be of a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant, . . . be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise.

Thus to succeed under the Act Bill the claimant, had to satisify four requirements:

1 That Tom promised to make a testamentary provision for the claimant, Bill;
2 That Bill rendered services to Tom during Tom's life;
3 That the provision promised was a reward for the services rendered by Bill; and
4 That Tom had failed to keep his promise.

If these four requirements were satisfied by the claimant then the question of quantum arose. Tipping J had to consider the third requirement and the quantum of the award.

Nexus between promise and services — "To reward"

Tipping J in his judgment noted that the Act has a contractual flavour and cited McCarthy and Richmond JJ in

Public Trustee v Bick [1973] 1 NZLR 301 at 305:

> . . . But a concept inherent in contract – a promise in return for something done – is still very much at the heart of the new enforceable promise.

However the work or services need not be the only reason for the promise. The test is whether it can be said that the promise was made in part as a reward for past services or expected future services.

It was argued that as the promise was a group promise, ie to all of Lorraine's children, it could not reasonably be inferred to have been a promise to reward Bill for his services. The defendant argued that a promise to all Lorraine's children was inconsistent with a promise to reward one of those children, that is Bill, for his services. On behalf of Bill it was argued that Tom was saying "I appreciate the family support which I have had and expect to have in the future and because of that I will leave my estate to your four whom I regard as my children."

Tipping J said he felt satisfied on the balance of probabilities that as regards Bill, Tom's promise was "inspired, at least in material part, by his appreciation of what Bill had been doing and was expected to do in the future". (at 523)

A little later his Honour repeated that he could infer this from the whole circumstances of the case and that therefore there was a sufficient nexus between the services and the promise.

Quantum

As the plaintiff was entitled to an award the question of quantum arose. It was argued by the defendant that under the Act there was no jurisdiction to award more than the value of the promise. Bill claimed $40,000, whereas he was promised a quarter of the estate which, in money terms, amounted to about $20,000.

The critical words in s 3(1) for the present purposes are the words "to the extent to which the deceased has failed to make that testamentary provision".

Tipping J said

> It would be a curious anomaly if, following a complete failure to make any testamentary provision or provide other remuneration, the claimant could obtain more than the promise. (at 524)

His Honour noted that section 3 does not require a specific sum to be nominated, if the promise is general then under the Act it is deemed to be a promise for a reasonable amount. If a specific sum is promised then there are two limitations on the amount which can be awarded:

1 The amount cannot be more in value than what was promised.
2 It must be reasonable.

The Court will not automatically award a specified sum if it is excessive. His Honour referred to two text books.

In the first edition of *Patterson on Family Protection and Testamentary Promises in New Zealand* (at 243) it is stated that:

> Even where a promise of a specific amount or a specific asset is established the Court has power to award more or less than the subject matter of the award.

In *Butterworths Family Law in New Zealand* (1993, 6th ed at 1016) it is stated that:

> If the claimant has been remunerated to the full extent of the promise, then there would be a jurisdictional bar to the claim.

Prior to the 1961 Amendment to the Act the promise was enforceable as if it was a promise for payment by the deceased in his or her lifetime of the amount specified in the promise. Tipping J held that:

> Following the amendment the relief to be given is what is reasonable rather than what is promised. (at 525)

His Honour went on to say that in many cases what is reasonable may be less than what has been promised, and that the 1961 amendment was designed to ensure that a promise of provision greater than what was reasonable would only be enforced to the extent that was reasonable.

Tipping J referred to an article by Peart (Peart, "*Re Welch:* The Boundaries of the Testamentary Promises Act" [1991] NZLJ 77) which discussed the Privy Council decision of *Re Welch, Stewart v Welch* [1990] 3 NZLR 1. That case had also involved a stepson who succeeded in his claim under the Act and obtained the sum of $20,000. Peart concluded that on the question of quantum a Court cannot award more than the sum promised and that any other conclusion would be contrary to the legislature's intention as expressed in the title to the Act:

> An Act to make better provision for the *enforcement of promises* to make testamentary provision in return for services rendered.

Both Tipping J and Peart make reference to *Re Murtagh, Mahe v NZ Guardian Trust Company* [1989] BCL 1157 where Doogue J awarded the deceased's sister almost ten times the value of the property promised. The claimant had provided substantial services to her brother who had promised to leave her his car valued at $3,500. In his will the deceased also left his sister other assets worth $33,200 none of which she received because her husband had witnessed the deceased's will. The claimant was awarded $30,000 which Peart noted (at 81) satisfied a sense of justice but which was clearly beyond the scope of the Act.

Tipping J concluded that in the case of a specific promise there is no jurisdiction to award more than the value of the promise, nor more than is reasonable and in the case of a general promise the jurisdiction is to award what is reasonable.

When considering the question of what is reasonable everything must be considered including the matters listed at the end of s 3(1). These are the circumstances in which the promise was made; the circumstances in which the services were performed; the value of the services; the value of the testamentary provision promised; the amount of the estate and the nature and amount of competing claims. After considering these matters his Honour awarded Bill the sum of $20,000. Tom had recognised Bill's services which were made when Tom was in need of support. $20,000 was a reasonable sum in the circumstances and this was the sum promised. There were no competing moral claims that required this sum to be reduced.

In concluding that the Court had no jurisdiction to award more than the amount promised, his Honour concluded that Patterson had erred in

stating otherwise. In his second edition Patterson (at 292) states that:

> It is unclear if the Court can award more than has been promised.

He says (at 299):

> In *Olsen v Cambus* (1994) it was held that a claimant cannot obtain more than has been promised. It is submitted that this is not necessarily the case. Further services may be rendered after the promise. The promise may have been no more than a reflection of the perceived value to the deceased of the services previously rendered, or may be only a partial recognition by the deceased of the services and not intended in any way to be a final and considered view.

Patterson goes on to say that jurisdiction exists only if the promise has not been fully carried out, and "in such a case quantum is determined by what is reasonable not by the extent to which the deceased has failed to honour the promise." (ibid.) This view conflicts with that of Peart who (at 82) has pointed out that "if the value of the promise can be ignored, then it would seem paradoxical to require evidence of a promise to reward as a prerequisite for making an award."

This decision settles the question of whether a Court may award more than the amount promised. Whilst one may have every sympathy with Patterson's view and have wished, in the present case that Bill receive $40,000, it would appear that logic and the wording of the Act require Tipping J's conclusion.

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International arbitration

Baltimar Aps Limited v Nalder & Biddle Limited [1994] 3 NZLR 129

Introduction

Where one of the parties to an agreement containing an arbitration clause starts a Court proceeding relating to that agreement, the other party can apply for the proceeding to be stayed and for the matter to be sent to arbitration. The Court has a discretion as to whether to grant the stay. Where the arbitration clause requires arbitration out of New Zealand then, under s 4 of the Arbitration (Foreign Agreements & Awards) Act 1982, the Court does not have a discretion and the focus shifts in such cases to whether or not the section will apply to the subject matter of the Court proceeding. This was the case in *Baltimar Aps Limited v Nalder & Biddle Limited.*

Facts

Nalder claimed summary judgment against Baltimar for possession of cargo discharged at Nelson from one of Baltimar's ships. Baltimar opposed summary judgment, claiming that it had a valid lien over the cargo and, furthermore, that both Nalder's claim for possession and its (Baltimar's) claim for a lien should be referred to arbitration in London as provided for in their contract. Baltimar sought a stay of the proceeding under s 4. The High Court granted summary judgment and refused the stay. Baltimar successfully appealed.

Decision

The issue before the Court of Appeal was whether the same threshold test could be applied to both Nalder's application for summary judgment and to Baltimar's application for a stay; the test being whether or not the defence raised by Baltimar was a genuine one. Proceeding in this way, the two applications are treated as being different sides of the same coin and the Court is required to enquire into the merits of the defence. Such an enquiry can be extensive in so far as it touches upon the legal issues involved, but should any factual dispute arise that cannot be resolved on the affidavit evidence, then the Court's enquiry will come to an end, summary judgment will be refused and a stay granted.

In *Baltimar v Nalder*, however, the Court of Appeal elected not to take this approach. Instead, it held that if any dispute is raised, whether of fact or law, then the stay must be granted without further enquiry and the summary judgment application will not be considered. Applying this to the case before it, the Court held that as in opposition to the summary judgment application Baltimar had asserted a defence to Nalder's claim, a stay should have been granted and summary judgment refused.

Reasons and Comment

The reason for the Court's decision was that any enquiry by a Court into the merits of a defence deprives a party to an arbitration clause of its bargain, that is, of having its rights and obligations determined by the arbitral tribunal of its choice. The requirement in the arbitration agreement between Baltimar and Nalder that the arbitrators "be commercial men, not lawyers" did not go unnoticed by Casey J, who delivered the Court's judgment. This provision, although itself quite common, appears to have been added to what was otherwise a standard form agreement.

In reaching its decision the Court of Appeal distinguished the English cases which require that a defence capable of surviving a summary judgment application to be established before a stay will be granted. The English cases were distinguished on the grounds that the English statute, unlike ours, expressly states that a stay is not mandatory where "there is not in fact any dispute between the parties". In finding that these words extended the English courts' jurisdiction beyond that of our courts', the Court of Appeal implicitly held that the words of our s 4, which apply that section to "any matter in dispute between the parties" could apply even where the matter in question was not in fact in dispute. With respect, it is hard to see how this could be a natural and ordinary interpretation of s 4. The English cases have quite clearly decided that the word "dispute" means "genuine dispute". The effect of the *Baltimar* decision, however, is that this interpretation has been rejected here. This can be contrasted with the summary judgment jurisdiction itself where the word "defence" in HCR 136 has, consistent with the English position, been held to mean "arguable defence" (see *Pemberton v Chappell* [1987] 1 NZLR 1).

The *Baltimar* decision is unusual in that the Court elected to support form over substance by granting a stay of proceedings where the appearance of a dispute has been made out, but without any enquiry as to its validity. The dangers of this approach were partly recognised by the Court itself when, having firmly closed the door on any enquiry into the nature of the defence raised, it then opened it slightly by saying that a stay might be refused where the stay application had been made in bad faith. Accordingly, the fate of a stay

application might then be determined by whether the defendant intentionally put up a bad defence or whether the defence, although unsupportable at law, was put up genuinely, but misguidedly. An example of the latter would be a common law defence put up in respect of a matter covered by a statutory code overlooked by the defendant. Following *Baltimar*, the Court would be obliged to refer the matter to arbitration without ruling on such an obvious defect in the defence to the claim.

At a policy level, it can also be argued that the introduction of summary judgment jurisdiction showed a clear legislative intention that litigants should not be obliged to waste time and money overcoming defences which, on a summary hearing, can be found untenable. This is at least as equally applicable when the claimant faces the expense of arbitrating in a foreign jurisdiction. There can be no question that by accepting an arbitration clause a party to a contract has renounced all recourse to the Court's jurisdiction as, for example, the existence of an arbitration clause will not displace the jurisdiction of the Court in respect of an application for an injunction (see *Leucadia National Corporation v Wilson Neill Limited*, unreported, Court of Appeal, CA 179/94, Cooke P and Gault and McKay JJ, 6 October 1994), nor will it prevent the arrest of a vessel subject to a maritime dispute (see *The "Rena K"* [1979] QB 377).

Conclusion

It is undoubtedly laudable to require contracting parties to abide by their bargain. It is questionable whether this should extend, however, to allowing one party to a contract to maintain a defence that a Court can determine, when exercising summary jurisdiction, is less than genuine and which serves only as a tactical disadvantage to a claimant who is ultimately bound to succeed. It is submitted that only explicit words in an arbitration clause, such as reference of "all claims of whatsover nature" to arbitration should be given this effect. But for the present, however, *Baltimar v Nalder* is authority for the principle that a dispute, whether genuine or not, is all that is needed.

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Directors' liability in tort

Livingston v Bonifant [1994] BCL 1024

The company director differs from other potential tortfeasors. This truism has emerged with new significance following the High Court's recent treatment of directorial responsibility in *Livingston v Bonifant* [1994] BCL 1024. In many cases where proximity in tort is difficult to determine, reliance will be placed on the elusive notion of "assumption of responsibility": a defendant will be liable for a wrong only where he or she has assumed a duty of care towards the plaintiff. *Livingston*, following *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, determines that where the defendant is the director of a one-person enterprise, a personal "assumption" is not evidence merely in the agreement of the company to act: "something additional" is required for liability to affix. To this extent, *Livingston* flies in the face of earlier authority which likened the director of a close corporation to any other tortfeasor, denying him or her the benefits of limited liability and separate corporate personality, principles to which the law ordinarily closely clings. The application of the *Ivory* principles in *Livingston v Bonifant* reveals the degree to which earlier authority on the tort liability of company directors has been overridden.

Livingston v Bonifant concerned allegedly negligent conduct by the managing director and principal shareholder of a foreign exchange management company. The Livingstons were farmers with a tenuous income position and loans in the order of $500,000. To control their indebtedness the Livingstons sought to borrow moneys offshore, in the belief that they could meet the lower overseas interest rates. To this end, they engaged the services of Currency Corp Ltd, a foreign exchange management company. Bonifant, the managing director of that company, was approached by the Livingstons on the recommendation of a friend. On the Livingstons' behalf, Currency Corp executed a number of complex foreign exchange transactions. These dealings were identified by Doogue J as "risky . . . with a large amount of chance involved", and fluctuations in the dollar unsurprisingly resulted in a $46,000 loss to the Livingstons. The Livingstons sought to fix Bonifant with personal liability, alleging that he and his company negligently failed to follow instructions and acted without authorisation.

The High Court expressed "sympathy" for the luckless Livingstons, but refused to fix responsibility on somebody else for risks they had knowingly taken. Bonifant owed no duty of care to the Livingstons. The relationship between the parties was governed, it was said, by the contract between the Livingstons and Currency Corp. For a personal relationship to arise sufficient to give rise to a duty of care, an assumption of responsibility must be identifiable in the conduct of the defendant director. No such assumption was present here. The Livingstons had chosen to enter into a clear written contract with Currency Corp; this was not a case, it was said, where there could be any difference of opinion as to whom the plaintiffs were relying upon. All fee notes were rendered by Currency Corp and paid to Currency Corp. At no time were they, or any correspondence, addressed to or by Bonifant personally. Indeed, all correspondence was conducted using the Currency Corp letterhead, describing Bonifant as the company's managing director. Bonifant did not at any time represent that he was acting in any capacity other than as managing director of the company. And other employees assisted in transacting the Livingstons' business; Bonifant was just one of the persons playing a role in the management of the loan by Currency Corp. In essence, then, the Court could find nothing suggestive of a personal assumption of responsibility by Bonifant: the Livingstons remained at all times aware that Currency Corp was the entity with which they had contracted, and which was responsible for the transaction of their business.

The governing intent behind establishment of a private company was, Doogue J held, "protection in respect of personal responsibility". In granting primacy to this principle, the High Court adhered closely to the reasoning of the Court of Appeal in *Trevor Ivory Ltd v Anderson*.

The facts of *Ivory* do not demand repetition, so familiar are they. The Court of Appeal rejected personal liability on the part of Ivory. By forming his company, Cooke P said,

Ivory had made it plain to all the world that he intended to limit his personal liability. To impose liability upon the owner of a one-person enterprise as if he were conducting business on his own account, and not through a company, would erode the principles of limited liability and separate corporate identity established in the cases of *Salomon v Salomon & Co Ltd* [1897] AC 22 and *Lee v Lee's Air Farming Ltd* [1961] AC 12. This is not to say, the Court held, that the director of a close corporation can never come under a duty of care to a client of his or her company. But rather, that the duty must be established as personal to the director, by reasoning of his or her having assumed a duty of care to the plaintiff:

> Possibly the plaintiffs gave little thought to that in entering into the consultancy contract; but such a limitation is a common fact of business and, in relation to economic loss and duties of care, the consequences should in my view be accepted in the absence of special circumstances . . . (at 524, per Cooke P).

What will amount to a sufficiently "special" circumstance? The Court of Appeal in *Ivory* declined to define in advance the types of conduct likely to attract liability. Clearly it is not enough that the plaintiff sought the services of the particular defendant. The plaintiffs in *Trevor Ivory* wanted Ivory to do the work, as the Livingstons sought Bonifant's expertise. This is inadequate where the plaintiff does not perceive himself or herself as having a contractual or personal relationship with the director, and where the director "deliberately created and retained an insulating corporate structure to guard against disasters" (*Ivory* at 532, per McGechan J). Rather, the defendant must have done something "extra", indicating a personal involvement in the transaction, and not an interest merely as a servant or other employee of the company. Such was the case in *Fairline Shipping Corp v Adamson* [1974] 2 All ER 967 (QB), where the managing director of a cold storage business was fixed with personal liability for failing to exercise due care of stored goods. He had employed his own personal letterhead in correspondence with the plaintiff, despite the availability of company paper, and had referred, in these letters, to "my invoices" and "my premises" in a manner suggesting that he regarded himself, and not the company, as concerned with the storage of the goods. These actions amounted to an assumption of responsibility.

In *Livingston v Bonifant*, Doogue J considered the various foreign exchange terms defined in *Centrepac Partnership v Foreign Currency Consultants Ltd* (1989) 4 NZCLC 64,940 (HC). But no consideration was accorded to the more significant fact that *Centrepac* reached a result contradictory to *Livingston*, on virtually identical facts. The defendant foreign exchange dealer in *Centrepac* was found personally liable in negligence to the horticultural partnership he advised. Gault J based his finding solely upon the proximity of the parties and the foreseeability of harm. His Honour stated that it was difficult to envisage a relationship, apart from a contractual relationship, evidencing greater proximity. As a result, the defendant director "was engaged personally to provide (through the vehicle of this company) a consultancy service" (at 64, 951), and owed the plaintiffs a duty of skill and care which he had breached.

Cooke P in *Ivory* identifies *Centrepac* as stopping somewhat short of a complete enquiry into the duty of care. The fundamental tenets of company law, accorded decisive significance in *Ivory*, were dismissed in passing in *Centrepac*:

> To find a duty of care in this situation . . . does not involve lifting the corporate veil. The duty of care exists directly between the plaintiffs and Mr Rutherfurd (at 64, 951).

Certainly, a duty of care may exist independently of a company, the recognition of which will not harm the separateness of the company and its director. Both *Ivory* and *Livingston* acknowledge that this is so. This will only be the case, however, where the director has, by words or conduct, represented himself or herself as the manifestation of the company, rather than a representative of it. It is a contradiction in terms to refer to a director as "engaged personally (through his company)". Either one is personally engaged to do something — by contract or by assuming personal responsibility for it — or one is operating through a company. Where one is "personally engaged", one is in effect not utilising the corporate medium, because although the company too may be liable, that is irrelevant to the director's liability.

In the absence of further New Zealand authority adopting the *Ivory* policy-driven approach to directors' liability, *Centrepac* influenced Thorp J in *Jagwar Holdings Ltd v Julian* (1992) 6 NZCLC 68,040. Thorp J distinguished *Ivory*, saying that Julian and his fellow directors had not "declared . . . a conscious determination to limit the liability their actions created", as Ivory had. In fact, none of the Court of Appeal judgments in *Ivory* use the language of "declaration". Ivory, like Bonifant, had consciously declared nothing; he had simply operated through the medium of a company. It is not a question of proximity, but one of policy. Although Ivory and the Anderson partnership were undeniably "neighbours", Ivory was not personally liable because of the intervening corporate structure he had chosen, and which the plaintiffs were aware he was utilising.

Livingston v Bonifant is important in its advancement of the *Ivory* approach. Proximity between Bonifant and the Livingstons was of course present, where they sought his services, and were brought together through personal recommendation. but the issue was not one of proximity, nor even of foreseeability of damage. The only issue, where those elements are clearly present, is whether the defendant director has stepped from behind the corporate veil and represented himself or herself as individually involved. Ivory had not. Bonifant had not. And, in *Centrepac*, Rutherfurd had not, yet was found liable. Today, however, the idiosyncratic *Centrepac* analysis will not be applied to determine the personal liability of an errant director. In building upon the principles established in *Trevor Ivory Ltd v Anderson, Livingston v Bonifant* has reinforced, indeed entrenched, them as those a New Zealand Court will follow.

Mary-Anne Simpson
University of Canterbury

Appointment of Queen's Counsel

Remarks of the Rt Hon The Chief Justice, Sir Thomas Eichelbaum, on the call to the Inner Bar of Professor Sir Kenneth Keith in the High Court at Wellington on 25 November 1994

Before saying a few words to the new silk, I mention that on the Bench with me today are Sir Maurice Casey of the Court of Appeal, and all the Wellington Judges able to be present namely Justices Gallen, Heron, Doogue and Neazor and Justice Robertson of Auckland. Judges unable to be here have asked to be associated with the remarks to be made. The Attorney-General unfortunately has a previous commitment. He especially asked me to send his good wishes to the new silk and his regret at being unable to take part in this ceremony. We are pleased to have on the Bench with us retired Judges Sir Thaddeus McCarthy, Sir John White and Sir John Jeffries. We are also pleased to see, as well as Wellington Queen's Counsel, a representation of silks from elsewhere. There is a large attendance of Sir Kenneth's Law Commission colleagues, and of course we also welcome Lady Keith and other family members.

Sir Kenneth Keith, QC

The office of Queen's Counsel is an ancient and honourable one. Under New Zealand practice appointments are the joint decision of the Attorney-General and the Chief Justice. The criteria for the exercise of the discretion have never been drawn together in a comprehensive way but appointments continue to be made only to the select few regarded as worthy of the prize awarded to the specially diligent, learned, upright and capable members of the bar.

For the last 15 years or so it has been the custom to announce a small number of appointments to the inner bar on a single occasion annually. This is only the second time during that period when the Attorney-General and the Chief Justice have invoked the exception for special cases, under which Sir Kenneth's appointment has been made. This is also one of the rare instances where recognition has been conferred on a person outside the category of counsel in active practice in the Courts.

Sir Kenneth, if I may now address you personally, for a long time now you have been in the foremost rank of those broadly referred to as academic lawyers. For many years you were a distinguished teacher and professor of law at Victoria University of Wellington where you followed in the footsteps of giants of legal academe, notably, referring to professors within the memory of some present, Williams, Campbell and McGechan. Since 1986 you have been a member of the New Zealand Law Commission which from 1991 you have headed as President. In that capacity you have been involved in many of the important projects of that body, now making a significant contribution to the development of the law in this country. But entirely apart from the daily demands of your occupation for the time being you have found time for involvement in an astonishing range of other law related activities. I mention only a few – membership of the Committee on Official Information, the Danks Committee; the Royal Commission on the Electoral System in 1985; and your participation for over 20 years in the work of the Legislation Advisory Committee and its

influential predecessor the Public and Administrative Law Reform Committee. As a member of the Legislation Advisory Committee you have I suspect been an advocate of plain language drafting. Now that the silks have acquired your services I anticipate that at an early date the somewhat impenetrable language of the declaration you read a few minutes ago will be made plainer.

Your expertise has also made you in demand for undertakings of an international kind. You were part of the New Zealand legal team in the nuclear testing cases, and your assistance has been sought in other assignments relating to New Zealand's international rights and obligations. You have sat as an appellate Judge in Pacific Island countries. Last year Sri Lanka needed your help as a member of a commission of enquiry in relation to that country's internal difficulties. Your reputation extends well beyond New Zealand.

Sometimes the term "academic" has been used as a pejorative expression by those engaged in more utilitarian pursuits; but it has been a hallmark of your contributions to the law that they have been valued for their practical reality as much as for the scholarly excellence on which they have been based. For example, the New Zealand Law Society sought your help in the revision of the Law Practitioners Act in the late 1970s. As always your input was notable for the liberal outlook displayed and your sense of vision for the future directions of the law.

A recent media article hinted that today your advice was regularly, if privately, sought in the higher reaches of Government. The same publication testified to your massive capacity for work.

Today's ceremony gives formal recognition to your standing as one of the leading legal figures of the present era. It has given all those on the Bench and, I am certain, all your friends and colleagues, great pleasure to see you take your place among, to use the formal expression, Her Majesty's counsel learned in the law. □

Spring-heeled Jack

MF Nye looks at a most unusual Victorian criminal

(Reprinted from New Law Journal, *September 16 1994)*

Fifty years before his more famous namesake was bringing terror to the streets of Whitechapel, another Jack was beginning his own peculiar criminal exploits. Today the facts surrounding Spring-heeled Jack's almost supernatural appearances are almost forgotten. But it was not always so.

There were accounts of a peculiar leaping figure as early as 1817 but Jack's first noted public appearance was in 1838 on Barnes Common in South London, where he was seen by a number of people "clearing railings at a bound" and causing a commotion by his frightful appearance. Over the following months he was sighted in a number of different locations around London, including the ominously-named Cut-throat Lane near Clapham Common. Eye witness reports were remarkably consistent in their description. The figure was tall and powerfully built, wearing a full black cloak and high black riding boots. The face was covered by a mask with high pointed ears and eyes the colour of fire. His hands were covered by metal claws. Certainly not a figure to be easily forgotten. The newspapers soon became interested, terming him "the leaping terror", "the suburban ghost", and "the bugaboo" (a terrifying object), although it was not long before a journalist came up with the nomenclature which stayed. The interest provoked by the press was considerable. Even the aged Duke of Wellington took to patrolling Jack's haunts on horseback in an effort to trap him.

Jack's previous escapades had generally been to shock and alarm. His *modus operandi* was to lie in wait for an unsuspecting victim and then leap out, terrifying and sometimes injuring the individual concerned. He would make good his escape by great jumps commonly attributed to some form of springs concealed in his boots. However, in 1838 his activities took on a more violent aspect. Most serious was his attack on the 18-year-old Jane Alsopp on the evening of Friday, February 20. Jane lived with her family in a small house in the Bow district of London. It seems that in response to a violent hammering, Jane opened the front door to a man who said he was a police officer and that he and others had managed to corner Spring-heeled Jack in the lane outside. He asked her to bring a light as quickly as she could. Once lured outside she was violently attacked and it was only the arrival of members of her family that prevented more serious injury. She later told the Lambeth magistrates that the man's "face was hideous, his eyes were like balls of fire. His hands had great claws and he vomited blue and white flames". Following this attack a spate of appearances were reported all over England. In Hampshire he was described as "the very image of the devil himself, with horns and eyes of flames".

It was in the latter months of 1845 that Jack perhaps committed his most serious crime in a depressed and disease-ridden part of London known as Jacob's Island. It was this area that Dickens immortalised in *Oliver Twist* as the headquarters of Fagin's gang.

Anyone who has seen the various film adaptations will recall the decaying dank properties connected by wooden galleries interspersed with foul-smelling open ditches which served as sewers. Apparently, Jack trapped a 13-year-old prostitute called Maria Davies on one of these connecting bridges. The terrified girl lost her balance when fire was blown into her face and she fell into one of the ditches and drowned. The inquest verdict was one of death by misadventure but there was a furore by local inhabitants who wanted to see Jack stand trial for her murder.

Consequent on all the publicity there was considerable interest expressed in Jack's activity. This manifested itself in a number of "penny dreadfuls" featuring Jack, as well as melodramatic plays. He was usually portrayed as the villain, terrifying young women, but sometimes as the hero avenging evil. As in the case of Jack the Ripper, there was enormous speculation as to who or what Jack was. Suggestions put forward were legion but they covered an insane circus acrobat, the devil himself and even a demented kangaroo.

Undoubtedly one of the key contenders for the title was a young and eccentric Irish nobleman, the Marquis of Waterford. Born in 1811, he came from a wealthy and privileged family who owned large estates on the southern coast of Ireland. He was educated at Eton where he excelled at sport, including boxing and rowing, and his strength was prodigious. As a leading member of the early Victorian "brat pack" he was continuously involved in wild activities of one sort or another and had the reputation of being a notorious practical joker. He amused himself by shooting out the eyes on family portraits with a pair of pistols and after a trip to the races he literally painted a town red including doors, windows and an un-amused nightwatchman. The Marquis's behaviour became less flamboyant with the passing of time and during the 1840s he settled into respectability until his early death aged 48 when he fell from his horse and dislocated his neck. Newspapers of the time suspected the "mad Marquis" to be Jack but there was never conclusive evidence and neither he nor any of his friends admitted to an involvement in Jack's activities.

Following the Marquis's death there were still isolated reports during the 1850s and 60s of Jack's activities but none of them are well-attested. However, in November 1872 the *News of the World* reported that "London is now in a state of commotion owing to what is known as the Peckham Ghost, a mystery figure who springs over stone walls and lofty hedges, quite as alarming as Spring-heeled Jack who terrified a past generation". This was but a foretaste of the striking events of March 1877.

A night sentry on duty at Aldershot Barracks on March 4, 1877 thought he saw a strange figure bounding towards him. The figure disappeared from sight only to land on the roof of the sentry box and place icy metal hands on the face of the startled soldier. The figure then leapt in front of the soldier, turned and grinned malevolently and bounded away.

Jack's final bound and last positive appearance was in Liverpool in 1904, some 60 years after the incident on Barnes Common. The *News of the World* reported that crowds of people watched Jack bounding up and down William Henry Street, where he made jumps believed to be in excess of 25 feet. He leapt from a roof and disappeared, this time for good.

There is little doubt that Jack's exploits were wildly exaggerated and he was blamed for any number of incidents that were nothing to do with him. It is also highly probable that there was more than one Jack, and he was known to have his imitators. One thing is sure – that he left a bizarre anecdotal legacy. □

Recent Admissions

Barristers and Solicitors

Elikana T	Auckland	15 December 1994
Goh TKA	Auckland	13 December 1994
Holdaway CK	Auckland	15 December 1994
Kalsakau IL	Auckland	15 December 1994
Keppel ST	Auckland	15 December 1994
Koller GF	Auckland	15 December 1994
Lim SS	Auckland	15 December 1994
Lin C-Y	Auckland	15 December 1994
Meyer-Rochow RY	Auckland	15 December 1994
Petaia P	Auckland	15 December 1994
Watt JL	Wanganui	28 November 1994
Wicks PF	Auckland	15 December 1994

Correspondence

Dear Sir,

The death of Sir Guy Powles on 24 October puts one in mind of tributes paid to people of greatness in the past. In the opening lines of *Measure for Measure* the Duke eloquently expresses the level of esteem he feels for his trusted counsellor Escalus. With but one alteration from Shakespeare's original, the passage would stand thus:

> The nature of our people,
> Our country's institutions, and the terms
> For common justice, y'are as pregnant in
> As art and practice hath enriched any
> That we remember.

Harold Evans
Retired Stipendiary Magistrate

The Courts and the Public

By Sir Ivor Richardson, Judge of the Court of Appeal

It is probably true that the general public considers the intricacies of Court procedure to be part of the obscurity of the law. The point and purpose of procedural rules however is, of course, to assist in the expeditious hearing of cases; and to see that the cases when heard are dealt with according to principles of justice. Whether "justice" is to be identified with "fairness" as postulated by Rawls may be open to jurisprudential argument, but it now seems to be firmly imbedded in the judicial consciousness. This seems now to apply to procedural matters as well as substantive issues. As Sir Ivor Richardson makes clear in this paper which was originally delivered to the Australian Institute of Judicial Administration at the end of November 1994, the question of access to justice is important in itself; and inevitably therefore the procedures of the Courts must be open rather than being in any way a bar to parties obtaining a full hearing of their case.

This paper is to be published also in the Journal of Judicial Administration.

Justice is a fundamental right in any democracy and I am honoured by the invitation to deliver the Australian Institute of Judicial Administration Oration on a subject within that broad area this evening.

The field itself is of daunting breadth and depth. Reading the recent report of your Access to Justice Advisory Committee brings that home. It is a remarkable document. Given the broad, yet detailed and prescriptive terms of reference and the short reporting time-frame, the Committee had a huge task to absorb, outline and analyse such a variety of issues. Some of the issues are central to the functioning of societies such as ours; others have to do with complex organisational detail.

From reading and reflecting on the report I came away with three particularly clear impressions. The first is of the vitality of the institutions of government and society and the significant changes which are taking place in the administration of justice. Many of the changes in the administration of justice were initiated by the courts and the legal profession and are designed to enhance access to justice. The second impression I formed from reading the report is of the extraordinary number and range of reviews, research studies and reports on aspects of justice in Australia. The Access to Justice Report is a valuable compendium of that work. The third, and potentially the most important feature of the report, is the statement of concepts and principles developed by the Committee to guide access to justice.

The Committee identified three objectives: equality before the law, national equity and equality of access to legal services. To have equality before the law, all Australians regardless of race, ethnic origins, gender or disability must be equally entitled. National equity requires that all Australians regardless of where they live should enjoy, as nearly as possible, equal access to legal services and legal services markets that function competitively. The third objective, equality of access, means that all Australians regardless of means should have access to high quality legal services and dispute resolution mechanisms necessary to protect their legal rights and interests.

The Committee went on to identify five principles which they considered underlie access to justice. The first is that public institutions and organisations like the law societies and bar associations must be accountable to the community. The second is that the courts are accountable but their accountability must also recognise the independence of the judiciary. The third principle is that law should be as clear and simple as possible. The fourth is that legal institutions and lawyers should adopt a consumer-oriented approach to their work and responsibilities. And the fifth is that competition principles should apply to the legal services market.

Whether that assessment, that prescription developed in the Access to Justice Report, reflects Australian perceptions I leave for Australians to decide. In the discussion this evening I plan to focus on one aspect of access to justice, the relationships between the courts and the public. I shall begin by discussing four broad conceptual considerations. They raise issues which every democracy must grapple with and answer in its own way. Against that framework I will then canvass a range of questions relating to the relationship between the courts and the public.

The first of the four considerations is directed to values. To a large extent any system of justice reflects the values of the particular society. Another basic question concerns the role of the justice system in a democracy. A third consideration is that the system of justice must serve both the legitimate interests of the parties to litigation and the wider public interest. In the language of economists, and like health and education, justice is both a public and a private good. A fourth consideration is that the administration of justice involves the use and so the allocation of necessarily limited resources. Let me explain each in turn.

The system of justice reflects the values of the society

The first question is what kind of society are we and what kind of society do we want to be? The question recognises that present realities may not match our aspirations. We may want to change

our objectives. We need to identify, articulate and give effect to what we see as our underlying values.

Any survey of democracies shows that different societies give different emphases to different values and that the emphases may change over time. For example, as between individuality and community; national identity and pluralism; the collective will and minorities; diversity and unity; individual autonomy and social cohesion; competition and co-operation; change and stability; conformity and tolerance; independence and security; civil rights and economic wellbeing; fairness and efficiency; rights and responsibilities; just deserts and social justice. It is not a matter of selecting one and rejecting the other. Rather it is a matter of arriving at the balance for that society on that particular continuum. And that balance will itself change in response to changing social values and needs.

Democracies such as ours place a high value on the equality and individuality of all its members. The recognition of human rights is basic. The protection and promotion of the rights of individuals and minorities is a fundamental value. Striving to redress disadvantage so that all members of society can participate is a hallmark of a civilised society. An emphasis on rights is a restraint on the state as well as a means of liberating the individual and group.

A balancing consideration to individual rights is the interests of the community. The exercise of one individual's rights may harm other people. Thus freedom of speech is not a licence to defame. Membership of an ordered society necessarily limits individual and group freedoms. Our laws and institutions need to reflect a just weighing of rights, interests and responsibilities. That weighing requires constant fine tuning. The goal must be to provide a proper balance between the rights and obligations of individuals; balanced against the rights and obligations of minority groups, including the different generations, and particularly indigenous and ethnic minorities; and balanced against the rights and obligations of the community as a whole.

Assessing rights and interests can be complex and difficult. What are our expectations of the justice system? For example, how central is gender and racial awareness? Again, and moving to a different inquiry, should we always encourage external resolution of disputes and differences? Do we want a society so based on the vindication of rights, whether individual or group, that the response to every perceived problem or slight is that someone must be compensated and someone must pay? I suspect that few would welcome a litigation ridden and riven society. At the other extreme live and let live as a dominating philosophy is likely to bear much more heavily on the disadvantaged and the weak. How far in the interests of an assumed social harmony and healthy economy should we expect people to put up with feeling wronged and disadvantaged? In what circumstances can we reasonably expect resort to non-institutional avenues for redress of grievances?

Those are large and difficult questions. Most of us want the justice system to recognise the worth of the individual and the human rights of all members of society. That still leaves considerable room for differences in approach to a range of access to justice questions. Particularly those involving balancing different values. For that reason it is important in an open society to debate, articulate and update the values on which those decisions rest. For example, many commentators say that the historical predominance of men in courts and legislatures over centuries has resulted in laws and processes that reflect the experiences and needs of men. If that is so and the vision of reality underlying many laws and processes is a male vision, a first step is to develop the kinds of gender awareness programmes on which the Australian Institute of Judicial Administration has embarked. Issues of that kind need to be debated and dealt with openly.

The role of the justice system in a democracy

I suggest there are four relevant features of the justice system in a democracy. First, the orderly resolution of disputes is essential to the functioning of any democratic society. The law should be the means through which people can protect their rights and interests and through which the community can be confident that disputes will be settled.

The second feature of justice in a democracy is that institutions of government are under the law. As Lincoln put it, democracy is the government of the people, by the people, for the people. The state is an extension of the public. Its role is to serve the people, rather than the people to serve the state. However complex the society and however important the role of the state, all three branches of government derive their authority from the law and are accountable accordingly.

The third feature of a justice system is that the courts as the judicial branch of government have a particular role in the protection of human rights. Recent decisions of the High Court of Australia make that clear. Thus in *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106 the High Court held that freedom of discussion of political matters is indispensable to the system of representative government prescribed by the Australian Constitution and is necessarily implicit in the Constitution. And in two decisions last month (*Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd*) the High Court applied that approach in expanding freedom of expression defences available to the media in defamation cases.

The fourth feature of justice in a democracy is that the equal protection of the law and the due process of the law underpin the resolution of disputes between citizen and citizen, and citizen and the state. That is fundamental to the functioning of democracy. If assumptions underlying the justice system and practices in the administration of justice alienate or discriminate against some sections in society then those assumptions should be changed. Any barriers of poverty, language or culture need to be dismantled. Otherwise we continue to fall short of the democratic ideal.

The justice system serves both public and private interests

I turn now to the third point noted earlier, that the system of justice must serve both the legitimate interests if the parties and the wider public interest in the administration of justice.

Certainly the litigants have a direct interest in the outcome. They benefit from the judicial processes. They are concerned to have their disputes resolved in a fair, efficient and effective manner. Other immediate

participants in the process – victims of crimes, witnesses, jurors, judges, counsel and court officials – also have a legitimate stake in the process in which they are engaged. Rightly they are concerned with the function of the courts.

But litigation is not a private preserve of those immediately involved. The open, fair and effective functioning of the courts is fundamental to a democratic society. The community as a whole has a stake in the just resolution of particular cases and of the generality of cases. The courts are the people's courts. Subject to very limited exceptions, we insist that the courts function under public scrutiny. The open administration of justice is a protection for all of us. The performance of the judicial system influences economic decision making, social harmony, individual flourishing and community development. That crucial public interest in the justice system is a critical consideration in numerous justice questions.

Resource constraints and choices

As earlier noted, a further consideration is that the administration of justice involves the use and so the allocation of necessarily limited resources.

Justice may be priceless. But it is not costless. The acceptable resolution of disputes involves balancing human rights and other moral values, fairness considerations and resource constraints.

In economic cost terms the object is to minimise the sum of the three types of costs. In other areas of public policy the costs are conventionally referred to as administration costs, compliance costs and economic or deadweight costs. In the justice system the administration costs are the net costs to Government after deducting court fees and other receipts. The compliance costs are the costs borne by those involved in litigation; parties, witnesses and jurors, to the extent they are not recompensed. The economic costs are the risks and costs of erroneous legal decisions and other indirect impacts affecting the efficient administration of justice. One example is the cost to the community of poorly drafted court rules.

At times we tend to concentrate on saving administration costs. It is important that case management and court management principles take account of all the costs, including expense to the litigants, and not focus exclusively on the resources of the courts.

Like economics the justice system is concerned with behaviour. Rules, sanctions and processes should be designed having regard to resource implications. Let me give one example. In recent years there have been concerns over the coverage and costs of legal aid. There are some obvious questions for consideration. For example, should society provide a Rolls Royce system, or a Holden Commodore or a Ford Laser? What moral and social values do we weigh when dividing the legal aid budget between crime, family law and other civil cases? Within what limits is it appropriate to impose expenditure controls by fixing fees in advance? If changes in legal aid resulting in less spending per trial lead to more appeals based on the inadequacy of counsel and may even lead on to a few more new trials, those changes may still be cost effective. It is then a question of how much special weight is given to human rights' values when striking the balance.

My point is that proposals to limit legal aid cannot be dismissed out of hand as contrary to justice. Other public policy questions involving competing claims on limited resources require a choice at the margin between expenditure on health, education, justice, social welfare, defence and so on. Just as in the decisions we make as individuals as to how we will spend our energies and our money, there are always policy trade-offs between efficiency, fairness and other individual and community values.

There is a further resource constraint consideration. Economic and social policy are inter-related with inevitable consequences for the justice system. For example, if in response to law and order concerns hundreds of additional front line Police are provided, that will result in more prosecutions and so more demands on the justice system. New legislation such as a Bill of Rights will likewise affect the justice system. To illustrate the point, the New Zealand Court of Appeal has had 118 Bill of Rights cases since the Bill was passed four years ago and there must have been thousands in the District Court and High Court. Other changes to economic and social policies may feed through to justice. It follows that policy development processes in the justice area, as elsewhere, require effective external consultation and appropriate cost benefit impact analyses.

Against that framework of the considerations I have been discussing I propose now to turn to a range of questions arising from the relationship between the courts and the public. If I emphasise public interest and resource constraint considerations it is because they are universally significant but often tend to receive less recognition. I shall discuss these questions under two headings: Courts and the community; and effects of the procedural system.

Courts and the community

I begin with three premises: that the courts are the people's courts; that the public has a legitimate interest in the administration of justice; and that public perceptions of the integrity and performance of the justice system are crucial to maintaining respect for the law and for the role of the courts in a healthy democracy. If we start from those premises two conclusions follow. The first is that the public must be assured that their rights are being protected. They have to feel that if they are in court or come to court they will receive fair and impartial treatment; that others coming to court will receive fair and impartial treatment; and more broadly that the rights of the individual are being upheld. The second is that the public must be assured that resources are being applied appropriately. Given that resources are finite, the public has a legitimate interest in knowing whether adequate resources are being committed to the administration of justice and whether those resources are being used wisely.

It is with those considerations in mind that I turn to courts and the community. The community consists of both those who come to the courts; and those who don't come and who rely on media reporting for information as to particular cases and information on the functioning of the courts in general.

Those in the first category, those who come to the courts, have obvious needs. Those needs exist in whatever capacity they attend, whether as litigants, victims of crimes, witnesses, jurors, media representatives, in a supportive role or as observers. They need to understand their role in the

administration of justice, their rights and their responsibilities. They should be made to feel as comfortable as circumstances allow. All those attending are entitled to be treated with appropriate consideration and courtesy. Court buildings should be designed, facilities provided and explanatory material supplied with those considerations in mind. Court proceedings and processes should be consumer-oriented and should be organised and conducted accordingly.

My impression is that those needs and concerns are well understood by those who regularly participate in the administration of justice and that a great deal of thought and planning is being devoted to meeting the legitimate needs of those who come to court. However regular opinion survey material would help in identifying deficiencies in those respects and unmet public concerns.

Greater difficulties arise in meeting our responsibilities to the great bulk of the community who never come to the court in the ordinary course and who rely on media reporting for information as to particular cases and on the functioning of the courts in general.

In the Annual Review for 1993 of the Supreme Court of New South Wales the Chief Justice said with reference to the appointment of the first public information officer that "it is clear that journalists, and members of the public generally, are interested in the way the courts work, and are anxious to be well-informed on that subject."

My impression is that in New Zealand, too, there is a real desire by the public to know more about what goes on in courts. That is reflected in public attendance at open days. It explains in part why the print media report cases and comments on the functioning and performance of the courts. It also explains to some extent the appeal at home of *Rumpole* and *LA Law* and interest in CNN's reporting of high profile cases.

At the start of this part of the discussion I suggested that the public has a legitimate interest in the administration of justice and that public perceptions of the integrity and performance of the justice system are crucial to maintaining respect for the law and the role of the courts in a healthy democracy. That then raises some obvious questions. How can the courts assist the media to ensure fair and accurate reporting of cases of the functioning of the courts? For example, should judgments be made more accessible and understandable to the media and the wider public by incorporating summaries where that would assist ready reporting and comprehension? Should we issue press releases explaining complex decisions? Should all courts employ press liaison officers? Various Australian courts have taken that initiative. Other institutions of government do so. Are there any public policy arguments against making the performance of our public responsibilities better understood by adopting modern communication processes? Should we encourage education in the schools and through the media as to the role, responsibilities and performance of the courts in a healthy democracy? And should we allow cameras in the courts?

Televising court proceedings

Televising court proceedings is a major and topical public policy question. The recent Access to Justice Report came down firmly in favour of an experimental programme for the broadcasting on radio and television of proceedings in the Federal Court. In New Zealand the Courts Consultative Committee has been examining the issues for over three years and is moving cautiously along the path towards televising court proceedings under appropriately stringent conditions.

The essential argument for allowing cameras inside courtrooms is that it would give the public better access to court proceedings and so make the principle of the open administration of justice more of a reality. A closely related argument is that showing cases on television has an educative value. Open justice reflects the principle that, subject only to specific statutory exclusions, court proceedings should be conducted in public. Neither the parties nor the witnesses can demand the exclusion of reporters or of the public from the courtoom. But it is only those members of the public who have the time, resources and inclination to travel to a court and for whom public seating is available who will see at first hand what transpires. For the remaining vast majority their understanding of particular proceedings and of the general functioning of the courts is derived from the media. For 200 or more years that was through the print media, through newspapers. In today's world people rely far more on television and radio for news reporting and for shaping their views on the functioning of the institutions of society. The electronic media are the eyes and ears of the public. For open justice to have real meaning they should have access to courtrooms.

The essential arguments against televising court proceedings rest on fair trial and privacy concerns. The right to a fair trial is paramount and there are obvious anxieties about how televising would affect the participants, particularly witnesses and complainants. Would it deter them from coming forward, make them more nervous in giving evidence and so affect its quality, or encourage them to tailor evidence to fit with evidence earlier broadcast or to conform with how they prefer the wider public to see them? Clearly too there would be a greater intrusion on privacy from being seen and heard by television viewers throughout the country. The associated argument is that television is essentially an entertainment medium, that presentation of short excerpts from court proceedings will not present a fair and balanced picture of the trial and that television coverage will trivialise court proceedings and so lower the standing of the courts in the eyes of the public. I should add that initial concerns that cameras would distract participants have been allayed: modern technology and limitations on the number and movements of cameras have resolved any such difficulties.

What then can we learn from overseas experience? Currently it rests essentially on the experience of the United States. Television coverage is widely available in America. Forty seven of the fifty States allow certain proceedings of their state courts to be televised. High profile trials are shown regularly on CNN and other channels. As well there is a courtroom television network with a wide national audience base which gives extended coverage to cases.

In England a Working Party of the Public Affairs Committee of the General Council of the Bar made an extended study including investigating American television reporting. In 1989 it recommended permitting televising of the courts on an experimental basis. Appellate proceedings in Scotland may be

televised with the approval of the presiding judge; and with leave of the Lord President a number of trials have recently been filmed there and subsequently shown on television in a well-received documentary series.

In New Zealand the Courts Consultative Committee is chaired by the Chief Justice, reports to the Minister of Justice and has general oversight of the administration of justice. After an extensive study the Committee was strongly in favour of proceeding with a pilot scheme in selected courts to be followed by an evaluation of the experience.

In terms of policy and principle the Committee was satisfied that open administration of justice considerations outweighed fair trial, privacy and television reporting concerns. It considered the current position unsatisfactory in two respects. First, it is difficult in principle to deny electronic media the access and reporting that are given to print media. In that connection the Court of Appeal of Ontario in *R v Squires* (1992) 78 CCC (3rd) 97 held that a statutory partial prohibition on filming of persons entering or leaving the courtroom violated freedom of expression under s 2(b) of the Canadian Charter of Rights. The court by a majority went on to hold under s 1 of the Charter that the particular conditions and restrictions governing filming constituted a reasonable limit on that freedom of the media to impart information.

Second, the New Zealand Committee concluded, current television coverage of the courts is unsatisfactory. Showing participants scurrying in and out of court buildings and a diet of fictional courtroom dramas gives a distorted view of court proceedings. In real life any media frenzy occurs outside the courtroom. Where cases are televised the public sees that litigation is often dry and drawn out; and that it is conducted patiently, carefully and always with appropriate seriousness.

There were two further considerations which weighed with the New Zealand Committee. One was the clear indication of media interest and the fact that on a number of occasions some parts of some proceedings had been televised. The other was that it is open now for any judge to accede to a media request. That is because each judge has an inherent jurisdiction to regulate the conduct of proceedings over which he or she presides. The Committee felt that the existence of a pilot project with stringent rules would provide better protection to individual judges and the judiciary collectively than the present vacuum.

We then went through an extensive process of consultation first with all the judges and, after they had given strong support for the proposed pilot, with groups of members of the legal profession, who were divided in their views, and with the Department of Justice which was supportive. The rules for television coverage were presented to the media as the basis on which a pilot project would run.

Under those rules television coverage must give an accurate, impartial and balanced view of the proceedings. To encourage a serious approach by the media the rules require that any broadcast be without editorial comment and of at least two minutes duration. Deposition hearings and cases involving charges of a sexual nature are excluded from the pilot. There is to be no filming of the jury or of the public. Parties and witnesses cannot veto filming but they may require that their identity be protected by visual and voice distortion techniques. The media are responsible for pooling arrangements and only one camera is permitted. Four days' notice of a wish to film proceedings must be given. The trial judge rules on the request after counsel and the parties and witnesses have had the opportunity to comment. Control rests with the trial judge throughout. The judge may at any time end media coverage if he or she concludes that the rules have been

Television in Court

The first television pictures of a British trial (in Scotland actually) were shown by the BBC in late November. An article on the topic was published in the Solicitors Journal of 18 November 1994 at page 1176. The following brief extracts make interesting reading in terms of the proposed television of short excerpts of trials to be permitted in New Zealand.

The documentary series *The Trial* represents two years of negotiations and planning by the BBC.

Scotland's most senior judge, Lord Hope announced that while televising the courts was illegal in England and Wales under s 41 of the Criminal Justice Act 1925, this legislation had never been applicable to the Scottish legal system. In Scotland all that was needed for cameras to gain access was a new practice rule . . . .

It was the BBC documentary unit which finally secured the official list of do's and don'ts. The key principle was that any filming of trials in the High Court and the Sheriff Court (which handles both civil and criminal matters) could only be shown after the trial and any subsequent appals were over. Filming is only allowed for documentary and educational programmes. But it was a guideline which required that everyone involved in a case had to give their consent before filming could commence, which caused untold headache and frustration for the BBC producers involved. The witnesses, police, the accused, prosecution and defence lawyers and most importantly the judges, all had to give their consent . . . .

The series will be an eye-opener for anyone who hasn't seen a lawyer cross-examining a hostile witness. In programme three, Edinburgh solicitor George More, the doyen of the Scottish legal world, is shown tearing into three police witnesses to expose the differences in their versions of what happened at the scene of an arrest. Viewers may be surprised by the aggressive tactics used by such lawyers as they seek to discredit a witness. . . .

Edinburgh solicitor George More, who appears throughout the TV series, says the BBC got the balance right: "This series will give the public a fair impression of what goes on in court. It doesn't titillate or give a false impression. But television is just too strong a medium for TV pictures of an on-going trial to be shown. Editors of news bulletins would be able to show only a few moments of what happens in a three day trial. They would only show the sensationalist, dramatic bits of evidence. They could show more of the incriminating evidence than the defence evidence. It would inevitably become mere public entertainment." □

violated or that continuation would prejudice a fair trial or substantial rights of individual participants.

We expect the pilot to begin early in 1995.

Effects of the procedural system

Another and unrelated public policy question is how the procedural system affects the costs and fairness of the dispute resolution processes and the quality of the outcomes. In cost terms the objective suggested earlier is to minimise the sum of the administration, litigation and economic costs. But other public interest and fairness considerations may outweigh pure cost factors. To illustrate the kind of enquiry contemplated let me give some random examples.

First consider pre-trial disclosure. An all cards on the table approach is more likely to facilitate settlement by enabling each party to make a more accurate assessment of the likely outcome of a trial. It may thus reduce administration costs and overall litigation expenses. But pre-trial disclosure imposes immediate compliance costs; and, if negotiations fail, surprise has a strategic value. There is a range of disparate short term and long term considerations involved. In this instance as in many others a party's freedom to act may have to yield to fairness considerations and to the public interest in the fair, efficient and effective utilisation of resources.

Again, an expenditure by one party, for example on experts or on interlocutory processes, may affect the expenditure decisions of the other. In recent times courts have taken over from counsel much of the responsibility for controlling the course of litigation. I have no doubt the judges have a proper public responsibility for case management and court administration. But I am inclined to think that how far to go under case management systems in balancing court intervention and party autonomy depends on what is practical based on experience and experimentation, rather than on ideology.

I move on to overall litigation costs. The traditional response to growth in demand for court services is to add judges, supporting personnel and facilities. That may encourage greater use of the courts, just as the construction of a new freeway designed to relieve traffic congestion may induce more people to drive. How much delay in the court system can be justified? What social and economic considerations are relevant? In what circumstances and to what extent is it appropriate to use the price system to moderate the demand and guide the supply response? For example, should summary judgment processes carry higher court fees because, like fastpost, you should expect to pay more for faster service? There are obvious public interest limitations to user pays in the justice field. But to what extent should commercial litigation be subsidised from the public purse? Should some of that litigation be subject to levels of court fees which encourage resort to alternative dispute resolution? Even there we need to remember the external benefit for the community of court precedents governing commercial conduct.

Another area where the procedural system affects the costs and fairness of litigation is in settlements. Civil settlements and plea bargaining, where that is allowed, take place because negotiation is a cheaper and more predictable way of resolving controversies than litigation. Each side gives up the prospect of doing better by going to trial. But in crime can it be considered simply a matter of private bargain even if, and it is a large if, the parties have equal bargaining power and if the Crown may be expected to weigh public interest considerations? The public perception of the integrity of the justice system is crucial and in my view it is important to establish criteria and mechanisms which command public support.

I turn next to appeals. Appeals serve the dual purpose of reducing the costs and unfairness of legal error and of creating and maintaining uniform rules of law. Judges are publicly accountable through the appellate processes. That is important. But the existence of appeal rights does not fully assure everyone involved in the court processes that their rights and interests will be fully protected. It does not alone discharge our responsibilities as judges. Successful parties may feel aggrieved after their day in court. So may non-parties. In only a small proportion of cases are appeals appropriate. They cost time, effort and money and they cannot meet what may in some cases be legitimate concerns over the conduct of the case and the functioning of the court. That is why judges see their responsibility as extending to understanding the needs and anxieties of litigants, victims, witnesses and the wider public. They do not undermine judicial independence by doing so.

Finally, I want to say a few words about performance standards and how they can assist the functioning of the courts. The first and important point is that performance standards set in consultation with the judges need not impair the independence of the judiciary. Next, such standards may apply not only to timetabling cases through to hearing but also for delivery of judgments. Long delays in delivering reserved judgments are never desirable. In rare circumstances delays may be inevitable. It is helpful both to those within the system and the public to know that the great bulk of decisions are given promptly and that only a small percentage may have to be delayed more than a specified time.

Performance standards are a healthy discipline for all of us within the system. They are a recognition of the public interest in the fair, efficient and prompt dispatch of cases. I note Professor Sallmann's assessment of the American trial court performance standards developed by the National Centre for State Courts and the United States Department of Justice. He concluded that their standard setting report has been influential in two important respects. The first is in providing a practical basis for assessing how courts are performing. The second is in raising awareness within the courts of the appropriateness of performance standards. ("Towards a More Consumer-Oriented Court System" (1993) 3 *Journal of Judicial Administration* 47, 51.)

It is appropriate to end this address with that acknowledgement to Professor Sallmann and the Australian Institute of Judicial Administration. The numerous references to AIJA publications and to the work of the Australian Institute of Judicial Administration throughout the Access to Justice Report are a well-deserved tribute to its leadership on crucial administration of justice issues. □

The new South African Constitution

By Bede Harris, Senior Lecturer in Law, University of Waikato

The relationship between New Zealand and South Africa has historically been one of long standing since New Zealand sent troops to the Boer War at the turn of the century. Even before that there was the shared colonial status illustrated by the fact that in 1853 Sir George Grey went from being Governor of New Zealand to Governor of Cape Colony and then back to being Governor of New Zealand again in 1861. Subsequently there has been the close relationship of Rugby contacts, and eventually the period of considerable tension within New Zealand arising out of apartheid and the Rugby issue. The holding of South Africa's first election under universal franchise in April 1994 was a milestone in that country's history. In this article Mr Harris, who was co-author (with L J Poulle and C E Hoexter) of the South African textbook Constitutional and Administrative Law – Basic Principles, *discusses the most important features of the new constitution and considers the political background to the issues that still remain to be resolved.*

Introduction

The coming into force of the Constitution of the Republic of South Africa Act No 200 of 1993 which confers universal franchise on the country's citizens for the first time, has been hailed as a turning point in that country's history. This article describes the essentials of the Constitution that was negotiated over the past two years, and also examines issues that have been left unresolved.

Status of the Constitution

In analysing the new Constitution, it is important to bear in mind that it is an interim document, and that Parliament, sitting as a Constitutional Assembly, has two years to draft a final Constitution (s 73(1)), which will come into effect in 1999. However, as will be explained below, the final Constitution will be based on much the same principles as the 1993 Constitution, and so the present version gives a good indication of long term trends in South African constitutional development.

The first point to note is that the Constitution evidences a shift in the source of legal authority – a change in the *Grundnorm*, to use Kelsinian terms – from an omnicompetent Parliament to the Constitution itself. Section 4 expressly states that the Constitution is "supreme law", binding all levels and branches of government, and Parliament's legislative authority is stated as being "subject to [the] Constitution". (s 37). Thus although it is a product of the last South African Parliament, which obtained its ultimate authority (via the Constitutions of 1983 and 1961) from the South Africa Act of 1909 passed by the Imperial Parliament, the new Constitution is intended to be autochthonous. This is particularly important when one considers that in drafting a final Constitution, Parliament (sitting as the Constitutional Assembly) is bound by 34 fundamental principles found in Schedule 4 which were agreed to during the constitutional negotiations.

Fundamental rights

The supremacy of the Constitution assumes particular importance in light of the Bill of Fundamental Rights contained in Chapter 3 (ss 7-35). These provisions bind all branches of government at all levels (s 7(1)) and the Constitutional Court is given express authority to declare invalid legislation and executive acts that are inconsistent with the Constitution (s 98(5) and (7)). Chapter 3 also reflects the debate on bills of rights that has taken place in South Africa since the late 1980s, and the result incorporates much that one would expect to find in a document influenced by the Canadian Charter and the Amendments to the United States Constitution.

A much debated issue was the extent to which the enactment of a bill of rights might have the effect of preserving existing disparities in South Africa. This is more fully addressed in the section on socio-economic issues below, but it is interesting to note that while affirming equality, s 8 permits measures designed to advance persons disadvantaged by unfair discrimination. Furthermore, the limitations provision, while obviously similar to that contained in s 1 of the Canadian Charter, permits limitations to the extent that they are "reasonable and justifiable in an open and democratic society based on freedom *and equality*" (s 33(1)). The addition of the word "equality" raises crucial questions of interpretation, firstly in regard to the relative importance of, and potential conflict between, freedom and equality, and secondly in relation to whether "equality" means equality of opportunity or of outcome. The answers to these questions will be decisive in determining the extent to

which rights protected by Chapter 3 may be limited.

Aspects of the rights provisions are mentioned in various of the sections below. Here it is necessary to mention only a few of them:

Chapter 3 leaves open to interpretation by the courts the thorny questions of whether the right to life (protected in terms of the simple statement "Everyone shall have the right to life" in s 9) is compatible with abortion and capital punishment, and indeed the first case lodged with the Constitutional Court requires a determination of the lawfulness of the death penalty.

South Africa's multilingualism has made the issue of official languages a sensitive one. Section 31 protects the right of each person to use the language of his or her choice, and s 25(3)(i) confers upon persons being tried the right to require that court proceedings be translated into a language they understand. Other provisions of the Constitution which are not part of Chapter 3 also address the issue of language rights: Section 3(1) recognises eleven official languages, and s 107(1) confers the right to translation of court proceedings on all litigants. However, s 3(3) and (6) state that the right of individuals to use and be addressed in their own language by the public administration exists "where practicable", while s 3(8) permits the government to pass legislation providing for the use of certain official languages by the public service "taking into account questions of usage, practicality and expense". In other words, except for court proceedings, the Constitution permits the state to adopt a pragmatic approach in relation to language use by its functionaries, and this is likely to mean that English will continue to establish itself as a lingua franca.

Finally, it is heartening to note the strong protections afforded to detained and arrested persons by s 25. Most important in view of the horrendous human rights abuses that became the norm in South Africa during states of emergency imposed during the apartheid era is the fact that the core of these and other rights (for example the right to challenge the validity of detentions in court and to have access to a lawyer — s 34(6)) remain *unsuspendable* during a state of emergency. It would be no exaggeration to say that the absence of such a protection has been fatal to bills of rights in almost every country in Africa, and the plugging of this loophole in South Africa evinces a degree of protection for the right to personal liberty that probably cannot be bettered on that continent.

Socio-economic issues

A keenly debated issue was the extent to which the Constitution should address socio-economic matters. On the one hand, disparities in government spending on social services for different races has led to the ANC making equalisation of education, health, housing and welfare its chief socio-economic policy goal, yet on the other hand it is clear that the country's comparatively heavy tax burden cannot be much further increased, and that even assuming that the fiscus will be able to reap a "peace dividend" (the existence of which will to a large extent depend on the extent to which the ANC is willing to give ground to the IFP on the federal question, discussed below), only rapid economic growth will be able to produce sufficient tax income to finance these projects. This in turn depends on the country attracting large amounts of foreign investment in an environment that has become far more competitive following the abandonment of Marxist economic policies by other Southern African countries.

However it is clear in deciding what economic role the constitution should confer upon the state, the parties to the constitutional negotiations ultimately realised that socio-economic advancement and economic growth bear a symbiotic rather than antagonistic relationship. Thus the ANC curbed its economically *dirigiste* instincts, while others who favour a free market approach, accepted that unless such growth produces visible and widespread socio-economic advancement, the next election might bring a far less amenable government to power. The Constitution thus embodies a compromise: it protects the right freely to engage in economic activity (s 26(1)), as well as the right to own property, with expropriation subject to the right to compensation, the fairness of which is justiciable (s 28). Furthermore a strict approach to monetary control is adopted: the Reserve Bank is directed to "protect the internal and external value of the currency", and its independence is recognised, subject only to regulation by Act of Parliament (s 196). The Bank's independence is also one of the fundamental principles upon which the final Constitution must be based (article XXIX). On the other hand, while "third generation" rights are not constitutionalised, the equality provisions provide that freedom of economic activity does not preclude measures designed to advance "social justice" (s 8(2)), and it is not impossible to imagine this provision being used to uphold reverse discrimination legislation which limits free economic activity.

The issue of land rights is specifically addressed by ss 121-23, which vests the courts with jurisdiction to order the state to restore land or, where this is not feasible (for example, where land has been transferred to private owners and the state is unable to repurchase it), to pay compensation to claimants whose land was dispossessed without just compensation in furtherance of racially discriminatory legislation passed since 1913 (when the first legislation demarcating land on the basis of race was enacted). Land claims will in all likelihood take years to settle, although the process will be somewhat eased by the fact that the majority of South African farmers are heavily in debt to the state-owned Land Bank and their land could, in theory, be sold in execution.

Legislature

The most striking difference between this Parliament and all previous ones is, of course that it has been elected on the basis of universal franchise (s 6). The Parliament is bicameral (s 36), consisting of a House of Assembly and Senate. The House of Assembly consists of 400 members (s 40) elected by pure proportional representation — there are no constituencies, and each party obtains list seats in proportion to its share of the national vote, although there is some concession to regional interests in that 200 of the seats are elected from national lists and 200 from lists for the nine regions into which the country is divided. Perhaps the most extraordinary aspect of the electoral system is that members of the National Assembly and Senate are required to vacate their seats if they cease to be a member of the parties on whose lists they were elected (ss 43(a) and 51(1)(b)). In other words, no legislator can cross the

floor and, even more disturbingly, one who is expelled from his or her party loses his or her seat. Presumably this provision is explicable on the basis that as all members are elected as representatives of a party, they ought to vacate their seats if they cease to belong to that party, yet it certainly augments the power of party whips to an extent unimaginable even in the United Kingdom or New Zealand. The second chamber of Parliament, the Senate, consists of ten members nominated by each of the nine provincial legislatures, with a party being entitled to nominate Senators from a province in proportion to its strength in the provincial legislature (s 48).

In terms of s 59, legislation must be passed by both Houses of Parliament. In cases of deadlock between the two Houses, the legislation must be passed by a joint sitting, except in the case of money bills, which may be passed by the National Assembly alone (s 60). The Constitution is entrenched, and a two thirds majority at a joint sitting is required for amendment (s 62(1)). Special provisions apply to amendments affecting provincial powers (discussed below). Bills passed in accordance with the correct procedure must be assented to by the President (s 64(1)).

Executive

Executive power vests in the President (s 75) who is elected by Parliament (s 77) and who is Head of State (s 76). The President wields power "in consultation with" the Cabinet (s 82(3)), which means the President must act with the concurrence of the Cabinet (s 233(3)). Cabinet members are responsible to Parliament and to the President for their implementation of government policy (s 92), and the President and Cabinet must retain the confidence of Parliament (s 93). Each party with at least 80 seats in Parliament is entitled to have appointed an Executive Deputy President (s 84) with whom the President must consult in formulating policy (s 82(2)). In addition, each party is entitled to one Cabinet seat for every 20 MPs it has in the National Assembly (s 88). The practice that has been adopted is to appoint members from different parties to Ministerial and Deputy Ministerial posts covering each portfolio. In general then, the Constitution preserves parliamentary government but mandates a coalition "government of national unity" for the duration of the interim Constitution. Whether this will work depends entirely on whether the consensual style of politics upon which the system is predicated takes hold. Co-operation between Ministers with political views as diverse as exist in South Africa obviously carries with it substantial risks of dissent, and it is in this regard that the interim Constitution will be given one of its severest tests. One factor does however augur well for the future : the constitutional negotiations were themselves an exercise in consensus building, and it is hoped that this experience will be built upon by the parties as they participate in government.

Judiciary

The independence and impartiality of the judiciary is expressly protected by s 96. The existing court structure is preserved (s 101), and incumbent Judges remain in office (s 241). However a major change in the method of appointment of Judges is represented by the establishment of a Judicial Services Commission, on whose advice the President must act when appointing Judges (s 104). The composition of the Commission is well balanced – its nineteen members include representatives of the judiciary, the government, the legal profession, the Senate, and the University law faculties (s 105).

Another new institution is the Constitutional Court, which supplants the existing Appellate Division as the court of final jurisdiction on constitutional questions. The Court has jurisdiction over all three branches of government (s 98(4)) and may declare legislation and executive acts invalid (s 98(5) and (7)). The composition of the Constitutional Court was one of the more contentious issues during negotiations. The original proposal, supported by both the ANC and NP, for an appointments process heavily weighted in favour of the executive, was amended upon the initiative of the liberal Democratic Party – one of the few instances in which a minor party played a decisive role in a process otherwise dominated by the two major parties. The Court consists of a President and ten Judges (s 98(1)), sitting for non-renewable terms of seven years (s 99(1)). The President of South Africa appoints the President of the Constitutional Court, as well as four other Judges, the latter from the ranks of incumbent Judges. The remaining six members may be either Judges, legal practitioners or academics of ten years' standing, or (in the case of no more than two of them) other persons with expertise in the field of constitutional law, but in appointing these six members, the President is restricted to choosing from a list of recommended candidates prepared by the Judicial Services Commission. The sharing of the power of appointment between the executive and the Commission is indicative of the compromise reached between those desiring a complete break with the existing judiciary and who saw the vesting of wide discretion in the executive as the quickest way of achieving this, and those who feared that the new government might be tempted to appoint a "political" bench. This tension is also evident in the directive that the Commission is to have regard to the need to appoint a bench that is "independent and competent and representative in respect of race and gender" (s 99(5)(d)). While it may be asked whether a Judge can be both impartial and representative, it is gratifying to note that the process has started off well – Arthur Chaskalson SC, an advocate who was prominent in human rights litigation, has recently been appointed President of the Constitutional Court.

Finally, the Constitution also establishes the office of Public Protector or ombudsman (s 110), a Human Rights Commission charged with the task of promoting respect for fundamental rights (s 116), and a similar Commission on Gender Equality (s 119).

Minority rights

One of the most vexed questions facing the drafters of the Constitution was what protection, if any, should be given to the right of ethnic groups to self determination. The claim for protection of minority rights came from two major sources – the Inkatha Freedom Party (IFP) and various groups collectively known as the "white right", some of whom threatened armed resistance to the new government, others of whom (represented by the Freedom Front party) have adopted a constitutional route. The very term "self-determination" carries the stigma of

having been used as a euphemism for apartheid, consequently advocates of minority rights of any form ran the risk of being seen as apologists for that ideology, with the result that debate on this vital issue was largely stifled. This was true even within the black community, where proponents of self-determination were labelled "tribalists" by those adhering to the ANC's non-racial policy. On the other hand it was clear that as a minimum, the new Constitution would have to eliminate compulsory race classification, inequality in political rights and differentiation based on group membership, and this ruled out reservation of seats or separate provision of social services by the state as means of satisfying group aspirations. Those advocating minority rights have therefore sought a solution in federalism, yet federalism, while necessary for other reasons, provides no solution to the issue of self-determination, simply because there is no area of the country inhabited solely by any particular ethnic group. Indeed, the entire "group rights" argument is founded on the anti-democratic fallacy that people of the same ethnic group ipso facto share the same political beliefs and can therefore be dealt with as a single entity.

The Constitution does however recognise self-determination as a principle that may be accommodated in the final Constitution (article XXXIV), and establishes a "Volkstaat Council" (s 184A) to advise upon ways of meeting the aspirations of those whites who seek territorial autonomy, but the reality is that the dispersion of the white population over the entire country will make it impossible for the Council to devise a territorially based solution. A far more fruitful avenue would seem to be provided by the right to freedom of association (protected by s 17 of the fundamental rights provisions) and the right to establish educational institutions based on common culture, language or religion (s 32) which, one might think, could be used by particular groups to establish their own schools et cetera. However, the Constitution sets its face firmly against such a possibility: the right to establish educational institutions is subject to a prohibition against racial discrimination (s 32(c)). Furthermore, this is re-inforced by s 33(4) which permits measures designed to prohibit discrimination by bodies and persons *other than* those bound by s 7(1) – in other words, while all other rights, such as freedom of association, are maintainable only against the state, and prevent the state from regulating conduct, s 33(4) reverses the position in that it permits the state to make the anti-discrimination provisions a right that is binding upon *private* bodies. Thus s 33(4) would protect legislation which prohibited ethnic or racial groups from exercising their associative or cultural rights by establishing exclusive cultural or educational institutions, even if such institutions were entirely privately funded. The fundamental principles upon which the new Constitution must be based are of like effect: article XII recognises "collective rights of self-determination", but states that these "shall be on the basis of non-discrimination". This approach must be re-evaluated – permitting freedom of association to be used as a vehicle through which ethnic, religious or any other groups could preserve their separate identity has the potential to solve a major political issue.

A stronger link can be made between federalism and self-determination in the KwaZulu-Natal region, where the IFP enjoys majority support among the Zulu population (who constitute 8 m of the region's 9.5m inhabitants). Although historical resentment against Xhosas, whose Transkei region has long been an ANC stronghold, is undoubtedly an element of the IFP – ANC struggle, it would be simplistic to see the conflict solely in these terms, as the IFP – ANC division also reflects divisions between rural and urban, socialist and capitalist, modern and traditional, within Zulu society itself. However, the overwhelming national dominance of the ANC has led the IFP, as one party among many that are (whether justly or not) apprehensive of ANC hegemony, to press for a strong federal element in the Constitution. Given the IFP's own dominance in KwaZulu-Natal, this would enable it to institutionalise Zulu self-determination, which is something to which the ANC has long been ideologically opposed. This is undoubtedly the single most important – and potentially dangerous – political issue facing the country, and while strengthening the federal element of the Constitution would doubtless satisfy the aspirations of the IFP and of the majority of Zulus, it would not eliminate tension, given the significant ANC minority among Zulus themselves. In other words, while a stronger federal system is clearly a necessary but not sufficient condition for inter-ethnic peace, long term tranquillity in a country where no region is politically homogeneous ultimately depends upon the development of a culture of inter-party tolerance.

Federalism

Both the importance and limitations of federalism in relation to minority rights have been discussed above, and it is because of its relationship to this question alone that federalism will be a key issue as a final Constitution is drafted. But its relation to ethnic questions aside, federalism is of benefit in itself in that it diffuses and thus checks governmental power, and gives regions control over their own affairs. It would therefore be of particular benefit to South Africa, which has suffered from an over-concentration of power in the hands of central government. Unfortunately however, the federal element contained in the new Constitution leaves much to be desired.

As already stated, the country is divided into nine provinces (s 124) each of which enjoys equal representation in the Senate (s 48). There is separation between central and provincial governments in that members of the National Assembly or Senate (ss 43(e) and 48(3)) may not be members of a provincial legislature. The provincial legislatures are elected on a party list basis (s 127). Each provincial assembly elects a Premier (s 145) who wields executive power (s 144) as head of, and in consultation with, the province's Executive Council (s 147), in which each party holding at least 10% of the seats in the legislature is entitled to representation proportional to its legislative strength (s 149). Thus, as at the national level, provincial executive authorities operate on the basis of parliamentary government (s 153) and with a mandatory coalition. Provinces may adopt their own constitutions which may differ from the model contained in the national Constitution in so far as legislative or executive structures and the role of a traditional monarch are concerned, but which must otherwise be compatible with the national Constitution and the fundamental

principles in Schedule 4 (s 160(3)).

The protection given to provinces is rather puzzling: Section 61 provides that Bills affecting provincial boundaries or the "exercise or performance" of provincial powers must be passed by simple majorities of each House sitting separately and, if such a Bill does not apply to all provinces, then it must also be approved by a majority of senators from the province or provinces in question. Section 62(2) provides that any legislation that amends those sections of the Constitution defining the legislative (s 126) and executive (s 144) competences of "a province" require a two thirds majority in each House and the consent of "a relevant provincial legislature". Several questions arise in this regard: is it possible to distinguish between s 61 Bills that only affect the "exercise or performance" of provincial powers from s 62(2) Bills? Surely any legislation affecting the "exercise or performance" of provincial powers also constitutes an implied amendment of ss 126 and 144 which ought therefore to be consented to by the legislatures of the provinces concerned? Also puzzling is the use of the term "a relevant provincial legislature" where one would have expected a stronger formulation such as "the legislature of the affected province or provinces".

But even assuming that these entrenching provisions adequately protect provincial powers, the weakness of the federal aspects of the Constitution is revealed by the fact that although s 126(1) confers upon the provinces authority over a substantial range of matters listed in Schedule 6 of the Constitution, s 126(2A) states that the national Parliament may also legislate on these supposedly provincial matters. Furthermore, provincial legislation may be over-ridden by central government legislation (s 126(3)). Admittedly that is true only if the national legislation applies to all provinces, and only to the extent that the conflicting provincial legislation "materially prejudices the economic, health or security interests of another province or the country as a whole", or to the extent that the national legislation deals with matters which "cannot be regulated effectively by provincial legislation", need to be regulated by "uniform norms or standards ... throughout the Republic", or relate to the "maintenance of economic unity ... or ... national security". However these are broad categories, and leaving the determination of the degree of federalism inherent in the Constitution to the interpretation of such vague formulae clearly places the provinces in a much weaker position than would have been the case if one of the normal federal devices, of listing *exclusive* powers of either the central or provincial governments, and leaving the residue exclusively to the other, had been adopted. The dependence of the provinces is further reinforced by the fact that they may raise their own revenue and loans only if authorised to do so by the national Parliament (ss 156(1)(a) and 157), and must otherwise depend upon such percentage of national revenue or other allocations as Parliament determines to give to them (s 155).

The federal question is likely to be the most contentious issue facing the Constitutional Assembly, but little assistance is to be gained from the fundamental principles upon which the new Constitution must be based: Article XVIII provides that the provincial powers in the final Constitution "shall not be substantially less than" those contained in the 1993 document, while article XIX states that "The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers ...". These provisions are frustratingly ambiguous: The effect of article XVII depends entirely on the interpretation given to the phrase "substantially less", while article XIX could be interpreted either as meaning each level of government shall have exclusive powers and shall share other concurrent powers, or that exclusive powers may be vested in one branch with concurrent powers being shared by both. Furthermore, provisions of the final Constitution relating to provincial powers need to be approved only by two thirds of the Senate (s 73(2)) – in other words, conceivably by the representatives of only six of the nine provinces. The Constitution does establish a Commission on Provincial Government to advise the Constitutional Assembly inter alia on the final form of provincial government (s 164), but its recommendations are not binding on the Assembly (s 161).

Final Constitution

The 1993 Constitution mandates the National Assembly and Senate to convene joint sittings as a Constitutional Assembly to draft a final Constitution within two years (ss 68 and 73). The final Constitution must be passed by two thirds of the Constitutional Assembly, and the provisions relating to provincial powers by two thirds of those members of the Assembly drawn from the Senate. Failing these special majorities, the new Constitution may be enacted by a simple majority if also given unanimous approval by a five-person committee of politically neutral constitutional experts. If only a majority of the experts agree, then the Constitution may be passed by a 60% majority in a national referendum. If it fails to win the assent of voters, or if more than two years has elapsed since the whole process began, Parliament will be dissolved and the resulting new Constitutional Assembly will have a further year in which to pass a final Constitution, this time by majorities of 60% rather than two thirds.

Whatever its method of passage, the final Constitution must also comply with the fundamental constitutional principles found in Schedule 4 of the 1993 Constitution, which are absolutely entrenched by s 74(1). The new Constitution will come into effect only once the Constitutional Court has certified that it complies with the principles (s 71). In essence, the principles coincide with those upon which the interim Constitution itself is based, and with the exception of the minority rights and federal issues, in respect of which improvements are clearly needed, and the compulsory coalition mechanism, which may either prove unworkable, or which may be abandoned as an undesirable fetter on majority rule, (although this may be difficult, given that the ANC narrowly failed to get a two thirds majority in Parliament), one can expect that the final Constitution will not be dissimilar from the 1993 version.

Conclusion

The interim Constitution is a remarkable achievement, given the distinctly illiberal ideological roots of its two main architects: the NP, which devised and ruthlessly used the coercive power of the state to enforce a policy which had as its basic

principle the subordination of individual rights to compulsory group identification; and the ANC which conducted its struggle by establishing parallel structures in black townships which, with equal ruthlessness, enforced boycotts and strikes and quelled dissent against the ANC's collectivist ideology. The reason for the drift of the NP and ANC from the extreme right and left respectively towards the centre is, in large measure, due to the fact that four years elapsed between the unbanning of the ANC and the drafting of the Constitution – years during which both parties had to learn to engage in argument rather than warfare, and to subject their policies to public debate. One hopes that the remaining issues will be settled in similar fashion, and that the consensual politics of the constitutional negotiation phase will become a permanent feature of the process of government. □

1 The author wishes to express his thanks to the University of Waikato Research Committee for a grant towards the internal expenses of a field trip to South Africa, during which material for this article was collected.

Books

Children: Stories the Law Tells

By Graeme Austin

Victoria University Press, 1994, $34,95

Reviewed by Mark Henaghan, Senior Lecturer in Law, University of Otago

Austin begins by stating that "the law relating to children tells important stories about who we are as a society and where we should be heading". All law does that. But that is not the primary function of the law which is to provide procedures, rules and principles for resolving conflict. Austin concludes his work by acknowledging law must find practical solutions to practical problems – "but this task must be performed against a background in which dignity, individual empathy and the importance of human relationships are primary values." Throughout the work Austin is critical of Judges for hiding beyond labels like "security" and "stability" when making custody decisions. "Dignity", "individuality", "empathy" importance of "human relationships" are just that – labels – they do not help with the nitty gritty of decision-making, or the art of advocating a client's case.

The theme of Austin's work is that much of child law requires a more "nuanced analysis than is traditionally associated with the craft of lawyering, one that is sensitive to the narrative, theoretical qualities of legal discourse". In plain language this means read the facts, the legislation and judgments critically. This is the strength of so-called traditional legal analysis. Traditional legal analysis requires the ability to read the law closely, working out the meaning of words in statutes, and to be able to justify those meanings by reference to the surrounding context. It also requires the ability to organise and marshal facts so that they fit into the legal framework. The best parts of Austin's work are when he engages in traditional legal analysis. The best parts are when he analyses custody decisions in chapters 4, 5 and 6 and shows where Judges do not make clear, justifiable connections between the legal principles and the particular facts. Custody judgments like all judgments are written first and foremost for the parties themselves. After putting themselves through a trial they need to know clearly and precisely why a particular decision has been reached. Merely to say a decision has been reached on the basis of "bonding" "security" or "stability" is not enough. Merely because decisions are difficult does not mean they should be glossed over by labels. The parties need to know what is meant by "bonding", why it is important and what evidence there is of it. Judgments need not be long if the key reason or reasons for the decision are explained.

Austin overstates the law at times. Section 23 of the Guardianship Act is said to be "open-ended and indeterminate". Yet, later in the work Austin is critical of Judges who do not relate a parent's conduct to the child's welfare as required by s 23 – it is not "open-ended", there are legislative limits.

The major focus of the work is on custody law. There are three major gaps in this part of the work. There is no analysis of the processes of counselling and mediation where the vast majority of such cases are resolved. It distorts the picture of custody decision-making to focus only on a few cases that have gone to Court. The majority of "stories" about children are told in the counselling and mediation processes. Austin acknowledges that litigation has a "rarefied atmosphere", yet bases the whole of his book on litigated cases.

The cases that have been studied are not representative. There is no analysis of cases involving sexual abuse allegations which have been a

major problem for the Family Court, nor is there analysis of cases involving violence in the family which are also too prevalent. These are areas where the open-ended flexibility advocated by Austin has been questioned. Sexual abuse cases require careful scrutiny of the evidence and where findings are made the possible outcome of the case is considerably narrowed, as it is and should be if a partner is violent in the relationship. There is no analysis of Hague Convention cases where legislation has put in place rules rather than discretion.

There is very little analysis of s 23(2) of the Guardianship Act 1968 — the child's wishes and the weight they should have in custody proceedings. This is surprising given the book's declared emphasis on children's rights. The focus of the chapter on children's rights is on English cases which captured the headlines. There is attempt to relate these to New Zealand statutory provisions, but given that the theme of the book is on stories the law tells about children in New Zealand, it is disappointing that the rights of New Zealand children are given such peripheral treatment. The significant United Nations Convention on the Rights of the Child ratified by the New Zealand government in 1993 is hardly mentioned.

The remainder of the book deals with the relevance of the Treaty of Waitangi for family law, and property and financial issues for children. The chapter on the relevance of the Treaty fails to analyse the key issue — Whether the Treaty is a legitimate basis for having a parallel system of family law for Maori. The chapter on property and financial issues, makes the important point that particularly in property matters there is seldom separate provision for the children. Austin's idea of investing a power in the Family Court to forge a financial "package" to help secure an optimum level of financial security for children is an interesting one. It is a pity it was not developed further in this book.

This book falls well short of its declared goal of "teasing out the key themes in New Zealand family law and policy." The major part of the work is on custody cases. It is here where there are attempts to develop a theory of how custody cases should be decided and some sparks of insight into decided cases. If the whole book had focused on custody cases in a more comprehensive way it could have worked. Even then the "literary" technique as used in the book fails to capture the practical realities of custody disputes. There is little feel for the power and control struggles which are at the heart of many such battles. There is not sufficient focus on the practical and procedural methods used for resolution. Custody cases are not "stories", they are difficult human problems which require workable and clear principles and procedures to resolve. As it stands the book is disjointed and leaves the impression that later chapters have been put in to give a broad-based appeal. Careful thought has not been given to the key question with all books — who is it written for? □

The Television Defense

The most persistent opposition to television has come from groups and individuals who believe that violence on the screen causes violent behaviour in society. Dade County, Florida, was the scene of the first trial in 1977 where the defense tried to use television-watching as the cause for a fifteen-year-old boy, Ronney Zamora, shooting an elderly woman next door.

Psychiatrist Michael Gilbert, an expert witness for the defense, argued that young Zamora pulled the trigger as a conditioned response, because of his addiction to violent shows such as *Kojak*. The bald New York detective, played by Telly Savalas, had become the young boy's hero, who even wanted his stepfather to shave his head.

In the end, the court rejected the defense's novel line of reasoning, causing attorney Elliot Rubin to complain:

> Your Honor, involuntary television intoxication is a new defense, but so was insanity at one time a new defense.

Though the state won its case, *Florida v Zamora* proved to be a landmark trial as the first to be televised throughout the state. There was a great deal of controversy at the time, but it opened the door to such spectaculars as the William Kennedy Smith rape trial and Court TV, a cable channel which shows cases 24 hours a day. At first, the novelty did seem to interfere with the due process, as when the jury in the Zamora case petitioned the judge if they could watch themselves on television during the trial with the sound turned down.

"They said they just want to see what they look like on TV," said Judge Baker, after turning down the request. And at one point, when both defense and prosecution attorneys appeared to ignore a ruling he had made, the judge complained:

"I only have a small role in this production."

from *Canned Laughter*
by Peter Stay, Oxford 1992

Coming "legal" attractions

Reports out of Hollywood say Universal Pictures has paid ex-lawyer John Grisham $3.75 million for the movie rights to a novel he hasn't even written yet.

Evidently this is a new record. The previous record for such rights in an unfinished book was the $3.5 million Warner Brothers recently paid physician-novelist Michael Crichton (*Jurassic Park*) for a work-in-progress on sexual harassment.

According to AP, the plot of this latest Grisham slated for celluloid (Hollywood paid the 38-year-old best-seller factory $600,000 for the rights to *The Firm* and $2.5 million for rights to *The Client*) concerns "a white supremacist lawyer on death row for the murders of two Jewish youths. He hires a rookie lawyer" who "turns out to be his grandson" — who no doubt is dating Whoopi Goldberg and contemplating circumcision.

Meanwhile, tough-guy Manhattan Criminal Court Justice Edwin Torres is working with tough-guy actors Al Pacino and Paul Mazursky on the screen version of Judge Torres's tough-guy novel, *Carlito's Way*.

The Ballad of Wellmeadow Cafe

Proprietor: F Minchella

(To the tune of "The Ballad of Bethnal Green")

Narrator *I sing the song of a civil wrong down Paisley, Glasgow, way.*
May Donoghue and friend so true went to Wellmeadow Cafe.

Mrs D *Oh gosh, gee whizz, I would like some fizz, but do you think we oughta?*

Friend *Why yes, my sweet, a special treat, ice cream and soda water.*

Chorus *Too my rit fall lall, too my ritty fall lall, too my ritty bitty fall dall day.*
Too my rit fall lall, too my ritty fall lall, too my ritty bitty fall dall day.

Narrator *The bottle make was quite opaque, you couldn't see inside it.*
But May tucked in with verve and vim and rapidly imbibed it.
Then cried out she in agony, no more, she gasped, no more.
She retched and groaned and screamed and moaned and sicked all on the floor.

Chorus *Too my rit fall lall . . .*

Mrs D *Its poisoned juice, my bowels are loose, I've gastro-enteritis.*
A dreadful stench, my gut's awrench by violent peristalsis.

Friend *Oh cripes, my dear, you've turned all queer, you look distinctly pasty.*
Methinks a snail is in your ale, I hope it's not too nasty.

Chorus *To my rit fall lall . . .*

Mrs D *I'm very sick, I'm dying, quick, get medical attention.*
No wonder though that I feel quite low from drinking brewed crustacean.[1]

Minchella *Now listen here my lady dear, I can see you're discommoded.*
But I'm not to blame if you make a claim — and at least snail's decomposed.

Chorus *Too my rit fall lall . . .*

Narrator *And so she brought a claim in tort 'gainst brewer of the potion.*
The poor man's name was Stevenson, in state of agitation.
It went before a man of law, a principle was at stake.

Counsel *Those who foul their ginger ale must pay for belly ache.*

Chorus *Too my rit fall lall . . .*

Narrator *Lord Atkin planned a noble stand.*

Lord A *I think I should aver*
that there must be liability 'pon manufacturer.
The consumer is his neighbour and so he must make quite sure
that slimy slugs and crunchy bugs don't make his drinks impure.

Chorus *Too my rit fall lall . . .*

Narrator *And thus he thought for this sordid tort there should be compensation.*

Lord A *For a girl like you just anything I'll do, go out in celebration.*
And look here by dear, you need have no fear, two hundred pound I'm giving.[2]

Narrator *So May Donoghue her winnings blew on dissipated living.*

Chorus *Too my rit fall lall*

Stephen Todd

1 Mrs Donoghue is in error here. A snail is actually a mollusc.
2 Apologies for the poetic licence. It seems the case eventually was settled for this sum. See also [1990] NZLJ 301 and 383.

Needed now: "Politically correct" legal precedents

[Mr Denby, the 48-year-old author of an article in the **New Yorker** *of 6 September 1993, describes how he went back to university to see what was now being taught about Homer. His quasi-politically correct professor seemed to admit there was a problem in understanding* **The Iliad** *in modern political terms.]*

"By appropriating it to some modern perception of class, power, gender – none of which much applied to Homer – you made the poem meaningless. The older classics, he implied, would not live if the books were turned into a mere inadequate version of the present."

I tried to think how such revisionism would apply to the law school canon.

No-one, so far as I know, has criticised *Donoghue v Stevenson* or even the women-are-not-persons cases as inadequate versions of the present, in themselves.

As heavily documented fact – a mirror of society – they can't easily be retrofitted for the culturally trendy. And *in* fact, the young working woman with the snail in her ginger ale is a hero of modern law.

But easy, dismissive jokes came first to mind – how in 1993 the Speluncean explorers of Lon Fuller's 1949 hypothetical case on necessary cannibalism would have to include some women and visible minorities, how Mrs Donoghue now would have to be the owner of the cafe instead of the customer, as well as an innocent victim of the ginger beer factory, which of course was a multinational conglomerate whose board of directors consisted exclusively of white males who helped South Africa acquire arms during the trade embargoes of the 1970s and '80s.

Obviously, the immediate problem with these dismissive "jokes" is that for law students they really would add modern relevance to the canon. It is not hard to imagine Coke or PepsiCo as modern versions of Stevenson's bottling plant.

Jeffrey Miller
The Lawyers Weekly
1 October 1993

Statutory interpretation or legal hermeneutics?

What's in a name?

By Nigel Jamieson, Faculty of Law, University of Otago

Access to the law is one of those current cant phrases that is being interpreted by many in different senses without really appreciating what the practical consequences might be. In its earlier expression it was taken to mean that people with limited economic resources should be able to take their disputes to Court. The effect of this universalisation of litigation needing more Courthouses and Judges and other resources seems not to have been contemplated. There are those, mainly academics, who think the phrase means putting all the law on computers so they can research it more easily. Then there are those who interpret the phrase access to law to mean that the law should be simplified to a teenage level. In this article Mr Nigel Jamieson considers the jurisprudential — and practical — meaning stemming from the renewal of interest in the writings of Francis Lieber in the 1830s. It was the concern of Francis Lieber that legal language should be clear and simple and it is his views that lie behind much of the "plain English" argument of the present day.

When scholars set out to simplify their subject of study they provoke a strange paradox. By virtue of their successful simplification they claim the right to rename their subject of study. Ironically, the new name given to their simplified subject may be twice as complicated, esoteric, and at odds with their search for simplicity, as was the original name of their subject. Dicey, whose name is mud in the academic arena at the moment, seems to be paying the price for doing something similar when he closed off historical from legal argument by conferring upon constitutional history the new name of constitutional law. And yet the paradox is that Dicey, in being accused of political motives, was the one who attempted to give the subject full legal autonomy by eliminating politics from what had previously passed for constitutional history.

Three further examples will suffice — two drawn from scholarship at large and one more from legal scholarship to prove that lawyers are as guilty as other scholars of confounding the obvious in their search for simplicity. When Wittgenstein chose to entitle his work *Tractatus Logico-Philosophicus* he could have just called it *Saying Things Simply*, for his aim was to show "what can be said at all can be said clearly". Although (or perhaps because) his *Tractatus* on the limits of language provokes twice as much academic argument than existed before, its study has become a sine qua non for would-be legislators. The reason for this is obvious: for as long as law drafting remains a literary occupation, the limits of legislation cannot transcend the limits of language.

The second example of the way in which scholarship complicates the obvious in its search for simplicity likewise reveals a world view of language, and so also runs the risk of constructing its own little Tower of Babel. When Whitehead and Russell set out the whole universe of twentieth century discourse, they did so in a logical form presaging the construction of the computer and the technology of the transistor. What could be more prophetic of modern times than the way in which Whitehead and Russell enabled ordinary discourse to be computed. Their work in pure logic has all the beauty of pure physics before the indivisible atom became divisible. Because "indivisible" is what the word "atom" means, our speech and thought and not just our scholarly view of the world was shattered when the atomic bomb became capable of construction. Despite Russell and Whitehead's *tour de force* in simplifying the scholarship of discourse, however, the result once again is to make a secret out of the obvious: the title to their work is *Principia Mathematica*. Despite the now esoteric qualities of what, in being Latin, was once the universal language of scholarship, the calculus of propositions contained in *Principia Mathematica*, again like Wittgenstein's *Tractatus*, becomes compulsory reading for would-be legislators. The reason for this is obvious: the limits of legislation cannot transcend the limits of logic, even though law drafting should cease to be a literary occupation and assume a mathematical form.

Keeping score for scholarship in ways that substitute the esoteric for the obvious poses problems for the legal academic. Latin has always been the language of the law. Does this mean that to complicate the obvious in terms of legal scholarship, the lawyer must accordingly move out of

Latin into Greek? It would appear so; for if he were to research "the grass roots of our legal system" he finds himself compelled to disguise this subject as the *autochthony of law;* and if he were to set about simplifying the subject of statutory interpretation he is obliged by legal precedent to respect the seriousness of this subject by calling it *legal hermeneutics.*

A classical turn of phrase still exerts considerable attraction for the learned professions – being built into Linnaean nomenclature for the biological sciences no less than the Apollo space probe for astro-physics. So far as lawyers are concerned, it satisfies that Janus-like criterion of looking back as well as forwards which Maitland laid down (in his *Doomsday Book and Beyond*) as a requirement for legal scholarship. So to write about "legal hermeneutics" or the "autochthony of law" cannot be scoffed off as having only a snob value to hold the hoi-polloi at bay. On the contrary, a close scrutiny of the words we use in constitutional law is apt to show – however much we would like to believe otherwise – that the law of the polis which we now call public law has hardly moved a muscle (give or take the odd nervous twitch) since the days of Pericles and Plato.

Because the simplication of our statute law is at present on so many lips and at so many fingertips we take the opportunity to look more closely at what Francis Lieber meant by this subject of study as recently as 1837 when he wrote *Legal and Political Hermeneutics.* Once again this subject is back in the news. In a series of essays edited by Gregory Leyh, *Legal Hermeneutics* rediscovered itself in 1992, deconstructed itself of some disastrous trends, and reconstructed its origins along more rigorously classical lines. Nevertheless, the question still remains – "What in God's name, made you choose to call your subject 'Hermeneutics'?" asked Professor William Kent of Professor Francis Lieber. "Had you called your book *Principles of Interpretation* many an honest fellow" would not have been "frightened away"!

Professor William Kent (son of Harvard's Chancellor Kent) was obviously speaking for the hoi-polloi. Why use a strange new word in place of the little ordinary ones we are so accustomed to use? The question is particular apt of anyone who, like Professor Francis Lieber, has set out to simplify what we all know as statutory interpretation. So why confuse the hoi-polloi of ordinary statute-users (even when served by an extraordinarily well-equipped legal profession) by reverting to the language of ancient Greece? Laymen could be forgiven for thinking that stamping the subject thus with the esoteric status of legal scholarship is no more than a dog does in establishing his territory around a lamp post – or less crudely like Whitehead of *Principia* fame who put up a notice outside his study saying "Philosophers keep out – men at work".

Just recently (for those who consider the date of Lieber's publication in 1837 so old as to make his work obsolete) the word "hermeneutics" has become a catchcry in academia, and is already now in process of penetrating the thicket of the law. We dare not scoff at Wittgenstein for hiding his light under the bushel of the *Tractatus,* or at Lieber for hiding his light under *Legal Hermeneutics* until we realise that the current school of plain language for lawyers is all there is to hermeneutics.

Such is the lack of a philosophia perennis in our legal scholarship that most current writing on plain language for lawyers propounds Lieber's principles without acknowledging their source, and most statute law reform along plain language lines implements them without considering the context for which they were first formulated.

Here is an amplified version of Lieber's (formerly famous) elementary principles of interpretation and construction. They were formulated in a litigious time when lawyers could find no consensus among themselves as to what was meant by the American constitution. Lieber's principles dumbfounded them – and so put a damper on their constitutional controversy in a way that gave the US Courts the last word and upper hand. But in a very different time, when lawyers take for granted the grass roots of their common law and so fail to realise how close to collapse our legal system may be by legislative reliance on legal principles at the expense of legal rules, it is necessary to amplify and paraphrase Lieber's principles in a way that will evaluate them. Otherwise the risk is that the original context of constitutional controversy which Lieber designed the principles to dampen will be aroused and exacerbated by their application in the reverse context. What Dicey in his *Law of the Constitution* and MacIlwaine in his *High Court of Parliament* had to say about the transatlantic litigiousness of the common law in relation to federal and written constitutions tends to be overlooked amid the rising level of litigation in New Zealand. And if the plain language for lawyers is no more than a reinterpretation of Lieber's hermeneutics there is a real risk that what is devised as a legal means to still controversy, may when applied in a reverse situation only generate what is needed for the legal means to fulfil its original purpose. In any case, if close examination is given to the historical context in which Lieber's principles were formulated, it will be found that the constitutional controversy among lawyers was only diverted into increased litigation. If none could agree on the legislature's first word, then the Judges needed to have the last word – thus giving rise to loads of litigation. For that sort of reason the writer would ask the reader to see through the spurious simplicity of the plain language in which Lieber promoted his principles, and take the strictured commentary that follows quite seriously.

Lieber's Nine Elementary Principles of Interpretation and Construction

1 *A sentence, or form of words, can have but one true meaning.* (Whose one true meaning – yours or mine? This first elementary principle sounds suspiciously like what one would expect in a soviet or fascist state. It is a political slogan rather than a linguistic principle, and quite at odds with traditional views of poesy never mind what are still current Wittgensteinian concepts of core and penumbral meanings. In any case *what is* the one true meaning of this first principle, never mind s 5(j) of the Acts Interpretation Act 1924, far less the Old Testament Psalms?)

2 *There can be no sound interpretation without good faith and common sense* (which means accept the status of the lawgiver as a matter of faith and, bearing in

mind the sanction imposed for breach of the law, do as he requires as a matter of common sense. It is obviously not for you to wonder whether you follow Hitler, Stalin or Mussolini).

3 *Words are to be taken as the utterer probably meant them to be taken.* (How else could they be taken if a form of words has but one true meaning to be construed in good faith? But this would mean that Thoreau is wrong — that it does not take two, but only one to make a truth. Indeed if I be the utterer it (probably) takes only me! But what does *probably* mean? If, in doubtful cases we are to take what Lieber calls the customary signification, is not that simply the vox populi — thereby demonstrating that it takes many to make a truth?)

4 *The particular and inferior cannot defeat the general and superior.* (But, as all science knows, general laws can be defeated by non-conforming instances, and normative laws also depend for their efficacy in prosecuting the particulars. So the question might still be put, as by Humpty-Dumpty, that who is to be general is determined by who is to be master — that's all.)

5 *The exception [to the 4th principle] is founded upon the superior.* (Just what does this mean, how far does the exception go, and what exceptions exist to all the other principles?)

6 *That which is probable, fair and customary, is preferable to the improbable, unfair and unusual* (and thereby lies the source of much injustice in the world. Is it not the case that truth is often far stranger than fiction — as witness this strange set of simplistic principles for one of the hardest and most serious of legal tasks?).

7 *We follow special rules given by proper authority* (but don't doubt what is meant by *special, rule, given by, proper, authority* — for that would demonstrate bad faith and expose one to the consequences of lacking common sense).

8 *We endeavour to derive assistance from that which is more near before proceeding to that which is less so.* (This imports a subjectivity, for what is nearer to me may be further from you.)

9 *Interpretation is not the object but a means; hence superior conditions may exist.* (This seems to falsify all the foregoing principles, at least by attacking the avowed *elementary* quality of the principles if not their status outrightly as *principles* of statutory interpretation and construction.)

So much for legal hermeneutics! At least when known as plain language for lawyers the issue does not claim the same pretensions. □

Their blacks — our browns?

Black leaders and intellectuals think that they must emphasize black victimization because it provides the only secure basis for pressing claims on behalf of their most disadvantaged fellows. So they formulate their claims in racial terms, and rely upon the historical mistreatment of blacks to give moral force to those claims. The desperate plight of the poorest blacks makes it unthinkable that whites could ever be "let off the hook".

Yet an affirmation within the black community that blacks are responsible for their own individual fates — which I believe is necessary for a full realization of black freedom — pulls against this tendency to stress specifically racial grievances. For this reason, addressing inner-city social problems with universal rather than race-specific policies — as the sociologist William Julius Wilson has proposed — has benefits beyond the political considerations that are typically cited in support of broad-based, inclusive, non-racial social policy. Americans, as a national community, have the responsibility to help poor people in the ghetto and elsewhere, whatever their colour. When they fail to fulfil the national responsibility, they foster a political discourse which makes it nearly impossible for black leaders and intellectuals to do what is necessary for the sake of their communities.

The temptation can be overwhelming for blacks to adopt the posture of the aggrieved claimant, the historical victim who, in his helplessness, is nothing more than the creation of his oppressor. Yet such a posture inhibits the attainment of genuine freedom and true equality, for it defeats the emphasis on personal responsibility and morality which is so essential within the group. The crime, violence, drug use, promiscuous sexuality, unwed child-bearing, parental neglect, abuse and irresponsibility, and the general failure to seize opportunity, are maladies affecting inner-city black communities for which black people themselves must accept responsibility. This means acknowledging that personal moral failings, not the failings of society in general, often lead to these problems. Too many black leaders and intellectuals, confronting their people's need and their own impotency, believe they must continue to portray them as the "conscience of the nation". But the price extracted from them for playing this role, in completely fulfilled lives and unrealized personal potential, amounts to the loss of their souls.

Glen C Loury
Professor of Economics
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(self-described as Black American now in the comfortable middle class)
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New Zealand Police policy and guidelines for forensic hypnosis: A response to Evans

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K Barrie Evans at [1994] NZLJ 348 discusses the implications and inherent risks of using hypnosis as a means of assisting recollection for evidentiary purposes. While the thrust of the paper addresses evidentiary matters associated with the use of hypnosis it is seriously flawed in the erroneous analysis made about New Zealand Police policies and practices concerning forensic uses of hypnosis. This paper remedies the deficiencies in Evans' paper, and presents the Police policies and guidelines in detail.

Introduction

Forensic applications of hypnosis have attracted considerable controversy, both in methods of application, and the evidentiary reliability of information produced by hypnosis. Hypnosis has been reliably demonstrated since Mesmer described the phenomenon to the Western world in the mid-18th century. However hypnosis and associated trance state phenomena have been well reported in religious activities in a number of cultures throughout history. The subject was shrouded by a mysticism that resulted in numerous myths about the efficacy and nature of hypnotic processes. Fortunately more sophisticated analyses of the topic now prevail, particularly in regard to the relationship between memory, psychotherapy, and hypnotic theory.

Forensic applications of hypnosis have from time to time offered a prospect of significant advances in Police investigations and the gathering of evidence. The prime developments have come from the United States where various law enforcement agencies have promoted hypnosis as an investigative tool with reports of substantial success. Published accounts attested to demonstrable benefits and gains where hypnosis was used to enhance memory – often with spectacular results. A illustrative case included the 1976 kidnapping of a school bus with 26 children and driver in Chowchilla, California, where the driver recalled the licence plates of the offender's vans under hypnosis, having previously been unable to remember any relevant detail. Such were the reported benefits of hypnosis that some agencies introduced extensive operational training programmes for routine Police work. Foremost was the Los Angeles Police Department which embarked upon an extensive use of forensic hypnosis by training in excess of 1000 police officers in hypnotic techiques under the supervision of their chief psychologist (Cohen, 1983).

The benefits of forensic hypnosis were initially regarded as positive. Reiser (1976) reported the use of hypnosis by the Los Angeles Police Department in cases of homicide, kidnap, and rape resulted in "an approximate 60 percent increase of success over traditional interrogation techniques." The FBI introduced guidelines in 1968 (Ault, 1979) for their use of hypnosis, and also reported significant benefits that included obtaining additional information in 85% of cases where hypnosis was applied, with commensurate savings in investigative time. They concluded

> Based on the studies that the FBI has done, hypnosis can at the very least be shown useful in enough cases to make it cost effective in forensic applications. This conclusion does not alter the fact that hypnosis is, and must remain, a very specialised tool in the investigator's repertoire (Ault, 1985).

The popularity of hypnosis as an investigative tool is demonstrated by the publication of a dedicated handbook on the subject (Reiser, 1980).

Given optimistic reports on the advantages of forensic hypnosis a number of law enforcement agencies have adopted hypnosis as an investigative aid. Included were Police in the United Kingdom and Canada (Waxman, 1983), Israel (Kleinhauz et al, 1977), and Australia (Grant, 1977). The New Zealand Police first used forensic hypnosis in 1983.

The New Zealand experience

The first Police forensic application of hypnosis in New Zealand was in the 1983 kidnapping of Oamaru teenager Gloria Kong. On that occasion hypnosis was used in an attempt to obtain additional details about the location where the victim was held captive. The case was subject to appeal by the principal offenders Paul and Karen McFelin (*R v McFelin* [1985] 2 NZLR 750). The convictions were upheld as the Crown had established sufficient evidence against the appellants to prove guilt without recourse to the questioned hypnotic

testimony. Although the Court of Appeal ruling did not establish precedent on the admissibility of hypnotically induced testimony it was extemely helpful in setting wider parameters against which post-hypnotic evidence would be considered by the Courts. The Police took particular cognisance of the *McFelin* ruling, as it gave valuable direction to the form and terms required of forensic hypnosis to have legal recognition, and provided a working basis to develop operational guidelines for investigators.

Evans claims

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

This statement is quite erroneous as a Commissioner's Policy and Guidelines for the Forensic Use of Hypnosis was published as early as 1986. These guidelines were developed in consultation with a number of bodies including the NZ Psychological Society, the Australian Society of Hypnosis, and the Royal Australian and NZ College of Psychiatrists. The final guidelines were prepared subsequent to the Court of Appeal judgment in the *McFelin* case, and came into operation in April 1986.

Since the disputed Gloria Kong case there have been 21 applications of forensic hypnosis. These applications have all related to serious crimes where conventional investigative methods had proven limited and include –

Offence	Number of Cases
Murder	9
Attempted Murder	1
Bombing	1
Sexual Violation	7
Assault	2
M/V Hit & Run	1

The New Zealand Police hypnosis guidelines

The guidelines address six specific areas, and accordingly these will be considered in sequential order for purposes of continuity. Commentary is provided for each section.

1 The Hypnotist

1.1 Must not be a member of Police. Must be an experienced mental health professional, either a registered medical practitioner or registered psychologist holding a current practising certificate.

1.2 Must be experienced in the forensic use of hypnosis to a standard recognised by the Australian Society of Hypnosis.

1.3 Must be approved by the O/C: CIB Support Group, Coordinator: Psychological Services and Chief Medical Adviser, Police National Headquarters.

1.4 Shall have no other interest in the investigation.

Commentary: The use of independent hypnotists with recognised professional qualifications circumvents problems implicit in using members of Police or lay hypnotists in this forensic area. Evans attempts to make much of using trained Police officers, or other hypnotists, as a theme in his paper. The Police position is straightforward – the skills required of forensic hypnotists include highly specialised training in the applications and practice of hypnosis, but also extends to clinical diagnosis and professional experience of a standard acceptable to the Court should any case proceed to prosecution. Further, hypnosis itself may produce adverse emotional or traumatic reactions that require competent clinical support. Finally, the hypnotist has to be sufficiently skilled to detect or consider deception in the subject, and advise the Police accordingly.

2 The subject

2.1 The subject's safety and well-being is of utmost importance and will take precedence over gathering information in all circumstances.

2.2 A full written statement must be obtained prior to hypnosis being considered.

2.3 Suspects are never to be hypnotised even by consent or request.

2.4 The hypnotist is to be alerted to the possibility of change of status from witness to suspect by subject.

2.5 The hypnotist is to satisfy himself or herself that the subject is medically and psychologically suitable for hypnosis.

2.6 The subject must give written or video recorded consent before being hypnotised. If under 17 years of age, consent of parent or guardian is required.

2.7 A written clearance from the subject's own or from a police doctor is required.

2.8 The subject must be informed that they may stop or withdraw from the session at any time and that fact is to be recorded on video.

Commentary: Evans claims "The Police however do not know that by using hypnosis as an investigative tool to develop leads to solve crimes, the witness so hypnotised may not then be qualified to testify". This is ill informed as the guidelines explicitly recognise the risks inherent in hypnotising witnesses precisely because of difficulties with admissibility of their evidence. The use of hypnosis with suspects is expressly prohibited, and the hypnotist is specifically advised to cease hypnosis if it becomes apparent that the subject is implicated in any way as a suspect in a case. The guidelines go further and specifically acknowledge the possibility that hypnotic processes may cause distress in the subject, in which case the subject's well being becomes the prime consideration beyond the gathering of information. To protect the subject's well being there is a requirement of medical clearance from their GP (or a Police Doctor in

the absence of the former) to ensure that there are no health factors that militate against the use of hypnosis. Before hypnosis is attempted a full written statement is required from the subject detailing the extent of their knowledge relevant to the investigation. This statement is provided to the hypnotist as an indication of established knowledge at that time. The hypnotist must determine whether the subject is hypnotisable, as many people are not susceptible, and the depth of trance state is assessed using standard recognised measures. The subject has the right to withdraw at any time from hypnosis. Protection is afforded those under 17 through the requirement for parental or guardians' consent.

3 Procedure

3.1 The hypnotist is to be supplied with the subject's written statement, written consent to hypnosis and doctor's clearance.

3.2 A quiet undisturbed environment is essential.

3.3 Only the subject and the hypnotist are to be present in the interview room.

3.4 No friends or relatives shall be present in the immediate area of the session.

3.5 All contact between subject and hypnotist is to be recorded on video in duplicate. A videotape system which contains a permanent electronic time/date record on each video frame is to be used to ensure continuity of record.

3.6 The hypnotist should be fully informed of the circumstances of the case as it affects the subject.

3.7 There should be a full interview of the subject by the hypnotist prior to the actual hypnosis session, this interview should also be fully videotaped.

3.8 The hypnotist should fully assess the susceptibility of the subject to hypnosis prior to the session beginning.

3.9 Once the subject has been hypnotised the level and depth of the trance should be tested by the hypnotist.

3.10 The subject must be told that the inability to remember is quite acceptable.

3.11 Leading questions must be avoided, personal bias must be guarded against. Direction to specifics from the written statement if required are permitted.

Commentary: These procedural steps are an essential component in forensic applications of hypnosis. It is imperative that the hypnosis session occur in an undisturbed environment, with only the hypnotist and subject together in the one location, as there is a risk of subtle cues or other contaminating factors influencing the subject if any other party is present. The hypnotist is to be satisfied that issues of consent, medical clearance, and pre-hypnotic level of knowledge are correctly addressed before attempting hypnosis. This will include a full interview with the subject which must be recorded before any assessment of hypnotic susceptibility is attempted. Only when these steps are completed is hypnosis to be attempted.

All cases of forensic hypnosis are videotaped to ensure a full record for subsequent investigations, and for considerations of admissibility. The Police have developed national videotape facilities for evidential interviewing, and this system is ideal for forensic hypnosis when required. The equipment provides a permanent record on each videotape frame that ensures a continuity of record to counter suggestions that the record has been altered. A sequential and permanent time/date record is electronically written on each frame (recorded at a rate of 25 frames per second). Such electronic evidence is routinely accepted as providing continuity of record by the Court in numerous cases of videotaped interviews. Over a three year period of Police electronic interviewing, in excess of 30,000 individual interviews have been recorded, and a number of these have subsequently been offered in Appeal submissions. To date no challenge has been made of the continuity of record provided by the electronic time/date generator which automatically applies to all tapes recorded on Police videotape equipment.

4 Following the session

4.1 A written transcript of the session is to be made, copy to hypnotist.

4.2 A written report is to be obtained from the hypnotist including an assessment of the session.

4.3 From the two videotapes, one is to be sealed and certified as original by hypnotist.

4.4 The original tape is to be kept as an exhibit in safe custody.

4.5 The second copy is only to be used for viewing and compiling transcripts.

Commentary: One copy of the videotape is sealed as a certified record by the hypnotist. A second tape is used for transcription, and a copy of this would be provided to the defence in any prosecution. The usual security procedures for exhibits applies to the sealed tape which is preserved as part of the evidence. They hypnotist also provides a written report on the hypnosis session, including an assessment of the depth of trance, and the nature of any material that results. This report compares pre-hypnosis recall with that obtained under hypnosis, and is part of the official record accessible to defence and the Court. It is accepted that the hypnotist will almost certainly be required to give evidence in any case where the admissibility of hypnotic testimony is questioned, and the sealed tape thus assumes a primary importance in such circumstances.

5 After care

5.1 Police shall be responsible for after care considerations.

5.2 The hypnotist should advise the police of any after care considerations if applicable.

5.3 The police shall advise the subject's own doctor or other health professional or police doctor of any after care considerations.

5.4 If after care is later required, the health professional is to inform Q/C: CIB Support Group, the Coordinator Psychological Services and the Chief Medical Adviser.

Commentary: The after care provisions provide for additional professional support in furtherance of the subject's well being if required. The hypnotist is required to advise of such requirements, as they have requisite clinical skills to assess the psychological state of the subject, especially if this involves emotional and cognitive reactions exacerbated by recalling trauma. After care support is provided at Police expense, and subject to recognised professional confidentialities.

6 Defence solicitor

6.1 Where hypnosis, pursuant to this policy, is used the defence solicitor of any person charged must be advised and provided with a copy of the session transcript.

Commentary: The Police accept a clear obligation to furnish defence with information concerning the use of hypnosis where a hypnotised subject gives evidence in any subsequent prosecution of another person. This requirement is appropriate and is not disputed.

A current assessment

The introduction of forensic hypnosis in this country was fuelled by positive reports of its investigative benefits by other law enforcement agencies. To date the powerful results found elsewhere have not been demonstrated, and it is considered that the reported benefits may have been overstated to an extent. In 21 applications of forensic hypnosis no significant new information has been produced. A number of considerations apply to this finding. Notably, hypnosis is used as a technique of last resort when conventional investigative methods have not produced positive results. Therefore the cases where hypnosis has been used tend to be difficult enquiries where discovery of new information is of a lower probability than in other cases, and consequently the odds against hypnotic memory recovery of enhancement are less favourable.

Another factor affecting hypnotic memory recall is a lowered or absent susceptibility to hypnosis, as not all the population are hypno-suggestible. Memory itself can be affected by such factors as physical and psychological trauma of an offence, the influence of alcohol or other substances, and the passage of time between the offence and time of structured recall. Clearly any of these factors may influence the ability to recall information, and the expectation that hypnosis will provide a panacea is not assured given the complexities of memory processes. Considering the conservative Police approach to forensic hypnosis, and its use as only an adjunct to conventional investigative methods, the absence of dramatic results is predictable and confirms the caution that surrounds hypnotically induced evidence.

Contrary to Evans' assertions the New Zealand Police have operated substantial guidelines for forensic hypnosis since 1986. The limitations and pitfalls of hypnosis are well understood and recognised in Police practices, with attention also given to maintaining current information on developments in the field. The guidelines address concerns about forensic hypnosis raised in other jurisdictions – particularly the judicial context. Accordingly the use of independent professionals as hypnotists is mandated, priority is given to the well being of the subject at all times, operational practices follow the established rules concerning preservation of evidence, hypnotic interviews are recorded on videotape, and Police recognise a responsibility to advise defence where hypnosis has been carried out. A remaining test has yet to arise when the admissibility of hypnotically induced testimony is challenged in New Zealand Courts. In the meantime the established Police guidelines well exceed those recommended by Evans in his flawed analysis, and the deficiences alleged in Police knowledge of forensic hypnosis are clearly not substantiated. □

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Reply by Mr Evans

In answer to Dr Ian Miller. The author was quite aware that since *McFelin*, the police have adopted their own guidelines. The Court of Appeal in *McFelin* however suggested that guidelines could be legislated for. This has not happened.

The author was not aware of any case in New Zealand where Hypnotically Induced Testimony has been tested in our Courts for admissibility – other than *McFelin.*

The object of the paper was to facilitate the admission of uncorroborated hypnotically induced testimony with such legislation.

There have been cases in the United States where there has been only one witness, due to retrograde amnesia, hypnosis has been successfully used, but then, the evidence has been inadmissible.

The issue is, that with guidelines set in legislation, and proof (by video) that it has been complied with, the good work of Dr Miller and his team, has more chance of acceptance. The issue then becomes one of credibility not admissibility. □