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Constitutional Essays

It has traditionally been common enough to say that New Zealand does not have a constitution. In the sense that we do not have a single written document labelled "The Constitution" as in the United States or in Australia for instance that is true enough. But like all commonplace sayings while it may be true, it is nevertheless misleading. New Zealand, like the United Kingdom from which we have derived it, has a very definite and relatively clear and simple constitutional system embodied in a set of laws and conventions and customs and procedures, all of which make up the totality of what we call constitutional law.

At the centre of our system is the monarchy. Historically it was England that devised the system, now embodied in the constitutional documents of most modern democratic states, of the division of powers between the legislature, the executive, and the judiciary as the three *equal* elements of government. And while separate they are united through being the Queen's legislators, the Queen's Ministers, and the Queen's Judges. In each case the powers that they have are separately derived from and separately dependent on their relationship to the sovereign. They are thus truly independent of each other, although obviously enough being closely, indeed intimately linked (see editorial comment [1986] NZLJ 1).

It is this crucial role of the monarchy in our constitutional system, as the unifying factor and at the same time the source and guarantee of the division of powers, that too often is ignored in arguments about republicanism. The most pitiful argument in favour of republicanism is of course the ludicrous one about the Queen of New Zealand also being the Queen of the United Kingdom, as if this is some sort of modern aberration. The fact that she is the monarch of a United Kingdom reminds one of the historical reality. William the Conqueror was King of England and Duke of Normandy; Eleanor was Queen of England (and for some years Regent for her son Richard the Lionheart) while independently Countess of Aquitaine and Poitou; James VI of Scotland was at the same time James I of England; William III, Prince of Orange, was joint King of England with Mary while also being Stadtholder of the Netherlands; and George I was King of England and Elector of Hanover.

As for the distance argument about London being so far from Invercargill it is worth recalling that with modern systems of travel and of communication the Queen in London is closer to Invercargill in terms of time, than Captain Hobson or Governor Grey were when living in Auckland. Indeed right up until as recently as the nineteen thirties it would normally have taken longer to get from Auckland to Invercargill than it now does to get from London to Invercargill.

There may be other arguments in favour of New Zealand becoming a republic but these two, a dual monarchy and physical distance cannot be taken seriously. On the other hand the monarchy is now an institution embedded in our constitutional system and is a formal protection of our rights and freedoms. It may not have always been thus, but it is now.

That we have a constitution, although not contained in a single document, is borne out by the fact that there is a discrete category within our legal system that is recognised as constitutional law. The standard text is *The New Zealand Constitution* by Philip Joseph, and this has now been supplemented by *Essays on the Constitution* (Brookers, ISBN 0-86472-190-0) which Philip Joseph has edited. Both books are excellent. The recently published book of essays cannot be too highly praised. It was launched at a function in the Beehive on 8 August 1995. The address of the Honourable Paul East QC and of Mr Philip Joseph are published in this issue of *The New Zealand Law Journal* at [1995] NZLJ 290. The variety of aspects of the constitution that are covered in these essays and the learning of the fifteen authors make the work invaluable. To select some of the essays for comment in a review is merely to use them to illustrate the value of the whole work, and not to belittle the others.

In addition to the Editor's lengthy Introduction there are fourteen essays on aspects of the constitution. They cover such varied topics as monarchy or republic, the Treaty of Waitangi, trans-Tasman relations, freedom of the press, the role of the Attorney-General, the legislative process, public utilities, and the electoral system. The extraordinary omission is any specific essay devoted to the Executive Council, a body that those who sit on it and the news media would think of as the centre-piece of our system of government!

In his Preface Mr Joseph says the standing of the writers "distinguishes this publication as a unique contribution to our legal scholarship". The fact that the Chief Justice, the President of the Court of Appeal and the Attorney-General are among the authors certainly

justifies this comment. There are other Judges and many academics who make up the notable roster of authors.

By way of example only of the overall value of the work I will comment very briefly on the essays of the three office-holders just mentioned. The Chief Justice, as is well known, considers the abolition of Privy Council appeals to be inevitable. It is heartening however to see that Sir Thomas does defend the value that the Privy Council has provided historically as an integral part of our judicial system. His essay does not deal with the question of whether there should be an indigenous second tier in the appeal system when appeals to Downing Street disappear. His views however are well enough known that there should only be one right of appeal (see [1994] NZLJ 86).

The strength of Sir Thomas' essay lies in the careful consideration he gives to a string of New Zealand Privy Council decisions. The Chief Justice concludes by remarking on the effect of the mere presence of the right of appeal to the Privy Council as something that should not be underestimated. The same, it might be said, would be true of an indigenous second tier appeal system. His Honour's final paragraph reads:

> Last year a senior Law Lord remarked to me that, whatever else might be said, from time to time the Privy Council had saved New Zealand law from going off the rails. The view is open that, while achieving that end, the existence of the appeal has not stifled the development of the country's own jurisprudence. Such assessments of the Law Lords' influence, however, are in modest terms. The special qualities of learning, experience, depth of legal culture, and refinement of style will not foreseeably be replaced. As the final curtain falls, it would be fitting if the past contribution were acknowledged.

The excellent and very informative article on the office of the Attorney-General will be of particular interest to members of the profession. As Mr Joseph notes in his Introduction the office is one about which little is known, and little has been written in this country. This article is especially valuable therefore in its clear explanation of the constitutional functions of the office.

The office of Attorney-General is one of the oldest institutions known to English law dating back certainly to the 13th century. Like the Lord Chancellor of England the Attorney-General in New Zealand can be said to breach the doctrine of the separation of powers in that, although a member of Cabinet, his office – and consequently his responsibility – is an independent one that is exercised only in the public interest. It is a rather different office from that of the Attorney-General in England. The two offices of Attorney-General and Solicitor-General in New Zealand embrace in part three different offices in England so as to include some functions of the Lord Chancellor.

Unlike the Lord Chancellor of course the Attorney-General in New Zealand does not exercise any direct judicial function. He does not sit in Court. In an indirect way however it could be argued that the responsibility he now has under s 7 of the New Zealand Bill of Rights Act 1990 has at least quasi-judicial overtones. The Attorney-General is required to report to Parliament – and this means independently of the Minister who introduces a particular Bill – on any proposed provision that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights Act. This necessarily involves an analysis and interpretation of the suspect provision and its relationship to a provision in the Bill of Rights Act. The essay notes that the exercise of this duty calls for a careful analysis and a finely balanced judgment. The Attorney-General states in his article that at the time of writing he had had to consider eight such provisions. The essay explains the issues that arose in each of these eight cases. It is reassuring to know that this does occur from time to time, and is effective.

The Honourable Paul East QC notes towards the end of the article that

> While the office of Attorney-General is born of an English institution, it has been shaped to become a very New Zealand one, and one that is central in many ways to our unwritten Constitution.
>
> In my view, New Zealand is very fortunate to have an unwritten Constitution. The New Zealand system can be regarded as a somewhat vulnerable one, in that it provides less formal demarcation if one of its institutions should play a more active role in an attempt to resolve the broad social issues that face all those who have a part to play in New Zealand's legal structure. But that same weakness is also its strength. I am sure that if the Westminster system, with its attendant Court structure and other institutions, were to be devised from scratch as a working model, it would be rejected as totally unworkable. And yet it has survived over hundreds of years and has provided probably one of the fairest systems of government that the people of the world have witnessed.

The article by the President of the Court of Appeal is entitled "The Suggested Revolution Against the Crown". As is always the case with the writings of Sir Robin Cooke the essay is a most perceptive one. While in general he endorses the views of Emeritus Professor Brookfield in the essay that immediately follows his own in the book, he comments that there are some differences in their positions on the suggestion of the abolition of the monarchy. Sir Robin describes his own approach as "being perhaps more conservative". This is surely a self-deprecatory description of any of the President's views that Professor Brookfield and others might find a little surprising!

Sir Robin refers to the Queen as being Head of the Commonwealth, within which there are several republics such as India, Pakistan and now again South Africa for instance. He then continues:

> No doubt techniques are available, indeed more readily in New Zealand than in federations such as Australia and Canada, whereby New Zealand could take for herself a somewhat similar republican status; although, subject to local adaptation and development, it seems likely that the common law of England would still be seen as the lineal ancestor of our *private law*. Section 5 of the Imperial Laws Application Act 1988 (NZ), which has that effect, would probably be preserved. The question is whether we wish to renounce our *public law* inheritance by a constitutional revolution.
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> Let there be no mincing of words. A revolution it would be – and not necessarily only within such

> dictionary definitions as "a great upheaval" or "a radical change in government". Arguably it would also be illegal.

This whole essay, for its subtlety of analysis of the issues and its breadth of reference deserves and repays close reading and careful consideration. It will no doubt provide a basis for much academic discussion over the next few years. Sir Robin tends to agree with Professor Brookfield that the final outcome will probably be decided more on pragmatic grounds than on those of strict legal principle. He adds:

> Glad that I am most unlikely to be in office if and when the question arises, I do not envy those judicial successors who would have to make the decision. It is highly doubtful whether any constitutional writer or commentator would have the confidence to make a firm prediction.

Sir Robin also touches on the problem of the oath of allegiance. As he says current attitudes as to the binding nature of oaths vary with the individual. (As an aside however it can be said that the Courts do not adopt a lenient or relativistic attitude in respect of perjury as depending on the moral attitude towards oaths of the particular witness.) Sir Robin goes on to say that some political leaders do not see their oath of allegiance as inhibiting them from openly promoting republicanism; and, he says, judicial oaths proved ineffective to prevent UDI in Southern Rhodesia or coups in Fiji. In regard to the latter however he might have noted the principled action of Justice Govind in Fiji at the time of the coup. Justice Govind resigned and in effect went into exile in Australia with his family. One wonders how many, if any, of our Judges will do the same come the Bolger revolution? No one of course would expect politicians even to think of that for themselves. It is also worth remembering in this context that things were not always thus. In Samuel Eliot Morison's *Oxford History of the American People* at p 286 it is noted that some 80,000 loyalists, a very large number in those days, left their homes in the new revolutionary United States and went, mainly from New York to Canada, to live under the British monarch.

These brief comments on some of the essays should indicate the depth of this work. The authors, including Justice Richardson, Justice Michael Kirby, Professors Farrar, Taggart, Harris and Burrows among many others, all make substantial contributions. The work is very much concerned with current issues. In the immediate situation the essay by Alan McRobie on the electoral system and the problems of MMP is most interesting. Mr McRobie notes the difficulties that could arise with population changes that may seriously affect South Island proportional representation; and if Maoris continue to enrol more and more on the general roll then separate Maori representation could well diminish.

One can finish with a few minor quibbles. Sir Ivor Richardson should be ashamed of himself for unnecessarily and unjustifiably feminising, on page 78, the well-known sentence of John Donne about no man being an island, which is truly part of the language. Admittedly Sir Ivor does not put the amended sentence in quotation marks, but it is too well known, and reads too well to have additional words slipped in in this way. What he has done is I suppose, sadly, the modern equivalent of the Victorian bowdlerising of Shakespeare. Presumably the works of the Bard of Avon will now have to be feminised too, or be banned from schools and theatrical performance. Depressingly, it only goes to show that the language and literary barbarians are to longer just hammering at the gates, they now occupy the citadel of the Court of Appeal. Those tempted to quote any of the classic authors of English literature in the Court of Appeal had best now be careful.

As an editor myself I have sympathy for the publishers about a few small editorial blemishes I noticed. For instance the last line on page 5 obviously has some words missing. It reads: "The seizing and occupation of Moutoa Gardens by Wanganui Maori from was over claims to . . .". On the odd numbered pages 33 to 39 the running head has dropped off the definite article that appears on the pages preceding them. Also the line from the bottom of page 212 is repeated at the top of page 213. Such publishing slips as these however do not detract from the great value of the work.

Essays on the Constitution is an outstanding contribution to our needed better understanding of the system of government under which we live. With momentous constitutional issues presently facing us this book illuminates the relevance of our past and opens up a multiplicity of perspectives on possible future developments. Mr Joseph as editor and his many contributors offer us enlightenment on, and incitement to want to argue about, so many aspects of the New Zealand Constitution.

P J Downey

Common law and statutory remedies

Where a statute confers a private law right of action a breach of statutory duty howsoever caused will found the action. Where a statute authorises that to be done which will necessarily cause injury to someone no action will lie if the act is performed with reasonable care. If, on the other hand, the authorised act is performed carelessly whereby unnecessary damage is caused a common law action will lie. This is because the act would, but for the statute, be actionable at common law and the defence which the statute provides extends only to the careful performance of the act. The statute only authorises invasion of private rights to the extent that the statutory powers are exercised with reasonable and proper regard for the holders of such rights. Thus careless performance of an authorised act rather than amounting to breach of a new duty simply ceases to be a defence to a common law right or action. This was, I believe, the situation which Lord Reid was addressing in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1030.

Lord Jauncey

PI v Bedfordshire County Council
(House of Lords, 29 June 1995)

Case and Comment

The minority strike back

Gambotto v WCP Limited (1995) 16 ASCR 1

Australian commercial lawyers and the directors of companies with restless minority shareholders have been forced to confront the implications of a recent decision of the High Court of Australia, *Gambotto v WCP Limited* (1995) 16 ASCR 1. The planned demutualisation of the National Roads and Motorists Association in New South Wales and of the National Mutual Life Association of Australasia are two controversial proposals for which the decision and the reasoning in *Gambotto* are especially relevant. New Zealand policy holders are, of course, directly involved in the National Mutual scheme which would ultimately see the French insurance group, AXA, taking a 51 per cent shareholding in a recognised National Mutual Group.

The facts of *Gambotto* were as follows. WCP was a limited liability company with an issued share capital of 16,980,031 ordinary shares. Wholly owned subsidiaries of Industrial Equity Limited (IEL) held 16,929,441 shares or 99.7 per cent of the issued capital. Of the remaining 50,950 shares the appellants held 15,898 shares or 0.09 per cent. The shareholding was such that compulsory acquisition was not possible. WCP proposed to amend its articles of association to include a new article, Article 20A, the effect of which would be to enable any shareholder entitled to 90 per cent or more of the issued shares to acquire compulsorily, before 30 June 1992, all the other issued shares at a price of $1.80 per share. It was agreed by the dissenting minority shareholders, the appellants in the High Court, that an independent and fair valuation of the shares was $1.365 per share.

Before the general meeting called to consider the amendment, WCP indicated that the majority shareholders would vote in favour of the amendment and the appellants commenced proceedings seeking to prevent the resolution being passed. On an interim basis, WCP gave an undertaking that, if the resolution were passed, it would not acquire any shares under the new article until the conclusion of the appellant's action. The meeting was held on 11 May 1992 and attended by representatives of the majority shareholders and by a minority shareholder who represented two other minority shareholders. The appellants were not represented. The chairman required a poll in which the minority shareholders were the only ones to vote and the resolution was passed unanimously.

At first instance, McLelland J held that the proposed amendment was invalid and ineffective. On appeal, the New South Wales Court of Appeal found that the amendment was not oppressive and should have been allowed to stand.

Before the High Court the fundamental issue was whether the amendment giving the majority the power to acquire compulsorily the shares of the minority was oppressive and therefore invalid. In a joint judgment the majority of the Court, which comprised Mason CJ, Brennan, Deane and Dawson JJ, found for the appellants. They reviewed the English and Australian authorities beginning with the judgment of Lindley MR in *Allen v Gold Reefs of West Africa Ltd* [1901] 1 Ch 656, 671 in which he enunciated the principle that the majority's power to alter the articles by way of a special resolution

> must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded.

The application of this principle in the English cases was then analysed.

The majority went on to consider at some length the High Court decision in *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457. They found support in the judgments in that case for a rejection of Lindley MR's "bona fide for the benefit of the company as a whole" test as being "inappropriate" in circumstances in which the effect of the amendment of the articles is to allow the majority shareholders to acquire the property of the minority. The Court held that such an amendment is valid and not oppressive to minority shareholders only "if it appears that the substantial purpose of the alteration is to secure the company from significant detriment or harm" (*Gambotto* p 9). In the absence of a clear and present danger to the company, expropriation of the minority would not be justified. The Court did give two examples of situations in which expropriation might be warranted. The first was that of a shareholder competing with the company, as in *Sidebottom v Kershaw, Leese and Co Ltd* [1920] 1 Ch 154; the second was an obligation to comply with a change in a regulatory regime, hypothetically a statute might require a TV station to have a 100 per cent Australian ownership thus justifying the expropriation of a non-Australian minority.

WCP had suggested that taxation advantages and administrative benefits would become available to the company if the expropriation went ahead. In the Court's view that could not constitute a proper purpose, despite it being apparently "in the interest of the company as a

whole". The obtaining of some commercial advantage for the company through the expropriation was equated with "personal gain" for the majority shareholders and thus for an improper purpose. Article 20A was therefore invalid and the appeal was allowed.

McHugh J also found for the appellants, although on slightly different grounds. His judgment contains an interesting discussion of the concept of fairness in the context of oppression.

> To prevent an alteration for the purpose of an expropriation being oppressive, the expropriators will need to act fairly. (*Gambotto*, p 17)

Referring to a leading American case *Weinberger v UOP Inc* (1983) 457 A 2d 701, he concluded that the basic elements of fairness are fair price and fair dealing. Those same elements are identified in the majority judgment, which likewise cited *Weinberger* as well as other North American cases, but McHugh J's is the more insightful analysis of the concept.

Relying on dicta in *Weinberger*, he held that market price is not the sole determinant of the fair value of shares, other factors such as assets, market value, earnings and future prospects must be taken into account. The market price or even a higher than market price is not necessarily the fair price. Presumably, an expert and independent valuation must be obtained.

In respect of fair dealing by the majority, McHugh J decided that a full disclosure of all the matters which might affect the fairness of the transaction was required, this was described in *Weinberger* as a duty of candor.

> This will usually mean the disclosure of the purpose of the transaction, the giving of full reasons for rejecting alternative means of achieving that purpose and for concluding that the compensation offered will be fair to those affected, and the obtaining of an independent valuation for the shareholders. (*Gambotto*, p 19)

McHugh J recognised that WCP's goal was a legitimate business objective that would justify expropriation if it was otherwise fair to the minority shareholder. However, he held that the majority had not discharged the onus to prove that the price was fair, to deal fairly with the minority or to make full disclosure. It followed that the expropriation exercise was oppressive and the resolution adopting Article 20A was invalid.

The two judgments in *Gambotto* raise intriguing and unresolved problems in respect of corporations law. In particular, the main judgment focuses on the proprietary nature of the rights attaching to the shares without ever defining what is encompassed by such a proprietary right. One possibility is that the interest is in the voting rights associated with the shares.

The test the High Court used for determining whether an expropriation of such valuable proprietary rights is valid required a judicial assessment of the future management of the corporation's affairs. The test is whether the continued shareholding of the minority is a source of detriment to the existing shareholders generally. A decision will be required, in each situation, on how immediate and how dangerous the detriment is. The matter is further complicated by the Court's suggestion that a different conclusion may be reached if the power to expropriate is already in the articles. A distinction was drawn between incorporating a power to expropriate a minority's shareholding, "for the purpose of aggrandising the majority" (*Gambotto*, p 9), into the articles upon the incorporation of the company and amending the articles to include such a power at a later date. A minority shareholder's ability, such as it is, to negotiate the contract upon incorporation is presumably the justification for this conclusion.

The Court also indicated that an extraordinarily high degree of independence may be required of the majority shareholders in their dealings with the minority. In its discussion of procedural fairness of the process used, the main judgment questioned whether the majority shareholders should refrain from voting on an expropriation resolution, as indeed they had in the facts of the case. Unhelpfully, having posed the question, the Court then decided it was best left open.

Although the case came before the Courts on a question of the validity of an amendment to the articles, the foremost concern of the Australian High Court was to protect the rights of the minority shareholders. It has gone out of its way to protect those interests. *Gambotto* has not been considered by the New Zealand Courts, and until they do the judgments in the High Court have raised troubling questions for which there are presently no answers in this jurisdiction.

Owen Morgan
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The rights of third parties as a defence to tracing claims

El Ajou v Dollar Land Holdings Plc and another (No 2) [1995] 2 All ER 213

The plaintiff, Abdul Ghani El Ajou, a Saudi businessman sought to recover £2.325m from an English company DLH. His action was based on DLH's knowing receipt of assets traceable in equity as representing misappropriated funds. Mr El Ajou was the largest single victim of a huge share fraud carried out in Holland by three Canadians between 1984 and 1985. The profits of this fraud were laundered through an elaborate international criminal system and some of the proceeds eventually came to be represented by part of the interest ostensibly belonging to DLH.

Apart from Mr El Ajou there were about 4,000 other would-be investors who were defrauded. Quite a number of victims were British nationals resident in Britain or the Gulf; others, however, came from the Near East, the Far East and Australia. The bulk of these people were described as small investors parting with up to US$10,000, one, the largest, invested $300,000. Nevertheless, the plaintiff was far and away the biggest participant and it was this that made it possible to trace his money through the money laundering system.

One interesting issue in the case was whether the rights of third parties could provide a defence to tracing claims. It was DLH's conten-

tion that the plaintiff should recover only a fraction of the £2.325m as in equity the other victims should be considered. The defendant posed the dilemma that if other victims who had tracing claims were before the Court, they could recover part of the £2.325m to the exclusion of the plaintiff. The appropriate method of tracing was therefore one of the difficulties of the case.

The defendant relied on *Re Diplock (Re Diplock's Estate, Diplock v Wintle* [1948] 2 All ER 318 at 356-357, [1948] Ch 465 at 539; and see *Sinclair v Brougham* [1914] AC 398 at 442, [1914-15] All ER 622 at 643) where the Court of Appeal stated that

> . . . where the contest is between two claimants to a mixed fund made up entirely of moneys held on behalf of the two of them respectively and mixed together by the fiduciary agent, they share pari passu each being innocent . . . The mutual recognitions of one another's rights is what equity insists on as a condition of giving relief.

Thus if other 1985 victims who had a tracing claim were before the Court, they could, it was argued, recover part of the £2.325m to the exclusion of the plaintiff. Because they are not before the Court the plaintiff claims the whole £2.325m, which in the defendant's opinion was an inequitable result and one which could not be the outcome of the exercise of the Court's equitable jurisdiction. The plaintiff intended to retain 70% of the total with undertaking to pay 30% to the trustee in bankruptcy for distribution among all the other 1985 victims.

Dividing a fund pari passu is only one way of distributing moneys held in a mixed fund. There is also, of course, the rule in *Clayton's Case (Devaynes v Noble, Baring v Noble, Clayton's Case* (1816) 1 Mer 572, [1814-23] All ER Rep 1) where the "first in, first out" principle was established. Depending on the approach taken, obviously, a different distribution can arise.

Millett J ([1993] 3 All ER 717) held that the assets were traceable but dismissed the action because he found that knowledge of a former DLH chairman did not amount to knowledge by DLH. The Court of Appeal (Nourse, Rose, Hoffmann, LJJ, [1994] 2 All ER 685) allowed the appeal and remitted the case to the Chancery Division, where Millett J made an interim award of £1.6m and gave direction permitting further evidence to be adduced at a further hearing. Robert Walker J in the present case thus considered that he had the responsibility of completing Millett J's unfinished work.

His Honour held that the defendant was to pay the whole sum of £2.325m with interest. There were no rigid rules as to whether or not the rights of a third party could be raised as a defence to a tracing claim, since each case depended on its own individual circumstances. In the present case there was no realistic possibility of the other victims bringing claims ([1995] 2 All ER 213 at 223). The facts were that the plaintiff had lost a huge sum of money traceable directly to the defendant and thus an order was appropriate for the total £2.325m.

His Honour held that the essential question of whether the plaintiff had shown that his equitable right extended to the whole of the £2.325m or only to part of it was important to keep well in mind because "tracing in equity is (to say the least) a complicated subject, and, although the ideal would be to have simple rules of general application, the fact is that the Court's approach has, understandably and rightly, been influenced by the context in which a tracing problem arises" (ibid, at 219).

The Judge considered older cases such as *Re Halletts Estate* (1880) 13 Ch D 696 where fiduciaries, in days of less stringent rules about mixing money, would get into financial difficulties having mixed money belonging to others with their own. His Honour contrasted such cases with decisions such as *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22 where funds from thousands of persons had been misappropriated and had passed through bank accounts which never had any honest purpose and were simply machinery for money laundering. The Court here is faced with dividing up any fund between the victims of the fraud. In this type of case the rule in *Clayton's Case* (supra) "may be neither practicable nor fair" ([1995] 2 All ER 213 at 219).

The present case differed from these situations as it was a personal claim against a constructive trustee based on its knowing receipt of a relatively small part of the proceeds of a major fraud.

The Court held that equitable tracing depends on the power of equity to charge a mixed fund with the repayment of trust moneys (ibid, at 221). In cases such as *Barlow* (supra) it is natural to view the divisible assets as a trust fund and the victims as the beneficiaries whose identities and whose proper share must be established. In these types of cases there is a Court-appointed fiduciary who is seeking directions as to how to divide up the proceeds of fraud. Tracing claimants, on the other hand are not in the same position as beneficiaries, since changes in the composition of the fund may alter their rights as between themselves and could affect their choice of assets to claim.

In the *Barlow Clowes* decision the Court of Appeal noted that the "first in first out" rule might not be appropriate and perhaps is not appropriate for those who have the common misfortune of being victims of large scale fraud ([1992] 4 All ER 22 at 41), and the Court did not apply the test.

In conclusion this decision makes it clear that it must always be remembered that tracing claims depend not on equitable ownership as such but on the concept of an equitable change ([1993] 3 All ER 717 at 736 per Millett J). Moreover tracing depends not on the actual imposition of an equitable change but on equity's capacity to impose such a change. The change itself is notional ([1995] 2 All ER 213 at 223 per Robert Walker J).

By not laying down any rules as to whether or not the rights of a third party could be raised as a defence to a tracing claim the Court recognised the enormous diversity of circumstances in which a tracing claim might arise. On the facts of *El Ajou v DLH* the decision to allow the unfortunate plaintiff to claim over two millions pounds sterling appears equitable.

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The Bar Association:

A two-part interview with the President, Julian Miles, QC

21 June 1995

Julian, when did you become President of the Bar Association?

I became President in March 1994.

The Association itself had been formed before then?

I think it was formed primarily by a steering committee chaired by Ted Thomas, with Ted becoming President just before he went on the Bench, which I think was round about 1989/90. The background of it occurred earlier at a meeting, I think, chaired by Charles Hutcheson back in the mid-80s. Charles, of course, was the doyen of the independent Bar and he'd always thought that there ought to be an organisation set aside to look after the interests of the independent Bar. I think he kicked it off with a meeting that he called with the independent Bar in the mid-80s.

Was it really an Auckland thing?

Yes, it was originally an Auckland thing, primarily because there have always been more members of the independent Bar in Auckland and perhaps a perception that Wellington had always been seen as the centre of the New Zealand Law Society. And again a perception perhaps that those representatives of the independent Bar in Wellington always had an orientation towards the New Zealand Law Society. Whether that's true or not I don't know, but that was perhaps the perception. It has become a genuinely national organisation now.

On the front page of this week's Independent *there's a piece about the Auckland lawyers revolting against control from Wellington, and this is on the basis of the tremendous computer system they want to set up and the new disciplinary system they want to establish.*

Well, of course, the Auckland Law Society always saw itself as somewhat independent from the rest of New Zealand. It saw itself as one of the most sophisticated of the Law Societies and perhaps the Bar Association, to some extent, echoed that.

After Charles Hutcheson called this meeting, I take it there was a bit of a hiatus or gap for a while.

Yes, I think there must have been because certainly Ted got very interested and I'm not sure when his interest began.

Well, of course, it would have to have been after he left Russell McVeagh presumably?

Well, yes, but I think he went to the Bar in the early 80s. I think it was fuelled by the massive increase in the independent Bar starting from the early 1980s where increasingly it was seen as the logical extension of litigation lawyers' careers.

About how many Barristers sole and QCs are there in Auckland now? Over 100?

At least. I think there's over 500 in New Zealand. That, of course, includes a number of more passive members – lecturers and some who are relatively retired. But I think in Auckland there would be well over 100 practising Barristers.

Well, when Ted Thomas became active in the founding, how was that done can you remember. Did he and Jim Farmer call a meeting or did Ted Thomas call a meeting?

Look, I genuinely don't know. Of course I was at Bell Gully at that stage. I didn't go out as a Barrister myself until 1990, so I wasn't part of the actual setup.

But in any event it started off really with Ted and Jim Farmer.

Certainly, Ted handled the original negotiations with the Law Society because, I think it was a delicate exercise and there were some quite delicate negotiations as to precisely what the Bar Association wished to be and what it saw itself as doing.

Let's leave the history there. You went out yourself from Bell Gully's about 1990 and did you then join up with the Bar Association which was already going?

Oh yes, very much.

And Jim Farmer would have been the President then. Why did you join it, and how did you find it?

I joined because it seemed the appropriate organisation to join. There was one very pragmatic advantage in joining which was that Jim had arranged a specific insurance cover through the Australian Bar Association which gave us very good and relatively cheap cover and that was conditional on being a member. So there was a very sensible pragmatic reason for joining, and I think a number who have joined have been influenced by that as much as anything. But that wasn't the primary reason I joined. The primary reason I joined is because I

saw it as being the logical association to join once one was a member of the independent Bar. If there were concerns that the independent Bar had then the Association was the logical one to promote them.

After you joined it in 1990 and thereafter, what have been its activities?

Well, I didn't play an active part in it at all; I was just a member. It was great fun because it ran two conferences each year. One in the South Island normally at Queenstown or in one of the ski centres . . .

Giving people a chance to break their leg?

And the other conference was always in Wellington or Auckland. The conferences were very interesting. They were great fun for a start because the people there had a certain homogeneity – commonality of interests – unlike the big Law Society conferences where there are so many people and so many varying interests that they just cease any more to have the same relevance, I feel. But there was also a very high level of papers and speakers. They were a very nice combination of the pragmatic papers given by experts in their field, and the conceptual debates again given by speaker of a very high level of competence. So they were dealing with issues both conceptual and pragmatic that had direct relevance to what we were doing.

So you yourself found it of interest and were glad you joined from the start?

I had no real idea of what they did other than organising a couple of conferences a year. That seemed ground enough to join.

Then Jim Farmer was President until when?

Until I took over at the beginning of 1994.

So you've been President now for a year and a half. Since you've become President what sort of responsibility has it placed on you?

It was all a bit strange for a start because I wasn't on the Council, I had had nothing to do with the working of it when I was asked to stand as President. So there was a learning curve. I was induced to do so partially on the promise that there wasn't a great deal to do, but that turned out to be a huge misrepresentation.

Like most promises – politicians aren't the only ones.

I don't know whether there has been more to do over the last year than previously, but there have been a raft of issues that have arisen and which increasingly the Bar Association or the Council sees itself as having a voice or role.

Can you give us some examples. What sort of things have you been involved in?

They've largely been issues that have had a direct relevance to the Bar and its members. One of the major ones, of course, was the resignation of David Williams from the Bench, and the implications that arose from that. That really did raise difficult and sensitive issues of him going back to practice.

I was at the conference in Wellington when that was being discussed. What was the outcome from the Association's point of view in respect of that? What stand did you finally take?

We were asked by the Chief Justice for our views on it and because it raised issues (it hadn't been debated in New Zealand this century) we really spent a good deal of time looking at it trying to present a coherent and hopefully rational point of view. Now the Council . . .

And that included having a full discussion on it at a conference?

Yes it did. We discussed it at least once on a slightly ad hoc basis where it arose soon after David's resignation, and then we addressed it on a much more formal basis at a later conference. The Council itself spent a lot of time discussing it. At the end of the day we formed a unanimous view that . . .

This is the Council?

The Council, yes. The view was that Judges should not return to practice at all.

How big is the Council?

Eleven.

Eleven plus the President, or does it include the President?

The membership of the Council was, and the voting, and the structure set up for the voting of Council members was a most elaborate business and that was very much a pattern developed by Ted and others at the outset. What they wanted to achieve I'm sure was a geographical mix; a mix of genders and a mix of experience so that there are a number of categories which people vote in. As a result the eleven members have to include representatives from Dunedin, Christchurch, Wellington, Hamilton, Auckland, plus several women, plus criminal Barristers as well as commercial.

You've got to be careful you don't refer to criminal solicitors, because that is a different connotation, unfortunately.

And young Barristers as well as the old. So the idea was that there would be representatives of every conceivable group.

I take it that one person might, in fact, include several categories?

Right. You could have a young woman from Dunedin – a criminal lawyer – to represent about four of them but in practice what happens is that there is a spread. The present Council does indeed have two quite young Barristers, several women of various experience, several Barristers who practice primarily in the criminal field plus a number of commercial Barristers. In fact Auckland, if anything, is under-represented.

Having started it off it's got away from you, as it were.

Well it's just part of the voting pattern. But, if anything, we are under-represented.

Do you have actual Council meetings?

Yes.

You don't just do it by phone?

No, no. There's so much work

involved now . . . I was talking about the retirement of Judges issue . . . a number of other issues have cropped up over the period.

Perhaps we should stay with that for the moment, then we'll come back to the organisation. What other type of issues?

Other issues that have cropped up; – well, there was the decision by the Government to allow Australian Barristers, and specifically silks, to practise in this country. That concerned us because there had been no prior discussion with the Association. We were concerned about both the principle and the pragmatic effect that that might have.

Is it a reciprocal arrangement? Melbourne used to be fairly open about it, but other centres rather cool.

We are assured by the Attorney-General that it is reciprocated and that he has received the appropriate assurances from his counterpart; but as far as we are concerned the issue is still not resolved. We still haven't seen those, and we're still concerned about it.

Another major issue that cropped up was the pilot programme that Auckland and Hawkes Bay are now having – the Case Management system. Last year the Case Management programme was imposed on the profession with very little consultation and we got very much involved with that issue and have been subsequently working with the committee that was set up to run the pilot programme with the aim of trying to turn it into the most effective way of handling the Court structure.

It is a little surprising isn't it that the Judges want to take this extra responsibility in view of the fact that the lists are still loaded, or do they maintain it's going to make the lists less loaded?

Yes, they do. I mean at the heart of it is a philosophy that Judges ought to be pro-active rather than reactive. That the profession can't be relied on to push the cases through as they ought to and the Judges have got to get involved and ensure that that happens.

But does that not imply that the Judges have been under-utilised up until now in the sense that they must have had time on their hands because if, in fact, they were kept busy what's the point?

No, I don't think it does that. The system is devised to utilise a certain amount of Judges' time and quite a significant amount of Masters' time in areas they hadn't been involved in before such as settlement conferences. Now to that extent time has been taken away from sitting or considering of judgments, but in Tompkins J's view that it is time well spent because it cuts back the list – that's the theory behind it. Whether in practice it is working properly it's too soon to tell and opinions vary. But certainly we're committed. We were very concerned at the way it was introduced – we thought that had we had an involvement prior to being introduced we could have perhaps produced a better product. We are committed now to working with the pilot to try to make it succeed. At the end of the day we will be part of the evaluation process to see whether it is succeeding. We continue to have reservations on the proposed system in its present form.

That's interesting. Is there any other major issue that comes to mind. For the purpose of this talk, that's probably enough. It illustrates the serious involvement of the Association in wider issues in the legal system.

Another important role we assume is reacting when we think that Judges have been improperly criticised and that occurred on a number of occasions last year. We try to do what we can to express our concern and try to ensure it doesn't happen again.

This actually raises the question of the relationship with the New Zealand Law Society in a very direct way, doesn't it? How does that work in practice?

We work in tandem.

Do you necessarily consult?

Yes, although there's no formal structure but Austin Forbes, for instance, and myself often write or ring each other and on occasions we have quite different views. The Judges retirement issue being one. On the other hand our concern about improper criticism . . .

When you talk about Judges retirement, you mean resignation?

Yes. On the issues, for instance, of Australian silks practising in New Zealand – I'm not sure whether the Law Society has a view on that.

Do you have any – the Council, or yourself for that matter – view on the extent to which there should be an independent Bar, that is to say do you see that there should be a limit or should market forces be allowed to determine it?

Well I've no doubt it's market forces that determine it. It was market forces that determined it from the outset and it will continue to be market forces that drive it. I think it's a very healthy development, and I spent twenty years in a large firm and it was a very happy and productive time for me. But there comes a time when one likes the idea of a career shift. It suited me perfectly that there was now a separate Bar which one can go to, in which there are a significant number of other Barristers. The structures are all there now, so that it is now an alternative career for someone starting; for someone in mid career and for someone at a senior level.

It's a little ironic, of course, that the English very rigid division of Barristers and Solicitors is being eroded, while we who had a totally fused profession for so long are actually moving to have a larger and larger independent Bar.

I've always thought we had the best of every world because we have the choice and those who want to practise as litigation partners in firms can continue to do so with all the advantages that they have, so that the English practice is in fact moving steadily towards ours.

That's true enough, yes. Actually, can I ask you the question – you may not be in the position to answer it – which just occurred to me. The reverse of that is the situation within the firms. If they are losing, particularly if they are losing their senior

litigation people, is this causing difficulties or have you heard any comment of any difficulties being caused to firms, or do they just brief it out?

Well, I don't think there's a problem. There has been some tension between, particularly the larger firms, and the independent Bar. I don't think it's nearly as strong now as it was two or three years ago.

Well, Bill Wilson made it clear in the public arena that he can't see why he can't be a QC and still be in Bell Gully Buddle Weir.

The short answer is that an essential element of being a silk is independence. You cannot have that level and degree of independence when you are working in a firm with all the constraints of the client constrictions which are part of that. If Bill goes out as a Barrister he'll understand immediately the distinction – as I did when I went out.

You did find it a different world?

I did; and I used exactly the same arguments as Bill did when I was at Bell Gully Buddle Weir. I saw myself as being independent, always thought of myself as being independent, that is within the firm. I used to get briefs from outside the firm and the advice I always gave the firm clients was independent in the sense it expressed my view – it made no sense to do otherwise. But it wasn't until I actually went out as a Barrister, found myself being independent in the literal sense, that I realised that you are more independent when you're on your own. You are not under any pressures from commercial partners. For instance to give the advice that their clients want to hear, or even on occasions where commercial decisions have already been made where they would prefer a justification or possibly even justification on the legal advice that's already been given within the firm. But there are all sorts of pressures – often very subtle – on litigation solicitors in the firms which independent Barristers simply do not have.

As far as the Council is concerned, it now consists of eleven people with a variety of backgrounds as you have explained. How does it actually operate? Does it have regular meetings, does it do it by telephone? Just explain how it works.

A major part of the work we do on top of what I have already described is the work for conferences, which requires a huge amount of work. We also produce a series of newsletters, not nearly as many as we ought to, but they require a good deal of work as well. So there's a certain amount of work involved. We have regular meetings, probably once every six weeks.

Where do you have them?

While I've been President it's always been here.

You mean in Auckland?

We have the library in Shortland Chambers. Jim used to have them in his Chambers. We would generally have at least three-quarters of the Council present; most make serious efforts to be there. Meetings last all afternoon; we kick off at 1 o'clock and we are still at it by 5. There is a great deal of work to get through.

At the end of the day do you usually get consensus?

Always. I try to get consensus on all the issues and I think on every issue that we've had to debate we've reached consensus eventually just by talking the issues through.

Why would that be, one would think there'd be somebody with a different view, particularly given the variety of categories that are represented? Even juries get hung!

I would like to assume the reason is that we have generally got to the right reason, and they're all intelligent and sensible and see it the same way eventually.

It reminds me of the way Sid Holland used to run Cabinet meetings and no doubt other Prime Ministers too. After having heard the discussion he would mark the papers approved or not approved as he felt.

That's quite different from us.

Is there anything especially interesting coming up that's troubling you at the moment?

Well there are two or three issues. In fact, there are half a dozen issues which are extremely important. There's the Privy Council question, there's the Court structure post the Privy Council – we've already had discussions about that. Those are major papers coming up at the next Conference. We're very disturbed at the option which the Government seems to be promoting at the moment on the right of appeal.

That's the one set out in the Solicitor-General's report as Option 2?

Yes, we're very concerned at the lack of resources in the Court of Appeal. We're concerned about the way the Courts are going to be run under the new Department. We very much would like to be part of the consultative process there.

And have you not been yet?

No, which makes no sense at all because we represent the people who work in there. The Law Society has all sorts of interests but it doesn't really represent Barristers any more.

Can I just take you up on that. When you say it doesn't really represent Barristers any more, do you mean not adequately, or that its attention is concentrated on solicitors or firms.

The Law Society from my perspective deals with the wider issues involving the legal profession, whereas the profession is now a series of disparate groups with often quite different interests represented by the large numbers of groups or sub-societies that have developed. There are now pressure groups for women lawyers; there are pressure groups for commercial lawyers; for in-house lawyers; for Barristers; for Maori lawyers etc. I think that just reflects the increasing lack of homogeneity within the profession – and we're just another pressure group. We happen to be a pressure group that has over 300 members, who are the bulk of the practising Barristers.

And you're a group concerned with the way the Courts operate?

Yes. So we feel quite strongly that we ought to have a say in it.

Is there any question of consultation on appointment of QCs or appointment of Judges?

Yes both. As the President I get consulted on the appointment of QCs and the appointment of Judges. So we are part of the formal consultation process. Actually I see quite a lot of Paul East, for instance, as the Attorney-General and John McGrath as Solicitor-General; but as both tend to be involved in these and other issues so there is increasing consultation, and also with the Chief Justice.

As far as the Conferences are concerned, are the papers published?

They were and we have been trying to, for the last couple of years – it's really a matter of resources. We have a part-time secretary and apart from that it's just people working in their spare time. But there are a large number of very good papers which we are in the process of trying to publish and would very much like to had we more time. What we're now going to do, I think – we've just got such a backlog – we've now delegated the job to at least two members for each of the last two or three Conferences. They gather the papers. I think they're going to put them in an Eastlight file or something, photocopy them, and send them out to all the people.

Financially how does the Association operate?

There's an annual membership fee that is used partially to administer the Council meetings, the Conferences tend to be self-funding. We also sponsor a young Barrister to the Advanced Litigation Skills Course each two years and so we put aside about $2,000 for that as part of our contribution towards the training of young Barristers.

Is there anything else that you would like to comment on?

What has surprised me since becoming President is the variety of issues which have arisen that need some input; increasingly the number of institutions that see the Bar Association as having a significant voice and a recognition that Barristers represent a significant number, or division, of practising lawyers, and that their views not only are of interest but are essential to the ongoing running of that part of the law. But that itself entails a good deal of work.

It's a somewhat vague question, but I take it therefore that you think that the Bar Association is not only a good thing in terms of the members getting something out of it but that it also does make a substantial contribution to the legal system as such.

I think it makes a contribution; I think it produces the best Conferences in New Zealand; I think it makes a contribution towards the issues that are concerning the profession; I think the contribution will become greater as time goes on as we get more members and the process gets more structured. I would like to have been able to put much more time into these issues, and I think most Council members would, but we don't have the infrastructure the Law Society obviously has.

Continuation of interview – 16 August 1995

At the end of the earlier discussion we had you referred to the Conferences organised by the Bar Association. I understand there was one recently in Queenstown. Could you comment on whether, from your point of view, that was a successful Conference?

Yes. It was a basically successful Conference. It fitted the format which we have been working on which is to combine some hopefully important conceptual issue which is of some significance to the Bar, plus some practical issue which is of equal significance. So we divided it up into two sections; the primary one which was on the issue of the Privy Council (and we did that in two parts); and the secondary discussion was on the issue of costs.

The last is a matter of some importance to everybody.

Absolutely, yes.

Including the clients.

Indeed, and that was reflected in the calibre of the speakers. We had Judges from the High Court, from the District Court; senior and junior practitioners, all being involved in that debate and it was a very interesting one.

Perhaps just a couple of practical questions first. How big was the attendance?

The Queenstown Conference is generally about 60, plus speakers. It was the same this year. The Wellington and Auckland Conferences are larger.

And, were they mainly people from the South Island, or geographically spread, or mainly from Auckland, or what? Auckland after all has the largest single group of Barristers and presumably therefore members.

I think probably a greater percentage would have come from Auckland, but there were attendances from right round the country.

Could we talk then about the Privy Council issue first? Were there a variety of papers given on that or just one keynote paper?

No, we divided it up into two issues; the first debate seemed the logical

one which is whether the Privy Council should be abolished at all, and the second session was devoted to an alternative structure in the event that the Privy Council was abolished.

On the first issue.

That is whether abolition should occur or not.

Indeed. On both sessions we spent a good deal of time working out who would be appropriate speakers and trying to get the speakers of the greatest authority on the issue.

This is when you were organising the Conference.

Yes. And I think we achieved that. For instance the speakers in the first session included John McGrath, Solicitor-General speaking essentially for the Attorney-General. We had Roger Kerr speaking really on behalf of The Roundtable. We had Donna Hall speaking for Maori interests, and Ken Keith.

It was a very successful debate because we got the diverse points of view from various sectors of the community who saw the Privy Council as a very important part of the Court structure; and in the case particularly of Roger Kerr and Donna Hall they are very reluctant to see it go.

At least in Roger Kerr's case he expressed himself with some vigour on the subject.

Well, yes. We knew that any paper that Roger Kerr would give would be controversial in the sense that we knew it would present a particular point of view and we knew it would be done coherently and with considerable force. What I actually hadn't anticipated was that Roger Kerr would give his paper to the media before in fact he'd actually delivered his speech. I was rung by the media within minutes of the speech being delivered and asked for my views on the story. I had no idea what they were talking about. However, when they faxed the story through, I realised what had happened and was able to give an appropriate comment. But the controversy I think does no harm. They are interesting ideas and they are part of the process of working through where we should go.

Well, was there a general discussion following the presentation of the papers, and if so was there a consensus, a strong difference of opinion,or what?

Well, there was a very interesting discussion subsequently. I think it would be fair to say that while the majority of those present recognised that the Privy Council should probably go . . .

Should, or would?

Well, would go. But there was a massive resistance to the idea that the alternative should be of lesser quality than what we presently have.

So, and that was related to the second part of the discussion?

Yes, and that of course spilled into the second session which is "What was an appropriate alternative". And again we had speakers of very high quality. We had invited a very well known Sydney Barrister, David Jackson QC, an authority on constitutional issues in Australia and ex-Federal Court Judge, and his view was firmly that there should be two rights of appeal. The second appeal being only with leave. The issues quickly became a debate as to whether the alternative argued by Mr McGrath on behalf of the Government which was option 2 . . .

Yes, that's in his report to the Government is it?

Yes. Or, option 4 which is the one we favoured. Now amongst the other speakers was Justice Tipping who gave a formidably argued and very impressive paper on why the two rights of appeal ought to be an essential part of the new process. We also had a very carefully argued view from Sir Ivor Richardson, who argued for the second option while recognising that in an ideal world option 4 would be appropriate. But he didn't think it was necessary at this stage and while his paper was given with all the care and logic that one would expect from Sir Ivor, there was no doubt that the views of those present were firmly behind the views expressed by Justice Tipping rather than by Sir Ivor.

Perhaps it's an interesting perspective as between a High Court Judge and a Court of Appeal Judge.

Well yes, and it is interesting because Sir Ivor said, or we certainly were told by someone, that the Chief Justice and the Judges of the Court of Appeal were of the view that option 2 is the appropriate one.

I published an interview in The New Zealand Law Journal *in March of last year when the Chief Justice went out of his way to state that.*

The question that flows from that is, as a consequence of the views expressed at the Conference, will the Association be making further representations of any sort?

Yes, we have.

You have done that?

Yes, we have prepared a quite elaborate submission for the Attorney-General arguing that if the Privy Council has to go then it cannot do so unless there is an alternative in place that is at least of the same quality as what we have. And we see that as being unquestionably option 4, and that there should be firm commitment that that should be in place prior to the Privy Council being abolished.

Well, what other matters came up at the Conference that would be of general interest to the profession?

I think that there was nothing else in a formal way. The importance of the issues was recognised in the debate – in the quality of the debate. The question of costs of course also was discussed.

What actually came out of that discussion?

The issue really came down to a debate about the scale. Clearly the scale as it stands doesn't work any more and is increasingly, at least in the High Court, being ignored. Justice Fisher I think is on a Committee looking at this.

So, when you say it doesn't work at present do you mean it's inadequate, or that the Judges largely ignore it?

Well, the Judges largely ignore it because it is seen to be inadequate. It's simply out of date. The issue then is what replaces it. Should it be replaced by an up-dated scale or should an award be based on giving the Judges greater discretion and linked with the actual costs of the litigation and if so should it be the whole of the successful party's costs? Or should it be just a contribution, and if so how much? The general consensus was that a scale, while of assistance because it suggested some certainty and hence an ability to be able to advise your clients of the likely cost in the event if they are unsuccessful, there was nevertheless a real preference for greater discretion linked with an appropriate percentage of actual costs. I think by the end of the day there was a preference for somewhere about two-thirds.

As far as a scale tied to actual costs of course that would probably inevitably result in taxation of all bills?

That possibility was a concern expressed by a number of speakers and there was unanimity in rejection of that. No-one was the slightest bit interested in getting into that regime.

That is having all bills taxed?

Yes. Justice Hansen who was a speaker on this topic and who had had some experience with it in Hong Kong was adamantly against it, as were all the other speakers.

Anything else about the Conference or shall we go on to talk about Justice Hansen and his swearing-in?

No, apart from it also having a splendid dinner, with a very fine after dinner speech by Justice Thomas, and splendid skiing.

Good. No legs broken?

No, no legs broken.

Well that's a blessing.

John McGrath was safe this time.

Yes, he put his shoulder out last time didn't he?

Yes, that's right.

The other matter that I would just like to ask you is about the Association generally and the involvement as yourself as President at the swearing-in of Justice Hansen? Is this the first time that has happened?

Yes, that's the first time we have been asked to give a formal address at a swearing-in of a Judge.

And do you see that as a positive step?

Very positive. Particularly as that appointment had some particular significance. It was the first appointment made under the Attorney-General's new regime of greater consultation.

Oh yes.

And it was also the first time that a Master had been appointed a permanent High Court Judge. We agreed with both of those developments so the invitation to be able to speak at the ceremony, which I think was possibly as a direct result of a personal invitation by Justice Hansen, was one we were delighted to get.

So we can take it from the Conference and from the development in respect of Justice Hansen that you see the Association as having a substantial role to play in the future development of the legal profession?

We think it has a crucial role.

Why would you say crucial?

Because we see the Bar Association as being the primary voice for the independent Bar and since they are now the primary users of the Court structure then it follows that their views on Court structures, and matters that relate to Court procedures and indeed the whole Court system, should increasingly be taken into account. □

Asia-Pacific Lawyers Conference

The 6th General Assembly and Conference of the Asia-Pacific Lawyers Association is to be held in Bangkok from 5 to 8 November 1995.

The papers at the Conference will be given by distinguished lawyers from several Asian and Pacific rim countries, including Singapore, Japan, New York, Shanghai, the Philippines, Moscow (!), Canada and Korea, as well as Thailand of course. The topics to be considered are primarily commercial ones. They will consider the legal trans-border perspectives on such subjects as Intellectual Property Protection, Stock Exchange transactions in China and in Thailand, Energy Law, Globalization of Free Trade and the European Community. There will also be seminar type meetings to discuss such matters as Natural Resources, Dispute Resolution, and Maritime Law.

The Conference will be a most prestigious one. It is under the patronage of the President of the National Assembly, and of the Chief Justice of Thailand. It will be formally opened by the Prime Minister.

The venue is the Oriental Hotel, Bangkok. There will be a social programme for accompanying persons. Thailand has a richly interesting culture. It is geographically and in terms of population, approximately 54 million, about the same size as France.

Further information about the Conference (and registration forms) can be obtained from P J Downey, Box 472, Wellington, telephone (04) 385 1479, or fax (04) 385 1598. Alternatively anyone interested can communicate direct with the APLA Host Committee Secretariat, C/o Anek and Associates, 19th Floor Wall Street Tower, 33/96 Surawong Road, Bangkok, Thailand. The fax number is (662) 236 5835.

□

Book of constitutional essays launched

On 8 August 1995 the Attorney-General the Hon Paul East QC launched the new book Essays on the Constitution *at a function at the Beehive, Parliament Buildings, Wellington. The remarks of the Attorney-General and of the editor Mr Philip Joseph are published herewith.*

Address by the Honourable Paul East QC, Attorney-General of New Zealand

As we speed, with increasing velocity, towards the Mixed Member Proportional system of representation, we tend to concentrate on the process – the list seats, the electorate seats, voting thresholds and so on.

While that is understandable as MMP represents a monumental change in the way we elect our representatives I believe there are equally, if not more, important issues surrounding the legal and constitutional framework underpinning our democracy.

That is why this collection of essays on the constitution, ably edited by Philip Joseph, is so important. It serves as a reminder to us all that the *principles* of democracy cannot be overtaken by the *process* of democracy.

The collection also serves to make another very important point. That is, the principles underpinning our constitution are founded on the law. I guess that is a point not always appreciated by the public whose sole view of "constitutional" matters is largely restricted to the day-to-day ebb and flow of contemporary politics.

Perhaps if the New Zealand public knew more about the legal and constitutional foundations of our democracy, there may have been less of a desire to support such a fundamental change to our electoral system.

May I also add that if the New Zealand public knew more about our constitutional framework, they may be less inclined to make unsubstantiated and intemperate criticism about our judicial officers.

The judicial system holds the fabric of our society together. It is all too easy to criticise, especially when one is not inhibited by knowledge of the facts. When mud is thrown, some of it inevitably sticks. Repeated criticism steadily erodes public confidence and nourishes doubts as to the competence of our Courts. Any spectacle of the Judges entering the public arena in defence would only lead to a public slanging match and somehow at the end of it, the judiciary would simply not enjoy the same respect.

This is not to say that the Judges are above criticism – they are not. They need to be and are aware of prevailing social attitudes and opinions. If anything they, like most people, are sensitive about adverse comments. What it is, that goes too far and is so damaging is a personal attack on a Judge or unfounded criticism of the judiciary generally.

Back to this fine publication. While, as a lawyer and a politician, I welcome the publication of this collection, as a father of three children still at school, I do have a concern that we tend to start our "constitutional" education only at the university level and only in subjects like law and political science.

I could see a place for this collection, in a different format and style designed for a different level of comprehension, aimed at our secondary schools. I am led to believe that apart from some constitutional history, there is very little attention given to the New Zealand constitution at the secondary level.

It seems to me that the New Zealand Constitution should be a legitimate and important area of our children's education and I would urge those who contribute to the curriculum debate to consider its inclusion as an integral component of our national education framework.

But back to today's function. My congratulations must go to the editor, Philip Joseph, Judges, law professors, practitioners and other notable contributors, even including a humble Member of Parliament – and the publishers, Brookers.

It is a very readable, erudite collection and will serve as a valuable resource for academics, students and the public in the years ahead.

I conclude with an excerpt from the editorial of the *Otago Witness*, dated 1852, commenting on the British Act giving responsible Government to New Zealand. It reads:

> The fun and frolic were universal. The greatest good humour prevailed the whole evening; there was not a quarrel or an angry word; all seemed determined to do their utmost to welcome the tidings of the glorious constitution.

Perhaps the citizens of 140 odd years ago had an attitude towards these issues that we have lost today?

And I wonder if the same good humour, without quarrel or angry word, will follow in the wake of our first election under MMP?

Regardless of the future, our presence at this particular function demonstrates our determination to "welcome the tidings of the glorious constitution".

It is my pleasure to launch *Essays on the Constitution*.

Reply by Editor, Mr Philip Joseph to the Attorney-General

Thank you Minister for those kind words. And for officially launching *Essays on the Constitution*.

Like the Attorney-General, I believe these essays will have lasting impact. These essays are as much about the future as the present. Take the prospect (some here this evening may say the "inevitability") of New Zealand becoming a republic; the abolition of the Privy Council Appeal; the future of trans-Tasman relations; the anticipated impact of MMP, and so on. Each of these issues is covered. Each, in a sense, charts the future.

But let us dwell for the moment on the present. All of the essays traverse quite different territories – no two cover exactly the same subject-matter. Yet they all nurture one fundamental idea, a realisation that we have reached a particular stage of constitutional development – a stage espousing, in a word, *nationhood*. Constitutional lawyers may prefer the term "autochthony", from the Greek word meaning "sprung from that land itself". But at this venue, I prefer the simpler, instantly more digestable term, "nationhood".

In my Preface, I quoted back words I wrote in the Introduction: "These essays [I wrote] are a reflection of our national culture . . . a unique record of our constitutional and political life." And I referred to a lovely observation made virtually a century ago, in 1897, in the *New Zealand Graphic*. The *Graphic* inquired rhetorically: "Has it ever occurred to you that the truest reflections of our national character and tendencies are to be found in our statute books?" That is, in the embodiment of our laws themselves.

This "character", these "tendencies", identify today our evolving sense of identity as a South Pacific nation, founded on bi-cultural principles, principles distinctively and uniquely ours. So I commend to you the stark symbolism of the book's title: *Essays on the Constitution*. Not *Essays on the New Zealand Constitution*, but simply *the Constitution*. For we now acknowledge no other.

Today we do not look to Britain for our sustaining functions, for either our constitutional legitimacy or foundations. A simply expressed proposition holds particular appeal for me, principally because it is self-referring: "We are because we are and for no other reason, as a law-constitutive fact itself". That reasoning may not appeal to any logician, but I believe it perfectly captures the New Zealand peoples' sense of "existence" and "self". We no longer perceive ourselves as the historical subordinate of some former colonising power.

We are not called upon to disavow our historical root. This remains firmly embedded at Westminster. We should not feel uneasy about that. But our *legal* root has since separated. In a subtle but perceptible way, our legal root has transplanted and has firmly taken hold in New Zealand soil. If these essays have a unifying theme, it is just that – that we have evolved from a colonial, settler community to embrace our own uniquely New Zealand culture, and to pursue what the late Sir Keith Sinclair popularised in his book, *A Destiny Apart* (1986). As a lasting and an authoritative record of that fact, I warmly commend these essays.

As editor, there remain three things I must do: Sir Robin Cooke asked that I convey his apology and regret, that he could not join us this evening. He has been spirited to foreign parts. Sir Robin, I mention, wrote the lead essay, "The Suggested Revolution Against the Crown".

Secondly, I welcome this opportunity again to thank each of the contributors. Their individual standing and reputation within their respective fields need no recounting. All had to fit this project around exacting professional and public responsibilities.

Lastly, to The Law Book Company and Brooker's in collaboration, who made these essays possible, my sincere personal thanks. □

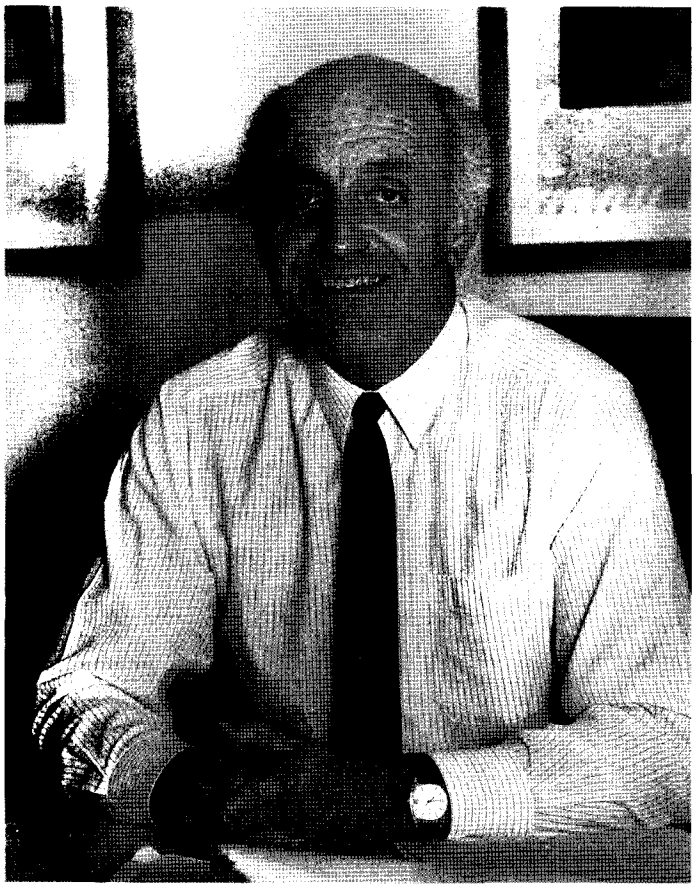
Dissenting from Denning

Again, referring to my experiences as a colleague of Tom [Lord Denning], there were occasions when I did not agree with his judgments. Sitting as No 2 at his right hand in his court was one of the most responsible and exhausting of judicial activities. Not only did you have to keep up with him, which was very hard work, but if you were going to disagree, the odds were that you would have to do so in an extempore judgment and would probably be supported by judge No 3. You would thus be giving the majority decision of the court. When this occurred there would be no form of pressure by Tom to bring you into line, or resentment for slowing up the development of the law as he saw fit. If the two of you were going to disagree he would probably say "Well, you two had better write your dissenting judgments". Tom did not "dissent". He had this tremendous gift of total confidence in the correctness of any decision he made and that if he was in the minority, sooner or later he would be found to be right (as was, indeed, not infrequently the case).

Lord Ackner
New Law Journal
p 527, 14 April 1995

Judicial appointments

His Honour John Hugh Williams



The Attorney-General has announced the appointment of John Hugh Williams QC to be a Judge of the High Court of New Zealand. The appointment is as a temporary Judge for a period of 12 months from 15 August 1995. The appointment is to be made permanent in due course.

The new Judge was born on 23 September 1939 at Nelson. His secondary schooling was at Wellington College and Gisborne High School. He completed his Bachelor of Laws degree at Victoria University of Wellington in 1963, and his Master's degree in 1966.

In 1962 he was admitted as a Solicitor of the High Court and as a Barrister in 1963. He practised as a Barrister and Solicitor in Palmerston North between 1962 and 1981, becoming a Crown Prosecutor in Palmerston North in 1977. From 1981 to 1988 he was a Barrister sole and in 1988 became Queen's Counsel. In 1989 the Judge was appointed Master of the High Court at Wellington, which office he held until 1993 when he returned to practice, this time in Auckland.

His Honour took an active part in Law Society affairs being on the Council of the Manawatu District Law Society for several years, becoming President in 1982. He was a Councillor of the New Zealand Law Society for the years 1979-81. He was at various times a member of the Barristers' Rules Committee, of the Courts and Tribunals Committee (of which he became Chairman), of the Committee on the Structure of the Courts (of which he also became Chairman), and of the Council for Legal Education.

The new Judge has been a Palmerston North City Councillor from 1983 to 1989, and has been on the Council of Massey University since 1970. He is currently Chancellor of Massey University which position he has held since 1990.

His Honour is married to Margaret Joy (Kinney) and has two step-children, a son and a daughter. He lists his recreations as bee-keeping and gardening. He will sit in Auckland.

Her Honour Sian Seerpoohi Elias

The announcement by the Attorney-General of the appointment of Sian Seerpoohi Elias QC to be a temporary Judge of the High Court of New Zealand for twelve months from 1 September 1995 had long been expected within the profession. Her Honour's appointment will be made permanent in due course.

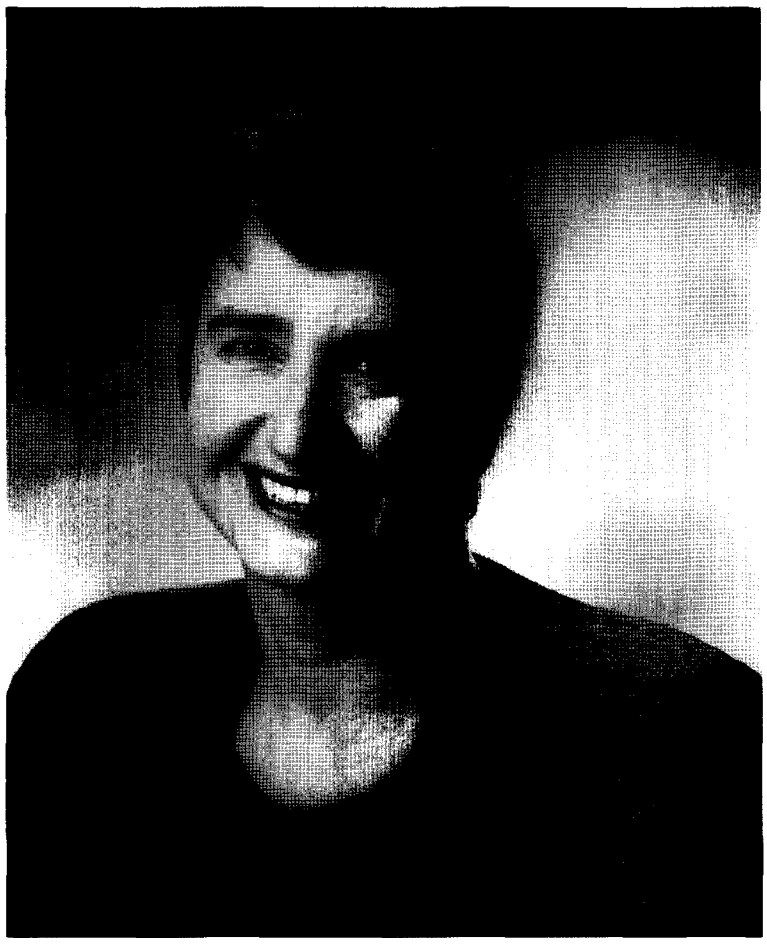
Her Honour was born in London on 13 March 1949 and came to New Zealand in 1952. She was educated at Titirangi Primary School and at Diocesan High School for Girls, Auckland. She graduated LLB (Hons) from Auckland University in 1971, and with a JSM degree from Stanford University, California in 1972.

She was admitted as a Barrister and Solicitor of the Supreme Court

of New Zealand in 1970. She was in practice in Auckland, working in the firm of Turner Hopkins and Partners from 1972 to 1975. In 1975 she commenced practice as a Barrister sole, and was admitted to the Inner Bar as a Queen's Counsel in 1988. She became Queen's Counsel at the same time as the present Deputy Solicitor-General Lowell Goddard QC when they were the first two New Zealand women Barristers to take silk. She was the Commentator for the title "Powers" in the *New Zealand Commentary on Halsbury's Laws of England* edited by the late Rt Hon Sir Alexander Turner.

Between 1984 and 1989 Her Honour was a member of the Law Commission, working on the Company Law Project. She was Motor Spirits Appeal Authority 1984-1988, and Chairperson of the Ministerial Committee to review health consequences of the ICI fire 1989-1990. In 1984 she was appointed a Member of the Working Party on the Environment. With Rod Hansen QC Her Honour was co-convenor for the Ninth Commonwealth Law Conference held in Auckland in 1990. She has been a member of a number of Law Society Sub-committees and ad hoc Committees.

The new Judge will sit in Auckland where the only other New Zealand woman Judge, Dame Silvia Rose Cartwright also sits.



Her Honour is a member of a number of community trusts and organisations including the Council of Auckland University. She lists her recreations as music and chess.

She is married to Hugh Alasdair Fletcher and they have two sons. □

Nature of an appeal

I am afraid that this [raising some incidental questions] shows a misapprehension by the Registrar or his advisers about the nature of an appeal to your Lordships' House. The purpose of the "exercise", as it is called, is not to provide the occasion for a ramble through the statute, with a pause for your Lordships to express an opinion on every point of interest, and still less for discursion into minor issues on which there is not any great difference between the parties. The procedure is adversarial, not advisory, and as I understand the practice your Lordships will not enter even into important questions unless there is a direct issue upon them between the parties to the suit. I therefore propose that your Lordships should not accept the invitation to discuss the meaning of "intended by the author of the design" and "integral part". Similarly, although submissions have been made on the meaning of "dependent", a word which also appears in paragraph (b), and which may indeed be of importance when the Registrar comes to consider individual cases, a conclusion upon them is not necessary for a decision on whether or not the appeal should be allowed. It is possible that if the controversy had come forward in a less abstract form, with reference to specific issues illuminated by much more extensive and concrete evidence, some of these points might have been the subject of decisions below which could be reviewed on appeal. This is not the case, and the matter can be taken no further.

In these rather unsatisfactory circumstances I propose that your Lordships should do no more than dismiss the appeal on the ground debated under the first issue. I should record that although reference was made in argument to the Parliamentary history of the Act, I have found that on this question it affords no useful guidance.

Lord Mustill
Regina v Registered Designs Appeal Tribunal ex parte Ford Motor Co Ltd
House of Lords, Judgment
14 December 1994

Correspondence

Response to Bernard Robertson's article: "Law, religion and economics" [1995] NZLJ 192.

From Ruth Smithies, Project Assistant to Thomas Cardinal Williams, Catholic Archbishop of Wellington.

Dear Sir,

Bernard Robertson is entitled to disagree with Catholic social teaching and reject its view on human nature and key concepts such as the common good, the virtue of solidarity and the call to social justice.

But he is not entitled to misrepresent that very same teaching or the Church leaders' Social Justice Statement. For example Robertson writes: "but there is no mention in [Ruth Smithies'] essay of the Decree of Vatican II on the Dignity of the Human Person with its emphasis on free choice". Presumably Robertson is referring to the Declaration on Religious Freedom (7 December 1965). The Declaration explains the general principles of religious freedom and discusses religious freedom in the light of revelation.

Significantly, the term "free choice" which Robertson uses, appears nowhere in the Declaration. On the contrary, the document places the question of liberty in the context of the Church's teaching on the inviolable rights of the human person, with frequent references to Pope John XXIII's encyclical *Pacem in Terris*. And it states explicitly that the protection and promotion of these inviolable rights is an essential duty of every civil authority. The encyclical *Pacem in Terris* provides a detailed list of these rights (PT 11-27). They include the right to food, clothing, shelter, medical care, rest, and the necessary social services. Contrary to what Robertson writes, in Catholic Social Teaching it is decidedly the State's task to protect and promote the rights of all its people.

Robertson sees a logical void between Christ's teaching that we should take personal responsibility to care for the poor and prescribing compulsion by enabling the state – through a progressive tax system – to ensure that people have "food, clothing, shelter, medical care, rest and the necessary social services", to quote Pope John XXIII.

First of all, Robertson seems to believe that we only act freely as individuals and that the moment we act collectively, we cannot act freely, implying that it is not possible to make decisions collectively as if we did not live in a democratic society with free elections every so many years! But more importantly, Robertson assumes that our economic, political and social structures are outside our personal responsibility – as if they are predetermined or inevitable. Yet structures and institutions have been developed by people deciding to organise their society in a particular way. They have been different in the past, they can be different in the future if we choose to change them.

Christ's teaching of loving our neighbour, including the poor, applies both to the way we relate person-to-person as well as to the way we choose to organise the structures, the institutions, the laws and regulations of our society. Charity and social justice are the two expressions of Christian love: charity is reactive, social justice proactive. Charity supplements social justice, it is not a substitute for it. Made in God's image, human beings have been given human dignity. It is an inalienable dignity and carries inviolable rights. Christian love is not about giving to someone in charity what in justice – in God's salvific justice – is owed to him or her.

It seems to me that the social justice debate is essentially a debate about the true nature of the human person and of the created world. Contrary to Von Hayek's view that what matters is to allow people to pursue their own ends on the basis of their own knowledge and not to be bound by the aims of others, Christians believe [1] in a God-centred interdependence, knowing that their true self is not to be free from others – with or without restrictions under the law – but a freedom for others. Christians realise that they are tied to God and one another because of a common creation, dignity and destiny. This has consequences for public morality. To quote the 1994 universal *Catechism of the Catholic Church* (CCC 1738): "the right to the exercise of freedom (. . .) must be recognised and protected by civil authority within the limits of the common good and the public order".

I wonder though whether Robertson has read the Church leaders' Social Justice Statement itself. For example, to imply, as Robertson does, that the Church leaders are advocating a system in which we are all dependent on the state for our development, is so far from what the Church leaders actually said, that the charitable interpretation is that Robertson has not seen the full Statement. His comment that Cardinal Williams has now worked himself into a bind (by committing himself to a particular policy through a recent submission I presented to the Finance and Expenditure Select Committee in March) is another example of Robertson's ignorance. Already in 1987 Cardinal Williams advocated progressive taxation in a lengthy submission to the Royal Commission on Social Policy which included the articulation of three criteria – adequacy, progressivity and economic neutrality – for an equitable and fair taxation system (in *Catholic Teaching and Social Policy*, September 1987; available from JPD, PO Box 1937, Wellington).

By all means let us debate the issues and the premises we work from. But let us do so, adequately informed and without misrepresenting the other side.

Ruth Smithies

Trade Law Harmonisation in the Asia-Pacific Region

A realist's view from New Zealand – and a way forward?

By Luke Nottage, Lecturer in Law, Victoria University of Wellington

Harmonising commercial laws is an important element in assisting the development of trade between nations. In this article Mr Nottage considers issues that arise more particularly in the Asia-Pacific region in which so much of New Zealand trade now takes place. He argues that working together both internally and externally, is important for legal practitioners as for others. The article reports on a conference on the issue held in Auckland in July of this year.

A message emerging from a conference in Auckland in July, on "Harmonising International Law to Benefit Trade, Business and Investment in the Asia-Pacific Region", bears reporting to a wider audience. New Zealand is becoming aware of the growing economic relations with its neighbours in the Asia-Pacific region. However, New Zealand practitioners, academics, and lawyers in business and government must work together conscientiously and in a structured manner, with counterparts in the region, to ensure that legal developments are also considered. This will not happen by itself. It requires the Law Societies, the universities, a range of government bodies, and legal experts in business to work together to identify priority areas and develop long-term strategies.

This article introduces some institutions with a role in this process that may not be familiar to readers, and summarises key issues. It also reports on some aspects of the Auckland conference, raising broader questions and offering some constructive proposals.

Institutions and issues

The Pacific Economic Cooperation Council joins together business, government and research representatives from 21 Asia-Pacific economies, to work on practical government and business policy issues to increase trade, investment and economic development in the region. It is an independent Non-Government NGO; but can be effective in influencing government policy in the region as some members represent governments, as well as indirectly through APEC. PECC is the only non-governmental organisation (NGO) with observer status in APEC, and there are relationships between their working groups, APEC having directly commissioned work from PECC. PECC has an International Secretariat in Singapore, but coordinates its activities through its Coordinating Group and Standing Committee, comprised of the Chairs of all the member national committees. The New Zealand committee (NZPECC), chaired by Kerrin Vautier, has a Trade Law Harmonisation Group.

The Auckland conference came under the auspices of NZPECC and the Australian committee (AUSPECC), and was supported by the New Zealand Law Commission, the Australian Attorney-General's Department (AGD), New Zealand International Business Councils Ltd, and Russell McVeagh McKenzie Bartleet & Co.[1]

In May 1992 AUSPECC put to PECC a Harmonisation Proposal that led to this conference and its predecessors. It saw a role for PECC to promote more systematic examination and adoption of a number of international trade law instruments in the region, through broader based information sharing. It perceived a rather haphazard approach in countries in the region, resulting more from difficulties in allocating the necessary resources to considering them and developing more systematic and broad-based decision-making processes, than from any particular objections to such instruments, usually well thought out and gaining more consistent acceptance outside the region.

The Harmonisation Proposal was approved by PECC, and meetings were organised in November 1992 (Canberra) and in September 1993 (Singapore). The latter meeting focused on disseminating information on:

(i) the ICSID Convention, a specialist mechanism for settling investment disputes between countries and individuals (signed by New Zealand in 1970 and ratified in 1980, in force from 2 May 1980);

(ii) the 1958 New York Convention on the Recognition and Enforcement of Forcign Arbitral Awards (acceded to in 1983, in force from 6 April 1983; recently discussed in *Baltimer Aps Ltd v Naldor & Biddle Ltd* (1994) 7 PRNZ 447 and *Leucadia National Corp v Wilson Neill Ltd* (1994) 7 PRNZ 701 at 707);

(iii) the 1980 UN Convention on Contracts for the International Sales of Goods ("CISG", acceded to by New Zealand after the Singapore meeting, and in force from 1 October 1995); and

(iv) the UNCITRAL Model Law on International Commercial Arbitration (which deals with aspects beyond recognition and enforcement, and forms the basis for the reform proposals in the Law Commission's Report No. 20 dated October 1991).[2]

The Singapore meeting confirmed the need for more information flows,

but also for education on international trade law instruments. Dr Mochtar Kusuma-Atmadja, former Minister of Justice of Indonesia, remarked that harmonisation of US commercial law through the UCC had taken roughly one generation and consistent efforts from the law schools; but that continuing legal education of lawyers can generally speed up this process, the ideal mix being a concurrent investment in the present (practitioners) and for the future (students and their teachers). He also noted the common difficulty of putting international trade law issues on the legislative agenda in the countries of the region, compared to more politically charged issues; but foresaw a likelihood of this changing as legal infrastructure was increasingly seen as as important as any other legal infrastructure, and important segments in the legal community became more actively involved in putting it on the agenda. Another major difficulty identified at the meeting was the parallel importance of getting business and business groups involved, given the "chicken and egg" situation of business expecting the benefits of harmonisation while expecting it to be achieved by "the lawyers". The benefits of adopting international trade law instruments like the four above were perceived as:

- providing greater certainty for traders, and thus reduced cross-border transaction costs;
- greater enforceability of an arbitral award, and thus a further incentive to propose this form of dispute resolution instead of Court litigation; and
- attracting or keeping more arbitrations in the region.

These benefits make sense to a New Zealand lawyer who has to advise clients on international transactions; but they are not necessarily communicated to a busy client. Also, once a deal is done, there is little incentive to lobby government or other groups to address an issue that has been carefully worked around (as well as can be). For example, companies exporting to Japan may be advised to insert a clause providing for arbitration in New Zealand, to avoid possible extra difficulty in enforcing a New Zealand Court judgment in Japan. But their legal advisors should already have had occasion to work through many of the issues in Article 200 of the Code of Civil Procedure regarding enforceability, and may be following the debate in Japan on possible reforms in this area. So the extra transaction costs for clients who find themselves wanting to enforce a judgment, or who intensely dislike arbitration, become quite minimal. Partly for that reason, and also because of the well-known phenomenon that business clients on the verge of a deal tend not to be too concerned about the possibility of a dispute arising, relatively minor uncertainties do not necessarily filter through to the collective consciousness of business clients. Furthermore, having made that investment in working through those issues in previous cases, or having successfully prevailed on the client to insert an arbitration clause, there are pressures on the lawyer to turn to the next file.

Similarly, the lawyer who has worked through issues regarding service and judicial cooperation in Japan under the existing New Zealand law, has little incentive to consider how to push New Zealand along the road of adopting certain further instruments that Japan is party to:

- the 1954 Hague Convention relating to Civil Procedure; and
- the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

However, it would be easier for New Zealand practitioners to take that extra step if there were an identifiable body to take up and coordinate that sort of proposal. Furthermore, there must be a long-run incentive to lawyers to be involved in this process, as it would help them to keep up to date at a time when many are already doing work offshore that calls for them to be familiar with the range of international instruments that are being adopted worldwide. Thus, for instance, a New Zealand lawyer assisting a law firm in Japan with marine cargo claims against shipping companies must be fully conversant with developments *worldwide* under *all* potentially relevant international instruments. (Maritime law in Japan has traditionally been influenced by English law; but reference is now made to much broader international developments in this area.)

In that regard, it should be noted that the initial impetus for the Harmonisation Proposal came from the AGD's International Legal Services Advisory Council (ILSAC), a consultative forum for private and public sector interests on issues such as how Australia can:

- react competitively to the globalisation of legal practice;
- develop a useful role in international commercial dispute resolution;
- promote international legal education and training given growing demand in the region (an issue now being partly addressed together with a sister organisation, the Australian International Legal Cooperation Committee, charged with fostering closer relations in the legal field with Vietnam, Laos and Cambodia); and
- locate broader legal cooperation in the region with Australia's commercial and other objectives.

Key members of ILSAC are also involved in the International Law Section of the Law Council of Australia. This sort of interaction in Australia between the government and the legal profession (which can also include academic lawyers) is instructive for New Zealand.

In late 1994 the Commercial and Business Law Committee of the New Zealand Law Society suggested the formation of an ad hoc International Legal Practice Issues Subcommittee to discuss:

- the possible contribution of the New Zealand profession in the international legal services market (eg through the use of an Overseas Consultancy Register, to signal the expertise and availability of New Zealand lawyers to work on certain offshore projects);
- the competence issues and information needs for those currently involved in such work;
- the respective roles of the New Zealand Law Society, the Law Schools, and government entities like MFAT, TRADENZ, and the Law Commission; and
- whether New Zealand needs a reciprocal foreign lawyers policy.

Draft recommendations have been circulated to Subcommittee members, before the final report is submitted to the New Zealand Law Society Council. Bearing in mind the Australian experience, it may be time to make the Subcommittee a standing one rather than ad hoc, so that it can furthermore build relationships with other appropriate bodies in government and business. Terms of reference could also be widened to identify competence issues and information needs regarding international trade law developments among the profession generally, not just those already undertaking offshore consulting work. As mentioned below, taking the example of CISG, these issues impact more on New Zealand practitioners than may be currently realised. This provides a more immediate and broader-based incentive to New Zealand practitioners to keep informed in this area: professional liability, if they do not.

Another important institution acting as a catalyst and a resource in this area is the UN Commission on International Trade Law (UNCITRAL). The initial Harmonisation Proposal specifically mentioned UNCITRAL's work in developing model laws and international convention relevant to international trade, such as CISG and the Model Law of Arbitration, and it has taken over responsibility for others like the earlier New York Arbitral Awards Convention. Earlier meetings also identified its importance in education, and the opportunity to harness its global orientation to an "open regional" initiative like this.

Consequently, the Auckland conference was preceded by an afternoon of stimulating working sessions led by UNCITRAL's indefatigable Secretary-General, Dr Gerold Hermann. After outlining the history and aims of UNCITRAL, Dr Hermann offered unique insights into certain aspects of the New York Convention, CISG, and the Model Law on Arbitration, which UNCITRAL has responsibility for, and other UNCITRAL instruments whose adoption was not specifically discussed at the conference the next day.[3]

The 18 participants at the working sessions were also fortunate to have the President of the Australian Law Commission, Alan Rose, briefly introduce the International Institute for the Unification of Private Law (UNIDROIT). This older UN body, based in Rome, has recently elaborated Principles of International Commercial Contracts, which aim to go beyond the typically delimited scope of its conventions proposed for particular commercial transactions (factoring, financial leasing, etc). The Principles may:

- be used to interpret or supplement international instruments, such as CISG (on which it has drawn, while extending coverage);
- serve as a model for legislators; or even
- be chosen by the parties as the law governing their contracts or referred to by arbitrators in settling disputes.

Although the Principles were only approved in May 1994, they may well come to affect the landscape of harmonisation of law – and possibly of practice – in the region, and beyond. Already they have been referred to in a major international arbitration involving listed New Zealand and Australian companies.[4]

The Auckland Conference: Convergence or divergence?

The conference itself, probably the first of its kind in New Zealand attracted 47 participants from 14 countries, predominantly (but not exclusively) from a legal background – in legal practice, business, academia, or government.

The main focus was on the legal, and particularly the practical impediments to harmonisation by means of the three international instruments highlighted at the PECC meeting in Singapore and discussed by Dr Hermann the previous day. However the first four speakers put those issues in a wider context. This is not necessarily done explicitly enough by those working in this area. They may assume that this context is known by those with a like interest or concern, or that a wider audience needs only the message, not the practical complications and qualifications. But the wider context is important so that those with an existing interest share a common understanding, and those whose interest has been more peripheral can start to identify more points of mutual concern.

The New Zealand Attorney-General, Paul East, opened the conference on a hopeful note, reporting that subject (as participants at the conference came to hear so often) to finding "parliamentary time", the prospects for "early action" appeared to be good for adoption of the Law Commission's draft Arbitration Law reform. At the same time, speaking more generally, a potential tension remained between dramatic examples of globalisation and particular views on sovereignty – or perhaps "nationalism".[5]

Rod Gates, a former Ambassador to Japan, also noted the sovereignty question raised at earlier PECC meetings. However he suggested that the main impediments to harmonisation of business law in the culturally diverse Asia-Pacific region will ultimately be assumptions and attitudes built on cultural differences as to how business is done there, the relevance of the law in business transactions, and the role of lawyers in facilitating them. Thus he argued that the laws for the foreseeable future harmonisation will have to be judged more by the quality of the process than the result. This process will involve a growing number of international organisations: the new regimes under the World Trade Organisation, others like the World Bank promoting legal reform and training in the region, various transnational organisations involving practitioners, as well as others already mentioned. PECC would retain an important role due to its tripartite role and influence either on APEC or other intergovernment groupings like CER, or on bilateral negotiations between governments. Participants in this process would also need to recognise that differences in commercial cultures may mean that a level of commonality falling short of full harmonisation may be a viable fall-back position, as the experience with CER shows. Similarly, broad differences in social and legal structures were seen as requiring lawyers to develop a community of experience and a thorough understanding of those differences.

The PECC initiative was also linked to APEC concerns by Veronica Taylor, Senior Lecturer at ANU and Associate Director (Japan) at the Asian Law Centre of the University of Melbourne. One concern is directed at dispute resolution. Another is the role of law as both the

problem (a potential trade barrier to transaction cost), and the solution (a familiar infrastructure open to improvement) – a concern leading to the doubtlessly more intractable area of competition law and policy. She also pointed to the multiple levels at which harmonisation operates. Those include statutory unification (through international conventions), non-statutory unification (eg the UNIDROIT Principles), partial statutory unification (eg the various domestic versions of Hague or Hague-Visby Rules) non-statutory harmonisation (through Judges), codification (as with Australian companies legislation), and the incorporation of private rule making in a new lex mercatoria. But they also include the private transaction choices of the parties and their legal advisors, in devising structures and documentation in different countries. She suggested that PECC retain a role in reducing transaction costs at various levels, but that limits must be recognised: the speed and nature of globalisation, yet concerns for sovereignty; working out linkages or demarcation disputes between new or existing organisations; variations in access to information and endowments in legal infrastructure in countries of the region, and consequent difficulties in implementing rules based on international instruments once adopted; and the proficiency of lawyers in this environment. However, of note for New Zealand at this stage remains what she termed a "minimalist" view, namely that it can be relatively easy to develop some critical mass in this process.

In contrast, Dr Hermann took a more optimistic view of the overall picture. He viewed harmonisation of law as functioning at two levels, as "equalisation", which should certainly reduce transaction costs, even irrespective of the content; and refinement or "modernisation", subject to a pragmatic recognition that "the best law" is likely never achievable. Thus, organisations like UNCITRAL are really aiming for what they consider as optimal, hoping that a high but not perfect adoption rate will nevertheless represent a worthwhile achievement. Problems of course also remained with ensuring consistent implementation world-wide, but Dr Hermann remained confident with overall trends. He also perceived some of the "Asian" elements in legal systems in the region as more universal, so that the "regional" aspect would be more usefully directed to a focused joint effort in adopting and implementing key international instruments.

Overall, it seems that these general tensions in the harmonisation process are reflected in the rather haphazard reception of CISG. Experts at the Auckland conference reported on the background to its non-adoption in three economies of considerable importance to New Zealand: Taiwan, South Korea, and the United Kingdom.

Professor Mao-Zong Huang of the National Taiwan University began with Taiwan's unique predicament with regard to adoption of UN conventions; but also stressed problems arising from some twenty differences between CISG and current sales law in Taiwan. The majority of these relate to breach of contract doctrine; the main problems identified were the need to "assimilate" the significant differences into current Taiwanese law without major "contradiction", given that Taiwanese lawyers are used to working with one cohesive system.

From a comparative perspective, this may indicate that a strong tradition of doctrinal development, worked out by academics and Courts can become an initial hurdle to any new scheme like CISG. But it also shows that this will not be an insuperable obstacle if adequate mechanisms for amending even a longstanding Code have developed. (Japan also shows a strong doctrinal tradition; but reform of the Civil Code has remained piecemeal and slow.[6])

Professor Kon Sik Kim of Seoul National University similarly identified two broad problems in South Korea: developing momentum to implement CISG among relevant bodies, particularly given that Japan had still not acceded to it, and inconsistency with current contract rules or practices in Korea. He noted some incipient interest, through the Administrative Reform Commission recommending accession in 1995, and a jointly sponsored Korean International Trade Law Association symposium in March this year involving representatives from universities, government and trading companies. However he concluded that South Korea would likely wait for Japan's lead. This related to his other point, that the "inconsistency" problem may lessen as Korean businesses become more familiar with CISG: no doubt they would find significantly more international sales contracts governed by CISG once Japan accedes.

Professor Francis Reynolds, on sabbatical in New Zealand from Oxford University, added a view coming from outside the "Asia-Pacific". However it meshed with views from closer neighbours, and it represents a tradition that New Zealand lawyers still find influential.

He neatly summarised the many arguments still raised in the United Kingdom against implementation of CISG there. There is said to have been insufficient professional and commercial input in drawing up CISG, resulting in a more academic treatment that pays little or no regard to problems of "strings" of contracts, future contracts, large-scale commodity transactions or documentary sales. Similarly, there has been some "theoretical" attempt to reconcile civil law and common law approaches. However matters have often been left open (such as the question of certainty or determination of price), and English lawyers continue to be concerned at how some other international instruments have been interpreted quite differently in civil law jurisdictions (such as the European Convention on Reciprocal Enforcement of Judgments). CISG is seen to have principal relevance to small-scale cross-border sales on the Continent; but even there difficulties are becoming apparent (such as delimiting the right to avoidance). A number of other provisions (such as "exemptions" for frustration of contract) will take time – and lawyers' fees – to clarify, and make operable. It remains possible to contract out of CISG provisions; but such attempts will not always be perfectly consistent, and will add to the complexities.

Nonetheless, Professor Reynolds was personally in favour of the United Kingdom implementing CISG, primarily because of its perceived "neutrality" for contracting parties where it is difficult to agree on how to "contract out"; and its potential long-term contribution to developing common understandings or, at least, an effective common "language". He was also in favour of

input into interpretation of CISG by common law countries. Some momentum may be gaining, with the Law Commission in favour of ratifying CISG, and particularly given a recent speech by Lord Steyn (in a non-judicial capacity) in the House of Lords.[7] On the other hand, the United Kingdom still faced the usual difficulties: finding sufficient "parliamentary time" (particularly in the case of a unified legislature), and lack of widespread enthusiasm among trading and professional bodies.[8]

In this light, New Zealand's accession to CISG last year, some two years after Law Commission Report No 23 recommended accession, is quite remarkable. This may be partly due to the Law Commission anticipating and responding succinctly to a number of the criticisms of CISG summarised by Professor Reynolds.[9] It also stems from forceful pragmatic arguments.

Firstly, a growing rate of accession has resulted in many of New Zealand's trading partners already acceding so that, *in principle*, CISG will apply wherever private international law rules lead to application of the law of one of those trading partners.[10] However, one potential problem reiterated by Dr Hermann is that some CISG member states (such as the Netherlands) may define that law as domestic sales law *excluding* CISG. Another is that two of New Zealand's major trading partners, the People's Republic of China and the USA, have entered a reservation under Article 95 against this avenue of application of CISG, meaning that if their private international law rules lead to the application of "PRC law" or "US law", CISG is *not* activated and their *domestic* sales law applies. (Professor Reynolds and Lord Steyn, in advocating that the United Kingdom ratify CISG, have also recommended making this reservation.)

Furthermore, it is difficult to know precisely what proportion of New Zealand's international sales are already governed by CISG via this avenue. If there is no express "choice of law" clause, a general rule of thumb among practitioners is that the law of the seller (the exporter) is likely to govern. But we would still need to know what percentage of transactions with parties in CISG member states involve the foreign party as seller rather than buyer, and anyway this is only a rule of thumb. If there is an express choice of law clause, it may well be that New Zealand businesses are often smaller and have less bargaining power (cf §134 of the Law Commission's Report), and may therefore agree to trade under the law of a CISG member stated – hence, in principle, under CISG. But this would also have to be checked empirically. Nevertheless, a review of the files of any significant New Zealand trader or law firm advising on international sales issues is likely to provide a surprising amount of existing transactions where CISG is already applicable.

A second pragmatic argument available to the Law Commission when it recommended accession to CISG was a recognised importance of business law harmonisation under CER. This latter now appears somewhat more problematic.[11]

New Zealand's accession also results from two further differences. Firstly, English law and London have traditionally been chosen by many parties to international contracts. English practitioners therefore have a direct financial interest in maintaining the status quo – if the latter must apply CISG's uniform law, practitioners in other countries may seem equally able to give the necessary advice. In contrast, New Zealand practitioners might well perceive accession to CISG as *expanding* the market for their services, both in the short term (through advice on changes to standard form contracts, resolving ambiguities in CISG provisions like those mentioned by predominantly English critics, through more skills in offshore work, or simply through a new edge on competitor firms in New Zealand) and over the long term (assuming for instance that a more harmonised regime *does* reduce transaction costs to expand the amount of business of both traders *and* their legal advisors).

The second difference may be a difference in judicial attitudes. One of the harshest public critiques of the United Kingdom's acceding to CISG comes from Hobhouse J.[12] In contrast, Hammond J in *Crump v Wala* [1994] NZLR 331 (at 338) went out of his way to look at CISG even in a domestic sale situation, to stress difficulties with the Sale of Goods Act treatment of rescission by the buyer (Ultimately, however, to no avail: the Court found that the current law still called for a finding that the buyer had accepted the goods.) More profoundly, such an openness may also reflect a greater "substantive" orientation of New Zealand legal system, including its approach to contract law, although the record remains mixed – the "formal" orientation inherited from English law still remains strong.[13]

Broader questions and some constructive proposals

The Australian Attorney-General's Department will shortly release its report on the Auckland conference, including the final recommendations. From a New Zealand perspective, two broader questions seem to remain even after accession to CISG:

(i) does New Zealand have the structures in place to ensure that other important international instruments are acceded to in good time; and
(ii) how will CISG be interpreted by New Zealand Courts and commentators, and what might its long term repercussions be on the trajectory of New Zealand contract law generally?

Firstly, as mentioned earlier, a simple but significant first step towards maintaining momentum on adoption of international trade law instruments would be to make the New Zealand Law Society International Legal Practice Issues Subcommittee a standing Subcommittee, with wider terms of reference, encouraging it to cooperate not only with the Law Commission, but also other government bodies and business groups. A more structured and cohesive approach would also be consistent with the recent Law Commission proposals for more public consultation in the making of and accession to treaties, which aims to promote public consultation and debate on an important and growing part of the legal landscape both in New Zealand and worldwide. New Zealand could then more readily justify joining the Hague Conference on Private International Law, and becoming more regularly involved in the work of institutions like UNCITRAL and UNIDROIT.

Secondly, as noted at the Auckland conference by David Bailey,

partner in Freehill Hollingdale & Page (Melbourne), *implementation* of an international instrument like the New York Arbitral Awards Convention has become a more pressing issue as accession has proliferated, in the light of differing judicial interpretations and the culture or wider context of arbitration in each contracting state. For CISG, Dr Hermann stressed the resources available to reduce the risk of divergent interpretations: travaux preparatoires, brief Explanatory Notes appended to official reprints of the text, and the Case Law on UNCITRAL Texts (CLOUT) service giving abstracts of Court decisions and (more occasionally) arbitral awards relating to its Conventions and Model Laws.[14] Bailey also identified a need still for adequate education on international arbitration instruments in Australia; that must become a matter of urgency in New Zealand as CISG's commencement date approaches, and beyond.

A process of education is also necessary if CISG is to offer useful insights into further development of domestic sales and contract law in New Zealand. That development may be at the level of legislative reform proposals, as has arisen in Germany and Scandinavia, the United States, and now Scotland.[15] In New Zealand, in the foreseeable future, there may be increasing judicial willingness to look to instruments like CISG for insight, if not binding norms. (On the other hand, New Zealand Courts appear to be more open to the international context in areas like human rights, rather than commercial law.[16])

Any such education process must be relevant to each of the constituencies it is proposed might work together more cohesively and consistently in raising and pursuing international trade law issues in New Zealand: the Law Society, government bodies and business groups.

For practitioners, the incentives to seek some continuing education regarding CISG have already been mentioned. A New Zealand Law Society seminar led by knowledgeable practitioners would be a well-proven and effective medium. To ensure the full range of practitioners realise the immediacy of how CISG can affect them, the Law Commission might organise a smaller session beforehand, inviting participant practitioners to check their files for contracts that are already governed by CISG (as adverted to above) or may come to be as negotiations proceed. In such cases, practitioners should check for omissions that would thus be governed by CISG "default rules", or consider how clauses as drafted may derogate from those rules (and thus become liable to challenge as insufficiently "neutral") and what the ramifications of such "contracting out" are.

Further, the expected implementation of the Law Commission's report on Arbitration may warrant a seminar (separate or combined) even before any amendment comes into force. In the long run, this would reinforce the message that international trade law instruments like CISG and the Model Law represent part of a broader trend. Also, in the short run, it seems to this writer that New Zealand Courts may be increasingly taking into account the underlying principle of greater party autonomy of the Model Law even in deciding cases under the present law: a seminar would provide an opportunity to test this idea more rigorously, and at least offer practitioners a number of insights that might improve their understanding or advocacy of arbitration law issues under the current law.

With such continuing education, practitioners would be more aware of and sufficiently trained in the relevant issues at least to bring these to the attention of their business clients. Another possibility is to run workshop sessions involving actual or reconstructed international sales case studies aimed at business people (typically with some legal training) and government officials as well as practitioners, jointly sponsored by the New Zealand Law Society and bodies like International Business Councils Ltd, or Chambers of Commerce.[17]

With an emerging and consistent interest among lawyers and those in business, it would be easier for law teachers to introduce more international trade law aspects into a variety of courses, not just specialist courses. Law teachers could also have a particular role in following overseas developments, noting domestic developments, and keeping them in that wider perspective.[18]

In sum, we are looking towards a gradual, but broad-based "consciousness raising" of those who are or should be interested in international trade law issues. No matter how well thought out the organisational structures and linkages, there must be a critical mass of motivated people making some impact on a wider audience, if the often ephemeral notion of harmonisation is to take some meaning. Interestingly, it became clear to the writer at and after the Auckland conference that both Dr Hermann and Sir Kenneth Keith QC of the Law Commission are used to thinking twenty years into the future. But the proverb goes, "Each journey begins with the first step". This article has suggested a number of possible steps. The writer hopes that some distance will be travelled in New Zealand before the next PECC Trade Law Harmonisation Conference, tentatively scheduled for Seoul in October 1996, around the time of the PECC Trade Policy Forum and/or the AGM of the International Council for Commercial Arbitration. □

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1 NZPECC has released a concise "Introduction" to its membership and activities (November 1994). The Minutes of its General Meeting on 19 July 1995 appends reviews of the Auckland conference by Sir Kenneth Keith for the Law Commission, and R Pitchforth on behalf of the Trade Law Harmonisation Interest Group. The establishment of an Interest Group on Trade and Competition Policy is also now being considered.

For a recent overview of PECC's activities, see *Pacific Economic Development Report 1955: Advancing Regional Integration* (Singapore, 1994). See also "Implementing the APEC Bogor Declaration – A PECC Statement to APEC" (Memorandum dated June 1995).

2 Other instruments initially identified for investigation and promotion by PECC were related to the 1969 Vienna Convention on the Law of Treaties; the 1983 Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific; and intellectual property.

3 On the background to UNCITRAL, see the Law Commission's Report No 20 (§57-59), and G Shapira "UNCITRAL and its work – Harmonisation and Unification of International Trade Law" [1992] NZLJ 309. More generally, see LF Del Duca "Developing Transnational Harmonization Procedures for the Twenty-First Century" in R Cranston, and R Goode (eds) *Commercial and Consumer Law: National and International Dimensions* 28 Oxford, 1993).

Further instruments or work in progress discussed at the meeting in Auckland, and another in Wellington on 14 July, included those relating to: international payment systems; transport; procurement of goods,

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Moral rights:
The right of integrity in the Copyright Act 1994

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The Copyright Act 1994 introduces the Continental concept of "moral rights" into New Zealand law. Moral rights provide creators with paternity rights to ensure that their works are correctly attributed and with integrity rights to ensure that their works are not subjected to "derogatory treatments". This article considers the scope and ramifications of the right of integrity arguing that this right provides creators with less protection from the activities of publishers than it ought while at the same time disrupting the balance that had previously been achieved in copyright law between creators and the "fair users" of copyright works. The article proposes that fair use rights can still be protected by clearly identifying the type of harm that integrity rights seek to prevent.

Introduction

Bernard Buffet was a well-known French artist who painted six distinct panels on a refrigerator, signing only one panel. It was sold for charity at an auction along with nine other refrigerators similarly decorated by other artists. The refrigerator's purchaser dismantled the fridge and attempted to sell each individual panel as a "painting on metal" by Bernard Buffet. Buffet claimed that the refrigerator was an indivisible unit and the sale of individual panels was a distortion of his artistic intentions. The Cour de cassation affirmed a decision of the Cour d'appel Paris holding that Buffet's "right of integrity" in the work had been infringed.[1]

With the introduction of "moral rights" in the Copyright Act 1994 ("the Act"), as part of the general intellectual property law reforms undertaken to comply with the TRIPS agreement,[2] such an outcome is now conceivable in New Zealand Courts. The Act's moral rights provide that the creator of a copyright work has the personal right to enforce correct attribution of the work ("paternity rights") and to protect the work from a "derogatory treatment" that may harm the creator's honour or reputation ("integrity rights").[3]

While the introduction of moral rights protection for creators in the New Zealand copyright scheme is to be welcomed, the haste in which the Copyright Bill 1994 was enacted necessitated drawing heavily upon the UK Copyright, Designs, and Patents Act 1988, replicating its shortcomings in the process. The right of integrity is especially problematic. The Act gives less protection from publishers' activities than would be desirable, and such protection that does exist is compromised by the facility for creators to "waive" moral rights. Worse still, integrity rights have not been reconciled with the competing public interest in what would otherwise amount to the non-infringing "fair use" use of a work (such as pastiche art and parody), thus jeopardising the freedom of speech rights inherent in copyright law.

Underlying these difficulties is the lack of a precise conceptual foundation for integrity rights. This article suggests that the purpose of integrity rights should be to give creators control over their reputations by ensuring that the public have access to copyright works in the form that their creators intended. Therefore in most cases integrity rights exist to regulate the relationship between creators and the publishers of their copyright works. But, because with some types of fine art there may be no substitute for the original "copy", integrity rights may also regulate the activities of the purchaser. In either case the harm that integrity rights prevent is damage to reputation caused by misrepresenting the creator's intentions. However the effect of the Act's drafting is to extend integrity rights to the fair users of copyright works (who do not misrepresent the creator's intentions) while providing inadequate protection from publishers.

Moral rights

Moral rights are mandated by Article 6*bis*(1) of the Berne Convention (1971):

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

Moral rights are totally distinct from the more familiar economic rights in a copyright work. The economic rights are the "exclusive rights" (such as the right to copy or broadcast etc) that vest in the copyright holder and provide an incentive for the creation of copyright works by making commercial exploitation possible. These economic rights are fully assignable and amount to the "copyright" in a work. In contrast moral rights are not related to protecting exploitation

rights, but rather provide protection for the work's creator. Moral rights are never assignable (s 118 of the Act), and for this reason are sometimes referred to as "personal rights". The period of moral rights protection is generally concurrent with that of copyright protection (s 106).

Both paternity and integrity rights respect the creator's artistic sensibilities as well as contributing to the creator's ultimate economic survival. Paternity rights ensure that creators gain the recognition due to them from their work and, because creators' reputations are inexorably linked with their published work, integrity rights protect creators' work from distortion. A happy consequence of integrity rights is that copyright works are preserved intact for future generations.

The right of integrity

Prior to the introduction of the right of integrity defamation law, passing off actions, and the Fair Trading Act 1986 were the only recourse creators had to protect a work's integrity. These mechanisms were regarded by law reformers as inadequate for meeting the obligations under Article 6*bis* and hence the enactment of specific provisions in the Act.

Section 98(2) of the Act provides that the creator of a copyright work has the right not to have his or her work subjected to a "derogatory treatment". The right is bestowed upon the creators of literary, dramatic, musical, and artistic copyright works, as well as upon the directors of copyright films (but not upon any performing artists or in respect of sound recordings). The term "treatment" is defined in s 98(1)(a) as any "addition to, deletion from, alteration to, or adaptation of the work", other than certain purely mechanical translations or transcriptions outlined in the section. Under s 98(1)(b) a treatment of a work will be derogatory if "whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation" of the work's creator.

An Australian Government Discussion Paper has drawn a distinction between the meanings of "honour" and "reputation" (*Proposed Moral Rights Legislation for Copyright Creators* Commonwealth of Australia, June 1994, para 3.49): "Honour" is said to refer to a creator's personal integrity and how the creator feels themselves to be perceived, while "reputation" refers to more commercial matters such as business or professional standing. Either way, the public's perception of the creator is at issue. The French law takes a more subjective approach that goes beyond protecting these reputational concerns. Because a work is regarded almost as an extension of the creator *themselves*, a derogatory treatment will be prohibited even if it is not available to the public (assuming the creator knew about it in order to bring an action). This principle was evident in *Buffet* where Buffet successfully gained an order preventing the sale of individual panels not just at public auction but *privately* as well. (See J H Merryman "The Refrigerator of Bernard Buffet" 27 *Hastings Law Journal* 1023, 1023 n 1. Note however that French integrity rights do not usually extend to the total destruction of the work, suggesting that preventing damage to reputation through misrepresentation of the work is still a primary concern). The New Zealand integrity rights do not take this approach. Under s 99 a derogatory treatment of a work will only be actionable when it is commercially published, publicly performed, broadcast, exhibited in public (etc).[4]

Some commentators have argued that the derogatory treatment threshold will be hard to satisfy in practice, like the defamation threshold (W R Cornish "Moral Rights Under the 1988 Act" [1988] 12 EIPR 449, 450). But the fact that the existing legal protection for creators was viewed as inadequate, and the wording of the Act itself, suggest that a lower threshold was more likely intended. European cases indicate that a treatment merely inconsistent with the creator's artistic "intentions" will be enough to satisfy the test, rather than only mutilation of defamatory proportions.

Exceptions

Applying integrity rights to all classes of copyright work, without any exceptions, would lead to impracticalities. The drafters had two options for dealing with this. Either to provide that the rights would only apply where it was reasonable for them to do so (eg permitting Courts to take industry practices into account) or to specify exactly the circumstances in which integrity rights would not apply. The choice was between flexibility and certainty, and the drafters opted for the latter.

Under s 100 integrity rights do not apply to computer programs, works created for newspapers and magazines or similar periodicals, works created for reporting current events, and works in which copyright first vests in the creator's employer. Under s 101 integrity rights, in the case of films, do not apply to acts done to maintain standards of good taste and decency or to films made for reporting current events. Section 99(3) provides an exception for architectural works in the forms of buildings. Whether or not these exceptions are too wide will doubtless be the subject of heated debate amongst the respective interest groups.

Integrity rights and publishers

Publishers and their licensees have great potential to interfere with the form in which a creator's work reaches the public. As a matter of commercial reality creators must use publishers for efficient exploitation of their work, and publishers often require that creators assign the copyright to them. Creators are usually at a disadvantage when dealing with publishers, especially when faced with the rafts of standard form contracts that characterise publishing industries. Therefore the creator's lack of bargaining power is a major factor justifying moral rights protection,[5] and for this reason moral rights are non-assignable.

Some publishers have argued that moral rights are inconsistent with property law in common law jurisdictions and that they fetter freedom of contract. This may be overstating the case however. First, moral rights simply redress an imbalance in bargaining power which arguably promotes freedom of contract. Secondly, even though moral rights do in a sense provide the creator with some sort of "ownership" of the work, the economic rights in copyright law have never furnished ownership of the work per se, but only the ownership of the *right to market* that work within the statutory limitations. (It would be ironic in the extreme if publishers sought to deny the limited nature of the copyright grant and instead were to invoke the

"natural law" rights of creators to property in their work in order to deprive those same creators of protection from the alienation of their property on prejudicial terms). As long as the distinction between the work itself and the copyright for that work is observed, moral rights do not interfere (conceptually at least) with the copyright holders' proprietary rights.

An illustration of a typical creator vs publisher clash occurred when singer-songwriter Tom Waits contested his publisher's decision to license his compositions for Levi's commercials in the United Kingdom.[6] Third Story Music (the publisher) maintained that an amended publishing agreement permitting them to license without Waits' approval and that "Waits' interference with its licensing efforts is motivated by an attempt 'to maintain and fortify his own distorted image of his own self-importance, and . . . [is part of] a continuing attempt to oppress and annoy" the publisher!

However, even if the use of the composition in a jeans commercial was prejudicial to Waits' honour or reputation, it is questionable whether the use of an unaltered composition in an advertising commercial could amount to a "treatment" under the definition in the Act. This definition is narrower than that in the Berne Convention as it does not appear to extend to the *context* in which a work is used as opposed to any alterations to the work itself.[7] So while the addition of a moustache to the Mona Lisa, or to a reproduction of the painting, would qualify as a "treatment" (assuming that integrity rights had not expired), the reproduction of the painting on a greeting card above a scatological caption would not strictly be a treatment of the work. Although intuitively the addition of a caption on a card seems like an addition to the work, it is in fact only an addition of another copyright work to the tangible medium in which the first work is reproduced (ie the card). To be an addition to the work, the addition must be to the *actual copyright work* in respect of which the integrity rights are granted. In any case the Waits example, or the relocation of site specific art, could never amount to a treatment of the work. The implications for creators whose works are licensed for multimedia use should be obvious.

Definitional problems with "treatment" aside, the obvious blot on this legislative landscape is that the Act permits creators to *waive* their moral rights in existing or yet to be created works in favour of publishers and their licensees (s 107). The inalienability of integrity rights provided for in Article 6*bis* is essentially undermined by the inclusion of a waiver facility.[8] This facility seems to have been provided to allay publishers' fears that the derogatory treatment threshold is too low and that the lack of a general "reasonableness" exemption will allow the right to impinge upon standard industry practices.

Integrity rights and fair use

While integrity rights may provide insufficient protection from publishers, they arguably provide too much protection from the "fair users" of copyright works. Copyright law has traditionally provided exemptions from the copyright holder's exclusive rights in order to facilitate access to copyright works and encourage artistic development. In New Zealand the fair use doctrine is comprised of the substantiality requirement in the "substantial similarity" test and the "fair dealing" defences. The "substantial similarity" test is the basic mechanism for determining infringement of the copyright holder's exclusive rights. The rationale underlying the test (although not being part of test itself the test is not always applied consistently with this purpose) is that if an objectively similar (ie recognisable) portion of a work has been copied and used in a new work, and the portion was a *substantial* part of the original work (accounting for qualitative as well as quantitative factors), then the economic incentive established by copyright law to encourage authors to create has been compromised. In short, the copier has impinged upon the market for the original work. The corollary of this is that authors may build upon the work of others provided that only an insubstantial portion of the original work is used. The fair dealing defences permit the use of substantial portions of works in a variety of fact specific situations such as criticism and review. (Strictly speaking "fair use" is a US term derived from 17 USC §107. The doctrine is basically the same as in New Zealand but with the difference that substantiality is considered as a defence to reproduction, along with factors similar to the fair dealing defences, rather than as part of the "substantial similarity" test which in the US involves only objective similarity and proof of copying. See *Arnstein v Porter* 154 F 2d 464, 468, 1946 2nd Circuit Court of Appeals. Furthermore §107(4) permits direct analysis of the affect of the copying on the market for the original work).

Fair use rights have until now provided protection for parodies and various forms of pastiche art (such as the visual art of Andy Warhol or the "recontextualisation" of musical phrases and sounds in much contemporary rap and dance music). However integrity rights expose these socially beneficial activities to attack by the creator of the original work, perhaps to the detriment of the "democratic" principles of copyright law. For when determining what will qualify for protection under the copyright scheme the common law Courts have long avoided making value judgments about the merits of a work "outside the narrowest and most obvious limits" of whether the work crosses the (low) threshold of originality and falls within one of the classes of copyright work eligible for protection (*Bleistein v Donaldson Lithographing*, 188 US 239, 251, Supreme Court, 1903, per Holmes J. Also see *Artifakts Design Group v N P Rigg* [1993] 1 NZLR 196, 213-214).

Yet the right of integrity departs from this "hands-off" approach and invites the Courts to make value judgments of copyright works to determine whether moral rights have been infringed. While this is justifiable to remedy the inequality of bargaining power between creators and publishers, the application of the right of integrity to the fair use of copyright works is questionable as *the creation of* ***new*** *works making fair use of original works will be restrained.* In Holmes J's words, it may be a "dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work]" as art forms like parody are prima facie at odds with the right of integrity.

Substantiality

The substantiality requirement of the substantial similarity test does not apply to the right of integrity. For copyright infringement this

requirement is embodied in s 29(2) of the Act which states that "[r]eferences in this Act to the doing of a restricted act are to the doing of that act – (a) In relation to the work as a whole or any substantial part of it . . .". Because the "derogatory treatment" of a work is not a restricted act, the substantiality requirement in s 29(2) cannot apply. Instead substantiality with respect to integrity rights is dealt with in s 110(2)(a) which provides that the right of integrity applies "in relation to the whole or any part of a work". (This is in contrast to some other moral rights in the Act which only apply "in relation to the whole or any substantial part of a work").

Under s 98(1)(a), alterations and deletions from a work amount to a "treatment" of that work, so conceivably the deletion of most of a work and its replacement with other material, thereby leaving only an insubstantial portion of the original work remaining, could still be a "treatment". Such a treatment, assuming it to be derogatory, could infringe the right of integrity *without infringing the copyright in the work.*

It appears that the substantiality requirement was abandoned for integrity rights in order to cover situations in which the *whole* work is used but where only a small part was given a derogatory treatment, such as the omission by a publisher of a critical line in a literary work (See R Merkin *Richards Butler on Copyright, Designs and Patents: The New Law*, Longman, London 1989, para 16.24, referring to the equivalent UK provision). Arguably this approach was unnecessary as when the whole work is used it seems contradictory to suggest that the alteration (or deletion) of a small, *but central*, part of the work does not amount to a derogatory treatment of the whole. This is like saying that the addition of the moustache to the Mona Lisa is not a derogatory treatment of the whole work. Unfortunately the abandonment of the substantiality requirement means that integrity rights will now also cover situations such as the use of insubstantial portions of a work in a new work.

The Department of Justice did not specifically address the substantiality issue in its report on the Bill to the Commerce Select Committee, but it did state that it had reservations about providing a specific exemption for parody (Department of Justice Report No 7 to the Commerce Select Committee, 116):

> In principle, parody and burlesque should not be exempted, but should be subject to the "derogatory treatment" test like other forms of adaptation . . . . There could be some instances in which parody is cruel and harmful to the author, and which may satisfy the derogatory treatment test. We note that the UK legislation does not specifically exempt parody. While we do not, on balance, favour making a specific exemption for parody, this is an issue which the Committee may wish to consider carefully.

Evidently the Committee agreed with the Department of Justice on this point as no exemption was provided. Other jurisdictions have dealt with the issue differently. The limited moral rights provisions in the Copyright Act 1976 (US) that provide rights of integrity and paternity for visual artists are expressly subject to the fair use rights provided for in that Act (17 USC §106A(a)). The Australian Discussion Paper on moral rights also takes the view that integrity rights should not "affect the important role played by parody and burlesque" (*Proposed Moral Rights Legislation for Copyright Creators* para 3.67). Indeed even French law provides a specific exemption from moral rights for parody, pastiche, and caricatures where this is done within the reasonable bounds of such genres (Article L 122-5 para 4 of the Intellectual Property Code).

The object of parody is to ridicule the sentiments expressed in a work and therefore appears to conflict directly with integrity rights. While preventing parody does not inhibit rights to freedom of expression (the work can be criticised without a parody) a parody is often the most effective way of making such criticism. The US Supreme Court's recent decision in *Campbell v Acuff Rose Music* 127 L Ed 2d 500, 1994 forcibly makes this point.

Parody as fair dealing for criticism and review

Parody has not yet been considered by a New Zealand Court, but in Britain parody has traditionally been assessed under the substantiality test, which, as mentioned, would provide no defence to infringement of integrity rights. The British approach to parody arguably confuses the purpose of the substantiality test, which is to determine whether enough of a work has been used to impinge upon the copyright holder's rights of exploitation. Parody does not harm the market for the original work by commercial *substitution* however but only by destroying demand for the original through "biting criticism" (*Fisher v Dees* 794 F 2d 423, 438, 1986). The artificiality of applying the "substantiality" approach to parody is highlighted when one considers that a parody by definition *must* use a substantial portion of the original work to achieve its objects. Hence if a case was ever litigated in New Zealand, parody might be more properly considered under s 42(1) of the Act as a criticism issue, as in the United States (see *Campbell*, 516).

Section 42(1) of the Act provides that "[f]air dealing with a work for the purposes of criticism or review . . . does not infringe copyright in the work if such fair dealing is accompanied by sufficient acknowledgment". Alas this too fails to provide protection for the would-be parodist as the defence applies only to *copyright* infringement and not, therefore, to moral rights infringement. This cannot be attributed to oversight as s 97(3) specifically applies various defences (including s 42) to the right of paternity, while the right of integrity has no similar provisions. In summary therefore any fair use of a copyright work will be subject to the derogatory treatment test.

Can integrity rights and fair use be reconciled?

If the Act's moral rights regime makes no express concessions for the fair use of copyright works, how can the public interest in such use be accommodated? The Australian Discussion Paper takes the approach that parody is permissible because usually it lampoons only the work and not the creator (para 3.67). This distinction may be a little fine given the fundamental premise of integrity rights is that creators' reputations are inseparably linked to their work. This article suggests that a solution lies in isolating the specific *type* of damage to reputation that integrity rights should protect against,

because the same treatment of a work may detrimentally affect the creator's reputation in radically different ways depending on the circumstances, and by whom, the treatment is perpetrated. The Act's integrity rights undoubtedly prevent treatments of works that misrepresent the creator's intentions to the public, but should they not be interpreted to prevent treatments that overtly build upon a work or that criticise or ridicule a work (and consequently its creator)? Taking this approach, and irrespective of whether the threshold is high or low, it may be possible to achieve a balanced regime that protects creators from the damage that really matters but that still permits some fair use.

The well known case of *Millar v Taylor* (1769, 4 Burr 2303, 98 ER 201) is sometimes cited as authority for the presence of moral rights in common law countries (see discussion in G Dworkin "Moral Rights and the Common Law Countries" (1994) 5 AIPJ 5, 6). In that case the King's Bench was asked to decide whether a "common law" copyright could subsist in a work upon expiration of the period of statutory protection. Lord Mansfield CJ justified the existence of a fully-fledged common law copyright (which was later discredited) with a mixed bag of economic and "moral" factors (2398, 252):

> [The creator] can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper and in worse print, and in a cheaper volume . . . The author may not only be deprived of any profit, but lose the expense he has been at. He is no more the master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend; or cancel a faulty addition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.

Apart from failing to appreciate that creators need protection from the "authorised" actions of publishers as well as from unauthorised users such as pirates,[9] these statements clearly accord with the rights of paternity and integrity conferred in the Act. The interesting aspect of the judgment however relates to the type of damage from which creators need protection.

Lord Mansfield CJ's comments were confined to publication of the *whole* work, rather than merely the use of insubstantial portions or a deliberate parody of the work. The focus of concern was whether the author could remain the "master of his own name". Sentiments of which the author disapproves can only be propagated under the author's name by the use of the work when *attributed* to the author. Arguably therefore integrity rights seek to protect creators from conduct that *misrepresents* their intentions to the public and thereby harms their reputations. Lord Mansfield CJ seemed to support this view later in the judgment (2405, 256): "[The creator's] name ought not to be used, against his will. It is an injury, by a faulty, ignorant and incorrect edition, to disgrace his work and mislead the reader".

The New Zealand Act is consistent with this approach. Section 99(5), which relates to the treatment of previous treatments, only deems integrity rights to be infringed if the relevant parts of the work "are attributed to, or are likely to be regarded as the work of, the [creator]". Sections 100 and 101, when permitting derogatory treatments in various circumstances, provide that (other than for the types of work where authorship is not usually credited and which are therefore excluded outright from integrity rights) where a creator is or has been identified with a work, there must be a "clear and reasonably prominent indication" that the work has been subjected to a treatment to which the creator did not consent. Furthermore s 125(3) provides that where integrity rights are infringed the Court may, if it thinks it is an adequate remedy in the circumstances, grant an injunction prohibiting the doing of any acts "unless a disclaimer is made . . . dissociating [the creator] from the treatment of the work". It therefore seems that the Act only focuses upon reputational concerns where the creator's honour and reputation is prejudiced because the creator is represented as being responsible for the treatment of the work. Interestingly s 62(4) of the Copyright Act 1962 addressed this concern for artistic works by prohibiting the publication or sale (etc) of artistic works where the work was falsely attributed as the creator's *unaltered* work. *Buffet* could have fallen within this section if there was a representation that the paintings on metal were Buffet's unaltered work. The provision is retained in s 104 of the new Act, and although it could apply to private sales and does not have a derogatory treatment threshold, it is largely superseded by integrity rights.

The activities of publishers are obviously within the scope of integrity rights, as publishers effectively control the form in which a creator's work reaches the public, and the public not unreasonably evaluate the work and the creator on the basis of the published work. Many types of fair use do not affect a creator's reputation in this way, and thus should be permissible under the right of integrity. However it appears that the precise rationale for the right of integrity may have been obscured by its application to "non-representative" copyright works in cases similar to, but not identical with, fair use.

Different characteristics of copyright works

If the touchstone for integrity rights infringement is whether the creator's intentions have been misrepresented to the public, then a distinction must be drawn between various types of copyright work. Most copyright works (such as books or records) are created for mass production and therefore exist independently of any particular copy of the work. However some copyright works such as "one-off" sculptures or large site-specific art works cannot be treated separately from their tangible mediums of expression. The distortion of the *original* copies of such works may misrepresent the creator's intentions and effectively deprive the public of access to these works in their intended form. A similar case can also be made for works like oil paintings which may have important textual qualities arising from canvas, paints, and brushwork that cannot be captured in "two-dimensional"

reproductions. With these types of works there is no substitute for the original. (Of course, integrity rights could also be infringed by licensed reproductions of such works that misrepresent the creator's intentions. See Merryman, 1029, for a discussion of the *Millet* case where, in addition to altering the painting, the publisher's photographic reproductions significantly affected the brightness and colouring of the painting).

Fair use more typically deals with mass-produced works rather than "one-off" works. The emphasis is not on the alteration of the irreplaceable "original" but upon the *reproduction* of portions of the work in a new work. In most types of fair use the new work is not produced "under the creator's name" and the public still have access to the creator's unaltered work. This is especially true of parody which undertakes a self-declared and obvious criticism of the original work. Thus there is no misrepresentation that the sentiments expressed are those of the original creator, and any harm caused is identical to that which would arise from criticism that did *not* involve use of a creator's works. This type of harm to reputation can hardly be described as "prejudicial" in the same sense as distortions by publishers, and may therefore be outside of the scope of conduct envisaged by the Act.

In the *Buffet* case mentioned at the beginning of the article, and in similar cases such as that of a mural being partly obscured by building alterations (see N Soloman & D Mitchell "Moral Rights – A Case Study" 1991 *New Law Journal*, December 6, 1654) the issue was not the reproduction of parts of the creator's work in a new work but rather the destruction or alteration of the single "copy" of an existing work. These dealings with a particular copy of a work do not involve any restricted acts (the work is not reproduced and showing a work in public is not a restricted act for artistic works) and hence the fair use doctrine is irrelevant in this sort of situation. Because the right of integrity has developed in Europe largely in this type of case, there has been little cause to consider the right's implications for fair use.

Conclusions

In principle the introduction of integrity rights into New Zealand law is to be applauded. However the integrity rights provisions of the Act strike a poor balance between the competing interest groups in copyright law. The Act gives creators less protection than they deserve from publishers through a narrow definition of "treatment" and by the inclusion of a waiver facility that arguably jeopardises what protection integrity rights did provide.

Perhaps a greater problem is the failure to more clearly define the interrelationship between integrity rights and conflicting fair use rights. If the balance of interests favours the absence of a blanket exemption for fair use from integrity rights, then perhaps this conflict can be resolved through an interpretation of "prejudicial to the honour or reputation" which considers the characteristics of the copyright work in question and the type of harm that integrity rights aim to prevent. It is hoped that the Courts will not apply the right of integrity to fair use situations where it is clear that the original creator is not responsible for the new work. In practice however the in terrorem effect of the Act's drafting (if fair use does not cease altogether) will certainly be to inhibit fair use and encourage the use of waivable integrity rights as economic leverage against fair users. □

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1 *Buffet v Fersing* 1962 D Jur 570 (Cour d'appel Paris), aff'd 1965 GPII 126 (Cour de cassation).

2 Article 9 of TRIPS requires Members to comply with Articles 1-21 and the Appendix of the Berne Convention (1971), but *not* with Article 6*bis* of Berne which provides for moral rights. Rather it seems that the Justice Department has taken the opportunity to comply with the 1971 revision of the Berne Convention in any case.

3 Section 105 of the Act also provides a limited right of privacy for persons, who for private and domestic purposes, commission films or photographs.

4 Section 99(3) also provides that architects whose buildings are subjected to derogatory treatments (which is not in itself actionable) have the right to have any identification on the building removed.

5 See D Vaver "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?" 14 *Monash University Law Review* 285 and M Weir "The Story of Moral Rights or the Moral to the Story" (1992) 3 *Australian Intellectual Property Journal* 232.

6 C Morris "Third Story Countersues Waits Over Commercial" *Billboard Magazine*, 1 May, 1993.

7 This criticism has also been made by Cornish of the equivalent provisions of the UK Act. See Cornish, 450.

8 See T Martino "R-E-S-P-E-C-T – that's what moral rights mean to me" July 31, 1992, *New Law Journal*, 1084 for criticism of the waiver facility in the UK Act.

9 See L R Patterson & S W Lindberg *The Nature of Copyright – A Law of User's Rights*, University of Georgia Press, Athens & London, 1991, 33-35.

Superior orders defence

It should be noticed that the point at issue here is not whether Pte Clegg was entitled to be acquitted altogether, on the ground that he was acting in obedience to superior orders. There is no such general defence known to English law, nor was any such defence raised at the trial. As long ago as 1816 it was held in *R v Thomas* (1816) Turner and Armitage *Cases on Criminal Law* (3rd edn, 1964) p 67 that a sentry who fired in the belief that it was his duty to do so had no defence to a charge of murder. For a recent illustration, see the emphatic view expressed by the High Court of Australia in *A v Hayden (No 2)* (1984) 156 CLR 532, followed by the Privy Council in *Yip Chiu-cheung v R* [1994] 2 All ER 924, [1994] 3 WLR 514. The point is rather whether the offence in such a case should, because of the strong mitigating circumstances, be regarded as manslaughter rather than murder. But so to hold would, as Viscount Dilhorne said in *Reference under s 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937 at 956, [1977] AC 105 at 148, be to make entirely new law. I regret that under existing law, on the facts found by the trial judge, he had no alternative but to convict of murder.

Lord Lloyd

R v Clegg [1995] All ER 334 at 344.

(For a comment on the Australian case *A v Hayden* see [1985] NZLJ 349 – misnumbered as 249)

Lies directions

By Don Mathias, Barrister, of Auckland.

*Part of the responsibility of juries is to determine the credibility of witnesses whether in whole or in part of their testimony. Lies of witnesses – as distinct from mistake or bias – can be a difficult addition to the problem. In this article Dr Mathias considers various possible classifications of lies and the different directions that Judges must give to juries. To judge from current media reports of the OJ Simpson trial the law as to lies is different in California.*Toia *was referred to recently by the Court of Appeal in* R v Oakes *[1995] 2 NZLR 673.*

Numerous cases illustrate wrong directions to juries by trial Judges about the use which may properly be made of lies told by the accused. Recently the Court of Appeal commented that it was "unfortunate that once again a direction about lies told by an accused arises for our consideration": *R v Manapouri and Tulafono* [1995] 2 NZLR 407. In theory the topic is simple, but clearly it deserves some consideration. It is not proposed here merely to summarise the law, because summaries are readily available in judgments and texts. Instead, the purpose of this article is to re-examine the subject from a premise that lies can be of three types, to evaluate present law against that premise, to recognise any deficiencies, and to suggest modifications to the approach presently taken. This is not as daunting a task as it may seem, since the topic is essentially a simple one.

Classification of lies

Lies might be classified in various ways, depending on what characteristics are emphasised. Of course we are only concerned with lies told by the accused, but these can be pre-trial or at trial, they can concern facts in issue or peripheral facts, they can be acknowledged or denied by the accused, they can have various significance in terms of the strength of the case for either side at trial.

The classification adopted for the purposes of this article is of the latter kind, focusing on the effect of lies on other evidence. Not surprisingly the law already does this, as shown in the leading (but certainly not the first) case, *R v Toia* [1982] 1 NZLR 555 CA. However the classification of lies into two broad categories in that case is expanded here. When the subject of categories is examined de novo, it is clear that there must be three kinds of effects which lies might have. Accordingly, in our proposed classification we have three types of lies, and here they are described rather than defined (note that the numbering is not in logical order; this encourages mental agility, as does the arid preference of numerals over adjectival nouns):

Type 1. *Probative lies.* These have the effect of strengthening the Crown case. They are rare.

Type 2. *Irrelevant lies.* These are lies which the accused has told but which could reasonably be said to have been told for a purpose other than to conceal guilt. They are quite common, and are often overlooked.

Type 3. *Credibility lies.* Lies which affect, according to their weight, the credibility of the accused's evidence.

The definition of each type involves the reason for the telling of the lie, and will become more clear as the following discussion proceeds. It is important to note that a Type 1 lie has additionally the essential effect of a Type 3 lie: it can count against the accused's credibility as well as weigh in favour of the Crown case.

The new category is Type 2. It is extremely unusual to hear a Judge direct a jury that particular lies told by the accused may (it being a matter for the jury to decide) have no effect whatever on the weight which can be given to other things the accused has said. Indeed, the usual instruction is to the effect that lies *are* relevant to credibility. Yes, in strictly legal terms relevance is not the same as weight, but do jurors know that? And the expression, commonly heard in directions to juries, "it is for you to decide what weight to give to the lie" should include the possibility that jurors might consider that no weight is appropriate.

It is not suggested that juries should be given this classification. It is simply an aid for us to use as lawyers while we analyse the subject. It will be shown that the presently acceptable directions on lies need very little modification, and that it is the way they are approached that deserves attention.

A few points common to all these types of lies should be noted. Whether a statement is a lie can only be determined in the context of the evidence in the case. Similarly, the type of the lie can only be determined in the context of the evidence in the case. The same false assertion may be one type of lie in one context (or case) and of another type in a different context (or case). Furthermore, it is difficult to determine what are the proper inferences about the reasons for lies without having seen and heard the evidence at trial. This is why law reports are useful mainly at an abstract level rather than as authority for the way in which a particular lie should be classified in other cases. Finally, jurors do not have to be unanimous on the weight to attach to a lie, or even on whether they consider an item of evidence to be a lie; their reasoning towards their collective verdict may take different paths. For convenience it is easier to refer to the jury collectively, but this last point should be borne in mind as a qualification on that.

Linking this classification with *Toia*

The three types of lies classified above can be compared with the approach laid down in *Toia*. In the following summary the links with the dicta in that case are noted in square brackets. At p 559 the Court

said that there are two main ways in which lies by an accused may be important [ie as Types 1 and 3]. "First, occasionally they are capable of adding something to the Crown case, whether as corroboration or simply as strengthening evidence" [this is the Type 1 lie, the sort of lie "which naturally indicates guilt rather than innocence – a hard test to satisfy"] . . . "Secondly, and more commonly, proved lies by an accused, whether in evidence or in statements out of Court, may be relevant to credibility" [Type 3] . . . "people may have various motives for lying and . . . a lie does not necessarily mean guilt" [none of the types of lies need necessarily mean guilt, and only Type 1 lies are capable of adding strength to the Crown case].

The decision in *Toia* is straightforward and it compares favourably with something Lord Devlin said in *Broadhurst* (considered below), but it has been misunderstood in two significant ways.

Misunderstandings of *Toia*

The first of the two ways in which *Toia* has been misunderstood has caused Courts to direct, not uncommonly, that lies *are* relevant to credibility. In strict legal terms there is nothing wrong with that, because lawyers distinguish between relevance and weight. A lie may (indeed *will*) be relevant to credibility yet it may have no *weight* on the question of whether another piece of the accused's evidence is credible. A jury, hearing the Judge tell them that lies *are* relevant to credibility, might think that lies *must* adversely affect the whole of the accused's evidence. The existence of Type 2 lies would be overlooked on such an approach. Yet Type 2 lies must exist for the following reason: if a juror concluded that there was a reasonably possible explanation for the lie which was consistent with the accused's innocence (for example, that the lie was told out of panic, or through instability, or to avoid unjust suspicion, or to protect another person, or to avoid having to disclose embarrassing information in front of another person present at initial interview), then the lie must not be treated as tending to exclude the reasonable possibility that the accused's other evidence might be true.

The first misunderstanding has the effect of omitting Type 2 lies as a category. The second way in which *Toia* is misunderstood leads to a tendency to turn Type 3 lies into Type 1 lies. This misunderstanding has arisen notwithstanding that the whole thrust of what was said in *Toia* about lies was aimed at avoiding it. The Court was at great pains to emphasise that lies by an accused only rarely strengthen the Crown case. But it repeated what has become a catch-phrase in directions on lies: ". . . it is customary and desirable to give a warning to the jury, as the judge did here, on the lines that people may have various motives for lying and that *a lie does not necessarily mean guilt*." [p 559, emphasis added.] Unfortunately, taken out of context, this expression can suggest that a lie of Type 3 can mean guilt since if it doesn't *necessarily* indicate guilt it might do *sometimes*, that is, it can be of Type 1. A juror might think that just because an innocent motive for a lie cannot be found the lie must mean guilt and add weight to the Crown case. Plainly the Court in *Toia* did not intend such a consequence.

There is a wide gulf between Type 1 lies and Type 3 lies. The absence of an apparent innocent explanation for the telling of the lie (Type 3) falls far short of the *inability* of the accused to give an innocent explanation for it (Type 1).

Earlier authorities

There is notoriously a tendency towards circular reasoning when considering the effect of lies. This might even be found in a passage in *Broadhurst v R* [1964] AC 441 PC at 457. Lord Devlin, delivering the advice of the Board, said that, except in one respect, an accused who gives untruthful evidence is no different from an accused who gives no evidence at all. [Taken out of context this is not true. There are two other possibilities apart from the lie having no effect (Type 2): the lie may strengthen the Crown case (Type 1) or it may affect the credibility of the accused's other evidence (Type 3).] He went on to say that where on the proven facts there are two inferences which may be drawn about the accused's conduct or state of mind, his untruthfulness is a matter which the jury can properly take into account as strengthening the inference of guilt. [This ignores the possibility that the lie is Type 2 or 3. Where, on all the evidence apart from the lie there are two inferences the Crown case would have to be regarded as weak and only a Type 1 lie could strengthen it. Furthermore, since the classification of a lie can depend on its context it would be highly unusual – but of course not impossible – to be able to put a lie into Type 1 without the support of a strong prosecution case. However the lie could be either Type 2 or Type 3.] He continued, saying that what strength the inference of guilt has depends on all the circumstances of the case and especially on whether there are reasons other than guilt that might account for the untruthfulness. [Again, the assumption is that the lie does create an inference of guilt even if there might be reasons other than guilt for it: Type 2 lies are being overlooked.] It should be mentioned, out of respect, that this was all said in a reasonably short paragraph in a lengthy speech largely concerned with other matters.

The *Broadhurst* approach was explained in *R v Dehar* [1969] NZLR 763 CA, where the jury had been directed in a circular manner. Here is the circularity: the jury was invited to consider whether a lie was told because of guilt and then to decide that therefore the Crown case became strong enough to prove guilt. The Court straightened this out, saying (pp 765-766)

> if and only if they had already come to the conclusion that this [the accused lying] was satisfactorily proved [beyond reasonable doubt], they could consider whether the fact of telling these lies was a fact which, in the circumstances of this case, pointed to guilt, and when added to the rest of the evidence, could prove the substantive Crown case beyond reasonable doubt.

This correctly states the approach appropriate to Type 1 lies.

Examples of Type 1 lies

Type 1 lies are lies which naturally indicate guilt rather than innocence, or, in other words, lies which suggest that the accused cannot give an innocent explanation. A recent illustration is *Webb v Police* (1994) 11 CRNZ 349 HC.

The classic example is *R v Vallance* [1955] NZLR 811 CA, referred to in *Toia*. In that case, where the charges were indecent assault on a male, the evidence of

the complainant required corroboration. The accused's lie about the reason he took the boy to the shed, in the circumstances of the case properly capable of being regarded as a Type 1 lie, was able, if established, to constitute corroboration. Whether any evidence was capable of being corroboration was a matter of law upon which the Judge had to rule. An expansion of the Judge's power make a legal ruling on the classification of lies is to be found below, under the heading "**Suggested remedies**". The link between lies and corroboration is also found in *Dehar*.

As anticipated, examples of Type 1 lies are rare, but another illustration is *R v Tyson* (CA202/90, 13 December 1990). This case is unreported and it deserves some detail here. On a charge of arson the issue was whether the accused had lit the fire. The accused had said many things which the Crown alleged were lies. In particular, he had said he was in his bed at the time the fire must have started. Another witness had observed his bed and noted that it seemed to be fully made up with the sheets *both* tucked in at the head of the bed under the pillow. When this was put to him, the accused said he had been unable to sleep, he got up, remade his bed, and got back in it lying between the top sheet and the blanket. The Court put the issue here as, if his evidence on this latter point was untrue then he was not asleep in bed when the fire started and the question would be why did he say he was? In some cases this sort of lie may be consistent with an innocent explanation, such as fear of attracting unjust suspicion, but in the circumstances of *Tyson*, where there was a lot of other circumstantial evidence pointing to guilt, the Court observed that "the case was a strong one and the evidence leads almost inevitably to the conclusion that the fire was deliberately lit. Nor can it be reasonably suggested that anyone save Tyson could have been its author." So the bed lie could only have been compelling in its indication of guilt. Failure by the Judge to specify individually the lies that were capable of being regarded as adding weight to the Crown case was (in this case which was "quite out of the ordinary") not prejudicial to the accused.

Note that where Type 1 lies are relied on by the Crown the Judge should itemise them to the jury:

> Ordinarily the Judge should identify those matters which the jury might find to be lies and for which it is open to the jury to conclude that there is no explanation save guilt. It is possible, although unlikely, that cases will arise where there are so many such items that such identification is impracticable and in which the minimum requirement would be that the Judge should indicate to the jury how it should determine whether a lie merely goes to credibility or is such as to be capable of offering support to the Crown case and assist them with one or two examples from the evidence itself. (ibid.)

The Court follows the practice of treating the question of what category a lie falls into as a question of fact. Bearing in mind that where errors occur in lies directions they usually arise from a misleading reference to the purpose to which a lie may be put (ie by confusing Type 3 lies with Type 1 lies) it seems preferable to regard the classifying of a lie as Type 1 as a question of law. As already indicated, this suggestion is advanced below, under the heading "**Suggested remedies**".

Examples of Type 2 lies

A good example of an irrelevant lie is that told by Dinsdale in *R v Cherrington and Dinsdale* (1984) 1 CRNZ 169 CA. The charge was rape and the issue was consent. When first spoken to by the police, and in the presence of his wife, Dinsdale denied having had sexual intercourse with the complainant. Later, when his wife was not present, he told the police that sex had occurred. The Court observed that the lie had been very understandable and it had no significance at all for the purpose of assisting the jury's assessment of the evidence in general.

In *R v Hart* (1986) 3 CRNZ 474 CA the charge was murder and the issue was intent. The accused had lied by saying that he was not with the victim at the relevant time. He later told the police that he was with her and that he had struck her. The Court held that

> . . . the initial lies were clearly as consistent with a desire to avert suspicion as with guilt. In themselves they could do nothing to prove guilt. If guilt was proved by other evidence, then the inference was obvious that the lies were not reasonably capable of adding anything.

The Crown had not relied on the lies in a positive way (ie as Type 1), and the Court noted that the Judge had correctly discouraged the jury from placing any weight on them. This is consistent with the lies here not being capable of detracting from the credibility of the accused's subsequent denials of guilt and therefore being of Type 2 rather than Type 3.

In *R v P* (1991) 8 CRNZ 33 CA on charges of sexual violation by unlawful sexual connection a major issue was whether the complainaint had been with the accused at the relevant time. The Judge had wrongly left the jury with the impression that if they thought the accused was lying that meant that he had a guilty mind. The Court repeated what it had often said: a false denial of opportunity to commit a crime usually does nothing to prove that the accused did commit it. He may well have denied opportunity so as not to make it more difficult to rebut the complainant's story. His statement to the police denying her version did nothing, if rejected by the jury, to prove her allegations or add to the Crown case. Here the correct approach was for the jury to disregard the lie and to turn to whether they could accept that the complainant's version "was substantially true in its essential allegations". There was no suggestion that this lie in part of the accused's police statement threw into doubt the rest of his denials of guilt in this statement. The lie, if it was a lie, in this case, illustrates the characteristics of Type 2 lies: the reasonably possible innocent motive for telling the lie, and the proper jury response of disregarding the lie.

In clear cut cases it will be appropriate for counsel to object to the admissibility of Type 2 lies, but usually it will be for the jury to decide whether the lie is of Type 2 or Type 3.

On the border between Type 2 and Type 3

Whether a lie is of Type 2 or Type 3 can depend on what is the ultimate stance taken by the accused, either at police interview or at trial. For example, where the ultimate defence is accident, as in *R v Chignall* [1991] 2 NZLR 25, (1990) 6 CRNZ 103 CA, an earlier false

denial of opportunity may come within Type 3 rather than Type 2. This will be so where in the context of the case the lie is not reasonably explained as an innocent effort to avoid the Crown case appearing stronger than it otherwise would. Where the accused has a strong defence he might reasonably be expected to advance it rather than take up a false fall-back position from the beginning. In *Chignall* the initial denials of knowing or associating with the victim, which were admitted through counsel at trial to have been lies, were properly regarded as going to the credibility of the accused's ultimate explanation to the police that the death had been accidental, and were therefore Type 3 lies.

Other situations in which lies which might otherwise be of Type 2 are properly regarded as of Type 3 are where the accused gives evidence and attempts to assert the truth of the lie he has previously told the police (in other words he repeats the lie), and where he compounds his original lie with another. The latter occurred in *R v Samuels* [1985] 1 NZLR 350 CA. An associate of the accused was the alleged principal offender, and when spoken to by the police the accused at first denied the identity of the co-accused who was being interviewed separately, but later he admitted that the other was indeed the person in question. Without more, a juror could perhaps – although some supporting evidence should be expected – categorise it as a Type 2 lie, consistent with an effort to protect another person or to avoid being wrongly implicated. However at trial the accused gave evidence and instead of admitting he had lied he said that he was not aware that the police were referring to the same person, whom the accused knew by another name, until he saw the person in another room at the station. This, the Crown in effect alleged, amounted to a compounding of the lie with another because if the jury thought he was lying about the names then his earlier lie about the identity of the other person was unexplained. In that situation the lie was properly a Type 3 lie, relevant to the accused's credibility.

It has to be accepted that in *Samuels* the Court said that the lies, which could have been for the innocent purpose of protecting the co-accused rather than for concealing the accused's own guilt, were "certainly relevant to [the accused's] credibility". This appears at first sight to amount to a denial of the existence of Type 2 lies, but it is suggested that in saying this the Court was speaking in reference to the circumstances of the case before it. Certainly it was not argued that the lies in this case should have been ignored, and nor would such an argument have been appropriate here. The point taken in this case was that the Judge had directed the jury in circular terms.

The lies in *Toia* also illustrate how the evidential context determines the category to which the lie belongs. The charge was rape and the defence was consent. The accused had initially told the police that he had not been involved in the rape (he had a co-accused). Later he told the police that the complainant had consented to having sexual intercourse with him. He did not give evidence. It was held that the fact that he had changed his story could properly be taken into account when the jury assessed Toia's ultimate claim of consent. *Toia*, then, is an example of Type 3 lies rather than Type 2 lies. The contrast with the circumstances in which Dinsdale lied in *Cherrington and Dinsdale* is clear: it couldn't reasonably be suggested that Toia had any excuse for not advancing his defence of consent at the outset.

Further examples of Type 3 lies

In *R v Speakman* (1989) 5 CRNZ 250 CA the charges were various frauds, the defences were inadvertence or honesty, and the accused gave evidence in which he endeavoured to explain certain false statements he had made to a prosecution witness (not a police officer). The credibility of the accused's explanation of his earlier admittedly false statements was important in the context of the trial, in particular on the question of his overall credibility. This was simply a case of lies by an accused, whether told in Court or before trial, being relevant to the credibility of his explanation. A brief lies direction, which reminded the jury that lies do not add to the Crown case and which avoided circularity, was all that was needed.

In *R v Gye* (1989) 5 CRNZ 245 CA the charge was cultivation of cannabis, the defence was a denial of having done it, and the Crown challenged the accused's credibility on the basis that he had told the police he was guilty. The alleged lies were told by the accused at trial when he denied making the earlier admissions. The Court held that the Judge had wrongly told the jury that if they rejected the accused's evidence it strengthened the Crown case. The proper approach was that if, bearing in mind the alleged inconsistent statement, the jury rejected the accused's evidence, then they had to turn their attention to the strength of the Crown evidence without adding weight to it arising from their rejection of the defence.

It should be remembered that most lies will be of Type 3.

The commonest mistakes

In many cases Judges wrongly put lies to juries as Type 1 instead of Type 3. This is usually linked to circularity in reasoning. This occurred in *Manapouri and Tulafono*, where the Crown had agreed that the alleged lies were, in our classification, Type 3, but the Judge told the jury that if the lies were proved, "*. . . then you must consider whether the telling of these lies points to guilt when added to all the rest of the evidence that you have heard.*" [Emphasis added to highlight the Type 1 confusion.] The other form of error which is suggested here is a failure to tell juries that Type 2 lies have nothing to do with the credibility of the accused's other statements; Type 2 lies tend to get wrongly merged with Type 3 lies. There is a need for closer scrutiny of evidence with a view to analysing alleged lies so that they may accurately be dealt with in summing up to juries. A remarkable illustration of how, even at appellate level, Judges can differ in the interpretation of the significance of lies is *Edwards v R* (1993) 117 ALR 600 HCA. The charge here was procuring an act of gross indecency, the defence was that the act did not occur between the accused and the complainant but that it may have occurred between the complainant and other prisoners who were being transported in the same van. The alleged lie was evidence given by the accused about what he had seen and heard in the van. The majority of the Court, Deane, Dawson and Gaudron JJ, held in a joint judgment that the lie – although it was difficult if not impossible to regard the

relevant evidence as a lie – was (to use our terminology) Type 3, while McHugh and Brennan JJ held in separate judgments that it was clearly a lie and was capable of being regarded by the jury as Type 1. On the majority judgment it was wrong of the Judge to invite the jury to use the evidence as a Type 1 lie and doing so was a serious miscarriage of justice. The conviction was quashed and an acquittal was entered. When Judges differ in this way it seems safe to say that jurors probably have the same sort of differences, and verdicts of guilty will be wrong if based on improper use of the evidence arising from mis-classification of a lie as Type 1.

It is not proposed to examine here the details of lies directions in other jurisdictions. However a glance at recent English decisions suggests that all is not clear there either. In *Goodway* [1993] 4 All ER 894 CA CrimDiv it was held that where the Crown relies on lies told by the accused the Judge should direct the jury that his lies had to be deliberate and had to relate to a material issue, and that the jury had to be satisfied that there was no innocent motive for the lies before the lies were relied on to support the Crown case. Applying our terminology, the type of lies under consideration was Type 1. The Court puts the third matter a little strongly ("satisfied"), and in a way which invites circular reasoning. By comparison, *Toia* puts it better at [1982] 1 NZLR 559:

> It is only when a lie is more consistent with guilt than with innocence, as when it suggests that the accused *cannot* give an innocent explanation, that it can add anything to the case against him. [The Court's emphasis; to make the present point the word "suggests" should be emphasised.]

The same tendency towards inviting circular reasoning occurs in *Richens* [1993] 4 All ER 877 CA CrimDiv where it was held that in such cases (of Type 1 lies) the Judge ought to direct the jury that before they could treat the lies as tending towards proof of guilt they had to be *sure* that there was not some possible explanation for the lies which destroyed their potentially probative effect.

For present purposes the point here is that this decision between classifying a lie as Type 1 or Type 3 is too important to be so vulnerable to error.

Suggested remedies

We have identified the following problems:

(i) the erroneous classification of lies as Type 1 when they are properly Type 3;
(ii) circular reasoning, especially in connection with Type 1 lies;
(iii) the overlooking of Type 2 as a category.

The first of these requires a robust solution because plainly the present tendency to err is entrenched and even if Judges get the direction right the chances are that jurors will misapply it (cf *Edwards*, above). It is suggested that the question of whether a particular item of evidence (if the jury finds it to be a lie) is a Type 1 lie should be *a question of law for the Judge to decide*. Only if the Crown applies for and obtains a ruling that an item of evidence is – if jurors find it to be a lie – a Type 1 lie should the jury be given the opportunity of regarding it as being capable of strengthening the Crown case. In the absence of such an application by the Crown, the jury will be directed on the basis that there are no lies of Type 1 in the case. If the Judge rules, after hearing argument in chambers, that any item of evidence is capable of being a Type 1 lie, reasons must be recorded. These would be available for appeal purposes. This proposal would minimise the likelihood of the jury misjudging the significance of lies in secret and it would avoid the need to speculate on how the jury or any juror might have treated the particular item if it was found to be a lie. It would also serve as a reminder to the Judge to be careful about the danger of circularity.

If the ruling was that the case involved items of evidence which the jury could regard as Type 1 lies, the direction would be along the following lines (remembering the *Dehar* model but also bearing in mind that set formulae are to be avoided):

> If you find beyond reasonable doubt that the accused told these particular lies . . . [specified] . . . then you may regard them as adding weight to the Crown case, but what weight they add is a matter for you to assess as individual jurors; you need not be unanimous on that. It is even possible for you to conclude that even though the accused told these lies they add nothing to the Crown case. Such of these items that you find to be lies may also be considered when you decide how much weight to give to whatever else you find that the accused said.

In the normal case there would be no Type 1 lies, and the jury would be directed in the following manner (bearing in mind that set formulae are to be avoided):

> If you find that the following things were said by the accused either in or out of Court and that they are lies then you must not treat them as adding weight to the Crown case . . . [list the possible lies].

This direction would continue as appropriate for Types 2 and 3 lies, see below.

The second of the above problems, that of circular reasoning, would, in the event that the *Toia* approach is followed, be avoided by careful analysis of the items of evidence and by applying the *Dehar* dictum referred to above. The reality is that these remedies have been urged by the Court of Appeal on numerous occasions without eliminating the tendency towards circularity.

The third problem, the overlooking of Type 2 lies, would readily be solved by avoiding telling the jury that "lies *are* relevant to credibility" and instead emphasising that "lies *may be* relevant to credibility". It might be appropriate to say something like

> If, upon consideration of all the evidence, you can see a reasonably possible explanation for the accused having told the lie, consistent with innocence, then you must ignore the lie.

It remains to suggest a direction appropriate to Type 3 lies. In general terms it would be of this sort:

> If you find that these items . . . [specified] . . . were lies, remember that lies may be told for many reasons and that the person who tells them may be innocent. But if you can see no reasonably possible explanation in the context of this case for the telling of whatever lie you find

proved, you may bear it in mind, giving it whatever weight you think appropriate, when you consider whether the accused's other evidence (or explanation) might reasonably possibly be true.

The point here is to avoid saying that lies told by an accused do not necessarily mean guilt, since putting it that way can give rise to the misunderstanding that they may sometimes mean guilt which for Type 3 lies is not the case.

Conclusion

The advantages of the method of classifying lies outlined here are that it promotes a precise analysis of the evidence; it focuses attention on what the Crown seeks to establish by each lie; it reduces the risk that jurors might misuse the evidence; it makes counsel aware of how the Judge is going to sum up and so reduces the risk of counsel misleading the jury about the use they can make of particular lies; it allows the problem of circular reasoning to be isolated and dealt with carefully; and it is not a method which needs to be taught to the jury since they receive the results of its use so it should simplify the issues rather than confuse the jury.

Furthermore, when counsel are at the stage of studying the transcript of the summing up with a view to formulating a memorandum for the Court of Appeal, this method of analysing lies enables efficient evaluation of the adequacy of the Judge's direction to the jury. Just in case you do not have such a file immediately to hand, the following might be worthy of consideration as an exercise. It is taken from real life, and I do not *necessarily* suggest that it is wrong and naturally it would have to be read in the context of the whole case for an informed opinion to be given. But anyway, . . .

I just want to say also something briefly about lies, particularly with respect to the position of an accused. For instance, if you thought that this accused was lying about [example given] – to take that as an instance, and I use that only as a possibility for discussion purposes. Lies are relevant to credibility. That is, whether you believe the credibility of this accused. But you should guard against a natural tendency to think that if the accused told you a lie about something, he must be guilty of the offence charged. The mere fact that someone tells a lie is not evidence of guilt in and of itself . . . At the end of the day this is a credibility case. □

continued from p 300

construction and services; prescription periods in international sales; electronic data interchange; BOT projects; large-scale construction contracts; and cross-border insolvency.

4 See D Williams, "The Further Development of International Commercial Arbitration Through the UNIDROIT Principles of International Commercial Contracts" (paper presented to the 6th Annual Journal of Contract Law Conference on "The Changing Law of Contract", Auckland 14-15 August 1995).

5 See K Keith, "Globalisation versus Sovereignty: An International Law Perspective on Globalisation and Treaty Making" (paper presented to the conference on "Australia in a Global Context: The United Nations and Law-Making for the Twenty-First Century", Canberra 25-26 May 1995).

6 See generally L Nottage "Contract Law, Theory and Practice in Japan: Plus ça Change, Plus c'est la Meme Chose?" V Taylor (ed), *Australian Perspectives on Asian Legal Systems*. (Forthcoming, 1996, Sydney: Law Book Co.).

7 See Parliamentary Debates (Hansard) House of Lords Official Report, [1995] at pp 1457-8]. Lord Steyn expanded on his support for England ratifying CISG in "A Kind of Esperanto", in P Birks (ed), *The Frontiers of Liability* (1994, Oxford UP) vol 2.

8 Professor Reynolds expanded on these views in a commentary on H Hunter and J Carter, "Is Commercial Law Becoming a World Law" (paper presented to the 6th Annual Journal of Contract Law Conference on "The Changing Law of Contract", Auckland 14-15 August 1995), and in "A Note of Caution", in P Birks (ed), op cit, vol 2.

9 See §53 and §92-4 of the Report on Price (see also B Nicholas "Certainty of Price", in D Clark (ed), *Comparative and Private International Law (Festschrift Merryman)*. (Berlin: 1991), 247); §115 on avoidance (see also J Carter "Party Autonomy and Statutory Regulation: Sale of Goods" (1993) 6 JCL 93); §71 on exemptions; §122-4 on problems in contracting out.

10 Article 1(1)(b). See §127 of the Report; also, D Webb, "A New Set of Rules for International Sales" [1995] NZLJ 85.

11 §128-130 of the Report; cf C Elliott, "CER at the Cross-roads: Business Law Harmonisation – where to now?" [1995] NZLJ 47.

12 J Hobhouse "International Conventions and Commercial Law" (1990) 106 LQR 530.

13 See generally B Coote's Valedictory Lecture reproduced in a booklet of the same name, B Brown (ed), *Contract – An Underview* (June 1995, Auckland: Legal Research Foundation). Cf P Atiyah & R Summers, *Form and Substance in Anglo-American Law* (Oxford, 1987). And see L Nottage, "Form and Substance in New Zealand, US and Japanese Law: What Role for Grand Theory in the World of International Contracting?", Proceedings of the 1995 Annual Meeting of the Research Committee on Sociology of Law (International Sociological Association): "Legal Culture: Encounters and Transformations" (Tokyo 1-4 August). A revised edition of this paper will appear in a *VUWLR* special issue on comparative and international law (forthcoming, early 1996).

14 Also, for certain UNCITRAL instruments such as that on Procurement, "Guides to Enactment".

15 See J Hellner "The UN Convention on the International Sale of Goods: Its Influence on National Sales and Contract Law" in R Cranston, and R Goode (eds) op cit 41; P Winship "Domesticating International Commercial Law: Revising UCC Article 2 in the Light of the United Nations Sales Convention" (1991) 37 *Loyola L Rev* 44. Scottish Law Commission, *Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* (Edinburgh: July 1993). Cf Law Commission Report No 25 "Contract Statutes Review" (dated May 1993), where the papers on the Contractual Remedies Act 1979 and Frustration of Contract might have benefited from a comparison with concepts and approaches in CISG.

16 Contrast the *Tavita* case [1994] 2 NZLR 257 (and the Law Commission's Report No 17, §53-54) with *Boscawen Properties Ltd v Governor-General and Another* (CA 9/94, 1/12/94), where the Court of Appeal upheld Blanchard J's finding that an invalid Order in Council altering the tariff on Japanese car imports can be "validated" under the Subordinate Legislation (Confirmation and Validation) Act 1991, even where the invalidity arose from a breach of New Zealand's international obligations (GATT).

17 There was unexpectedly strong participation by businesspeople and government officials in morning workshop sessions, aimed more at practitioners, at a one-day seminar on Japanese business law late last year jointly sponsored by Victoria University's Centre for Asia-Pacific Law and Business, and the Wellington Chamber of Commerce and Industry. A presentation in the afternoon sessions, aimed at a wider audience, has been rewritten as L Nottage, *Law in Japan Today: A Changing Interface with Business and Government* (Wellington, VUW Press for CAPLAB: May 1995).

18 R Goode, "Reflections on the Harmonisation of Commercial Law" in R Cranston, and R Goode (eds.) op cit, at p 26 argues that "inherent resistance to change is exacerbated by the low priority accorded by our law schools to the teaching of comparative law", citing a leading London solicitor as "forcefully" reiterating this problem recently. The same must be said of New Zealand. In the USA, Del Duca, op cit at p 40, notes dramatic increases in enrolment and courses in international and comparative law.

A suitable "national reporter" for New Zealand's contribution to CLOUT might be the Law Commission, as the government agency, drawing on reports by the newly formed NZ Association for Comparative Law. Members of the Association could share the work of preparing abstracts, and may be more consistent in providing UNCITRAL with timely abstracts than an individual lawyer or government official.