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Law Conference 1996 and judicial participants

Some of the outstanding overseas speakers who will be at the 1996 Triennial Conference of the New Zealand Law Society were noted in the November 1995 editorial at [1995] NZLJ 349.

The most senior overseas judicial guest will be Lord Browne-Wilkinson. Another distinguished judicial speaker will be Justice Gabriel Bach of the Supreme Court of Israel. Background comments on these two speakers, among others, were made in the November editorial.

Some further information on judicial participation in the Conference has now become available.

A highlight will undoubtedly be Madam Justice Beverley McLachlin's paper "Justice – Whose Property?". Her paper will consider some of the challenges faced at present by the justice system in Canada and indeed throughout the world. Madam Justice McLachlin was appointed Chief Justice of the Supreme Court of British Columbia in 1988 and elevated to the Supreme Court of Canada in 1989. As well as her Bachelor of Laws Degree, Madam Justice McLachlin holds an MA in Philosophy. She taught at the University of British Columbia from 1974 to 1981 rising to a Professorship there. In addition, she holds many Honorary Doctorates of Law from throughout Canada. Madam Justice McLachlin spent several years in private practice.

Also hailing from the North American continent will be Chief Judge Russel Holland. He is Chief Judge of the United States District Court for the District of Alaska. He will be speaking about two areas of law. The first is a paper he is to give entitled "Legal Liability and Environmental Damage" in which he will consider the legal obligations, particularly of large corporations, to meet environmental standards, and the consequences of failing to do so. He will also be involved in the session on "Indigenous Claims: Are We Working Towards a Sustainable Future?". This session will consider issues relating to indigenous claims, particularly in New Zealand, Australia and Alaska. Judge Holland was appointed Chief Judge in 1989 and has had involvement with tort litigation, most notably regarding the Exxon Valdez oil tanker grounding which occurred in March 1989.

From Australia, Justice Gray, a Judge of the Federal Court of Australia, and Justice Hampel, a Justice of the Supreme Court of Victoria, will be presenting papers on Australian Labour Law and Trial Advocacy respectively.

Justice Gray will also be involved in the Indigenous Claims session already mentioned. Justice Hampel's presentation will be run as a workshop in conjunction with his wife, Felicity, a barrister of 14 years' experience who has had an extensive background in advocacy teaching internationally.

In addition to this impressive list of international participants, the New Zealand Judiciary will be well represented. Contributing to speaking sessions are The Right Honourable the Chief Justice, Sir Thomas Eichelbaum, The Right Honourable the President of the Court of Appeal, Sir Robin Cooke, The Right Honourable Justice Thomas Gault and The Right Honourable Justice Ian McKay from the Court of Appeal; Honourable Justice Sir Ian Barker, Honourable Justice Dame Silvia Cartwright, and Justices Blanchard, Elias, Hansen, McGechan, Robertson, Tipping, Tompkins and Wallace from the High Court of New Zealand; Chief Justice Young, Chief District Court Judge, and Judge Shaw from the District Court; Chief Judge Durie, Chief Judge of the Maori Land Court; Judge Finnigan of the Employment Court; and Judge Skelton of the Planning Tribunal.

The New Zealand High Court Judges intend to hold their own two day Conference in Dunedin concurrently with the Law Conference. The Australian Chief Justices – who meet twice yearly – have also decided to make the Dunedin Conference the gathering place for their next meeting. The Chief Justice of Australia, the Honourable Sir Gerard Brennan will be chairing the Conference session on Securities Market Regulation. This will be the first time the Australian Chief Justices have met in New Zealand and their presence promises to lend an extra dimension to the Conference overall.

P J Downey

Case and Comment

Protection of privacy: media and the Broadcasting Standards Authority

TV3 Network Services Ltd v Broadcasting Standards Authority [1995] 2 NZLR 720

Introduction

Under the Broadcasting Act 1989 a complainant who believes that his or her privacy has been invaded by the media can complain directly to the broadcaster concerned pursuant to s 6(1)(a) of the Act. The broadcaster must then receive and consider the allegation, provided it is made within the specified time limits, and notify the complainant whether or not it finds the complaint justified (s 7). Alternatively the complainant can complain directly to the Broadcasting Standards Authority (the Authority) under s 8(c) of the Act. The Authority then determines whether or not the complaint is justified and, if it considers the complaint is justified, may impose certain penalties (s 13(1)).

Re McAllister [1990] NZAR 324 was the first privacy complaint to be determined by the Authority. In that case the Authority had carefully considered what approach it should take to determining privacy matters. Because its decisions could be appealed to the High Court, where legal notions of privacy could be expected to dominate any approach, the Authority did not believe it could rely solely on everyday notions of privacy to determine complaints. Moreover there were obvious competing interests in individual privacy and the public's right to know about events of interest to it. Unfortunately privacy as a tort was, and is, in its infancy in New Zealand so the Authority turned to United States jurisprudence where the most developed ideas on the concept could be found. Privacy is a difficult concept to define in legal terms, and it was to two of the four distinct torts discussed in *Prosser and Keeton on Torts* (5th ed) that the Authority considered as relevant to determining the limits of the s 4(1)(c) protection – protection against public disclosure of public facts, provided they were sufficiently objectionable, and protection of an individual's interest in solitude or seclusion either as to his or her person, private affairs or concerns.

Later the Authority issued an advisory opinion outlining five "privacy principles" which it had developed from the US case law. The main thrust of the principles relates to three situations:

(i) The legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

(ii) The protection against the public disclosure of some kinds of public facts. These too have to be "highly offensive" to the reasonable person, and can include public facts which have become private again through, for example passage of time.

(iii) Factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. Once again the intrusion must be that which is offensive to the ordinary person, but it does not extend to any complaint about being observed or followed or photographed in a public place.

The principles also encompass two defences: the defence of consent and the more important defence of public interest which is defined by the Authority as "a legitimate concern to the public".

These principles have been applied to the cases coming before the Authority when a breach of privacy has been alleged. *TV3 Network Services Ltd v Broadcasting Standards Authority* was an appeal by TV3 to the High Court against a decision of the Authority which had decided that one of TV3's programmes, broadcast on 11 July 1993, contravened privacy standards. It is of particular interest because it is the first time the High Court has had the opportunity to comment on the privacy principles and their application by the Authority.

Background to the case

The programme in question, part of the network's 20/20 programme, dealt with a matter of public interest, incest, and focused specifically on the case of a man convicted of sexual offences committed on his five daughters. TV3 had earlier applied to the Court under s 139(1) of the Criminal Justice Act 1985 for permission to publish identifying information about certain of the daughters: *TV3 Network Services v R* [1993] 3 NZLR 421. This application, which initially had the consent of two of the daughters and the qualified consent of another, had been declined by the Court of Appeal, so TV3 were prohibited from publishing any identifying information about the sisters.

There had been previous publicity about the matter: newspaper reports of the father's trial in February 1993, a television programme at or after the time of trial and an interview given by the eldest daughter published in a weekly magazine in April 1993. These first two publications had given the father's correct name and the magazine article had included the eldest daughter's name, and the first names of some of her sisters. It had also included an old photograph of the father and mother, referred to in the Authority's decision as Mrs S, and a report that the mother had been an incest victim herself. The article referred to the eldest daughter's belief that her mother had protected her husband during some police inquiries in the 1970s. It did not reveal the mother's present name.

The programme

The theme of the programme was the official inaction of the authorities despite complaints laid by one or more of the daughters during the late 1960s and 1970s. It showed interviews with three of the daughters

and a brief interview with the mother, which had been abruptly terminated when the reporter suggested that she had known of the abuse inflicted on her daughters and did nothing. The faces of all of the women were pixilated so that their identities were disguised, and their true names withheld, although TV3 did not argue that Mrs S's voice was altered. Viewers saw Mrs S, partially obscured by the leafy branches of a tree, barefoot and wearing a floral dress and white apron. She was leaning on a stick, at the back door of her house. Initially she seemed prepared to talk to the reporter but once the allegation of complicity was raised the reporter was told in no uncertain terms to leave the property. Her house was shown but the shot of the house was not such as to be clearly identifiable.

Mrs S alleged that her privacy had been invaded (a) in the interview which was filmed and recorded surreptitiously (TV3 had taken their equipment across a neighbour's property to a landfill nearby), and (b) by the voiceover comment revealing that she herself had been an incest victim. She complained directly to the Authority pursuant to s 20(c) of the Broadcasting Act arguing that there had been a breach of s 4(1)(c) of the Act.

The Authority's decision

The Authority in upholding her complaint considered two factual matters were important. First Mrs S knew the person she was speaking to was a reporter, and on that basis it did not accept that the report of the conversation, in itself, invaded her privacy. The other factor was the prior disclosure of the facts in the print media. There was one further matter which was clearly relevant to the decision, and that was that although recognition of Mrs S may not have been easy the Authority nonetheless believed that she could well have been identified by friends and acquaintances.

The majority thought there had been a breach of privacy principles (i) and (ii) in the disclosure of "highly offensive" facts relating to Mrs S's experience as an incest victim. The majority also considered that in view of what it termed the "suppression order", in fact the s 139 Criminal Justice Act prohibition, the prior disclosure was irrelevant, and indeed the existence of the order reinforced the fact that the information it protected was private information in terms of privacy principle (i). Alternatively if they were wrong, and the information was a public fact, the continuation of the order meant it became private again within the terms of privacy principle (ii). The minority disagreed. In their opinion as the information had been disclosed before, and Mrs S's identity had not been revealed to the public at large, the disclosure by TV3 did not breach either privacy principles (i) and (ii).

The Authority then considered privacy principle (iii). It thought that the surreptitious filming of an interview about a highly sensitive matter, where one party thought she was only being asked to take part in an interview, was in the nature of prying, and would have been found offensive to the ordinary person. Although the filming and recording had taken place from the landfill the public place exception to principle (iii) did not apply. It was not the observer, follower or photographer who had to be in a public place, but the person being observed, followed or photographed who was required to be in a public place for the exception to apply.

Nor did the Authority consider that TV3 could invoke the public interest defence. The theme of the programme was official inaction following the earlier complaints made by the eldest daughter. While Mrs S's actions were part of this reason the Authority thought this did not excuse the methods used to obtain an interview. The Authority did not believe "the item moved beyond the 'human interest' level to where it became a legitimate concern to the public" (p 6). Moreover Mrs S had to some extent been a victim herself. TV3 appealed to the High Court under s 18 of the Act. The way the interview was conducted was not necessary to add balance to the programme.

The High Court decision

In the High Court TV3 took issue with the Authority's adoption of US case law on privacy arguing that privacy in s 4(1)(c) should be read as a reference to the principles of the New Zealand law on privacy. The Chief Justice rejected that submission for three reasons. First, His Honour noted that when the present legislation was enacted it was not a situation that had an established meaning in New Zealand law. Second, as the Authority was to have a central role in establishing and maintaining broadcasting standards it would downgrade the role of the Authority if the meaning of Privacy was to have the meaning contended for. Third, His Honour thought that if a complainant was to be restricted to privacy in the "narrow setting of the tort of that name" the protection intended to be afforded by s 4(1)(c) was likely to remain limited. What was at issue was not whether the facts constituted a tort but whether they were such as to be the proper basis for the imposition of a standard by an Authority charged with maintaining standards consistent with the privacy of the individual.

Counsel challenged privacy principle (ii) on the basis that it did not derive from US law and was uncertain in its scope due to the difficulty of deciding when a previously public fact became private. His Honour rejected this. Quite apart from the judicial expressions of approval this aspect of any tort of invasion of privacy had received in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 he thought the Authority could properly decide that the protection provided by s 4(i)(c) could include relief where individuals were harassed with disclosure of past events insufficiently connected with anything of present public interest. Nor could His Honour see any error in principle in the Authority's decision to regard prying as one potential form of breach of privacy.

In considering whether the information could properly be said to be in the public domain His Honour carefully examined the effect of s 139 of the Criminal Justice Act. Mrs S came within the protection it afforded only indirectly because to identify her would lead to the identification of her daughters. This meant however that she should not have been identified. There had been cases, and *Tucker* was one, where information which should never have been published ultimately achieved widespread notoriety such that it would have been an "exercise in futility" for the Courts to prevent other people from publishing the same information. Here however it was only to a limited extent that the facts had become public and Mrs S's identification with them had been

slight. Her evidence that she was an incest victim had been given in open Court and but for s 139 she could have been named. The print media at the time had reported only that the mother of the complainant was herself an incest victim. Counsel for TV3 argued that by giving the evidence in open Court such information necessarily became public property. This argument was rejected on the basis of the flow on effect of the s 139 prohibition. Although anyone who was in Court at the time could identify her the information still retained a significant element of privacy. "In determining whether information has lost its 'private' character it would be appropriate to look realistically at the nature, scale and timing of previous publications" (at 731).

TV3 wanted an interview. They wanted to show Mrs S in the programme. If she did not consent they were willing to film and record her actions in doing so. His Honour was prepared to infer that (a) Mrs S would not in the circumstances have agreed to an interview and (b) TV3 knew this. These factors meant that the reporter's action did not fall within the terms of the implied licence affirmed in *Robson v Hallet* [1967] 2 QB 939, and the reporter was a trespasser from the outset. But, even had the reporter not been a trespasser, TV3 could still have been liable for breaching broadcasting standards. And, and even more important from the perspective of the media, His Honour considered that the method of obtaining filmed material was a matter the Authority could consider in adjudicating on a complaint.

His Honour agreed with the Authority that the actions of the mother 20 years earlier were not a matter properly within the public interest defence. Nor did he consider the covert approach to the mother necessary to give balance to the programme.

Comment

His Honour was careful to draw a distinction between the concept of privacy as used in the Broadcasting Standards Act and interpreted by the Authority, and the concept as it is slowly emerging in the innominate tort of invasion of privacy. In doing so he confirmed the approach adopted by the Authority to the cases which come before it. Yet in the end there may be very little difference between the two.

He also made it clear that in reaching any decision the Authority could properly take into account the actions of the reporter and camera crew in obtaining the material used for the relevant broadcast. The actions of this camera crew and reporter were no different from those of the camera crew and reporter in *Marris v TV3 Network Ltd* (High Court, Wellington, CP 754/91, 14 October 1991, Neazor J) where the plaintiff sought an interlocutory injunction to restrain the broadcast, or indeed for that matter the actions of the camera crews and reporters in many current affairs programmes. What the decision does do is indicate that in most cases any reporter who enters private property knowing that the interviewee is likely to refuse an on-camera interview is a trespasser from the outset, and this is so notwithstanding that the camera crew may be lawfully situated on public property. This does not mean that such an approach can never be justified. Privacy is a fluid concept and one that on occasions must give way to a public interest defence. But here the media must distinguish its own interests in obtaining a story that will boost ratings because the public find it interesting from that which is of legitimate concern to the public.

Rosemary Tobin
University of Auckland

Constructive trusts and "contributions"

Nuthall v Heslop [1995] NZFLR 755

This case concerned an application by a defacto partner for an award of property in the property of her former partner. The decision is of interest and importance because Tipping J explained his judgment in the leading case of *Lankow v Rose* [1995] 1 NZLR 277.

Facts:

Mr Heslop and Mrs Clark had lived together for five years. When the relationship terminated Mrs Clark claimed both financial and non-financial contributions to the relationship. It was argued that Mrs Clark had contributed to Mr Heslop's overall asset position not by increasing it but by diminishing his need to spend. She had done work on the farm cottage that they lived in (this cottage was in the name of a company in which the defendant owned shares) and assisted in her partner's jet boating business. Mrs Clark had also worked as an unpaid secretary and had helped run the farm and cared for the home. In total it was said that Mrs Clark had spent about $55,000 from her own resources largely on living and general expenses. Tipping J at 758 acknowledged that "in a sense Mrs Clark subsidised Mr Heslop's living expenses to some extent by paying more than her half share". The consequences it was argued enable Mr Heslop to make less of a loss than he would have otherwise. Besides the $55,000, Mrs Clark claimed to have contributed $7,000 to the cottage and $8,000 to Mr Heslop's business; a total of $70,000. In summary it was argued that if Mr Heslop had been obliged to spend more himself he would necessarily have been worse off. Tipping J said that "in reality Mrs Clark's claim amounts to the proposition that she should be compensated retrospectively for having contributed more than half the money consumed during the relationship on general living and partnership purposes" (at 760).

Judgment:

In *Lankow v Rose* at 294 Tipping J held that a defacto claimant must show:

1 Contributions, direct or indirect, to the property in question.
2 The expectation of an interest therein.
3 That such expectation is a reasonable one.
4 That the defendant should reasonably expect to yield the claimant an interest.

With regards contributions His Honour said (at 295)

> I would allow as a contribution any payment or service by the claimant which either:
>
> (1) of itself assists in the acquisition improvement or maintenance of the property or its value; or
> (2) by its provision helps the

other party acquire improve or maintain the property or its value.

There may be greater difficulties of proof and assessment when the contributions are indirect, but, once established, they are as real as direct contributions. At the simplest level one partner might have paid for all the groceries with the other servicing and reducing the mortgage. There is an indirect contribution by the former, no less real than if the roles were reversed.

In the present case it was argued that if a couple had lived off the earnings of one partner, thus enabling the other to keep his capital intact, that should be construed as an indirect contribution of a qualifying kind to the other partner's asset or assets (at 757). Tipping J said that he did not have such a situation in mind when he wrote his judgment in *Lankow v Rose* (ibid).

His Honour held that the Court's jurisdiction is not an exercise in general wealth distribution. The starting point is to identify what assets the defendant owns, and then to consider the plaintiff's direct and indirect contributions. The issue in *Nuthall v Heslop* was whether the Judge's concept of "maintenance" of property were apt to cover circumstances where one partner had supported the other enabling that other to keep an asset intact. Tipping J said that it was not possible in such circumstances to say that the "contribution" of the one partner has directly maintained the asset of the other and that whilst it might be possible to take the view that in such circumstances there is indirect maintenance it is of a passive rather than an active kind (at 758).

The problem with Mrs Clark's approach, as His Honour saw it, was that it has the capacity to put a defacto plaintiff in a better position than a married plaintiff. His Honour gave the illustration of a case where the asset attached would, in a married context, be the defendant's separate property. Such an approach would be "taking the concept of sustenance beyond what is generally understood in a matrimonial property context" (at 759).

Tipping J went on to give the example of a defacto relationship where the man supports the family unit beyond a half share with the woman having an asset worth a certain sum. If the plaintiff's argument was to be adopted then at the termination of the relationship the man should be able to recover from the woman a sum representing the excess over his half share of the partnership expenditure. This would be done by a constructive trust over the woman's asset. The Court in *Nuthall v Heslop* was not persuaded that there should be judicial development of the law in this way. It involved social policy and was a matter for Parliament.

Mrs Clark's argument was "really an invitation to the Court to adjust retrospectively the way the parties have chosen to run their domestic finances in the interest of some amorphous concept of equality" (at 759). If the parties had chosen to run their affairs in the way they had then there is no justification for the assumption by the Court of an ex post facto power to require equality by constructive trust or otherwise. His Honour was of the view that all kinds of potentially intractable problems could arise if the Courts expanded the concept of constructive trust yet further.

On the facts of the case it was found that Mrs Clark spent $15,000 above her half share of general living and partnership purposes. There was no evidence that Mrs Clark had an expectation that she would be compensated for this by being awarded a share in Mr Heslop's general assets at the end of the relationship.

On the balance of probabilities it was impossible to find that any work or money contributed by Mrs Clark increased the value of Mr Heslop's assets except for $3,000 increase in the value of the cottage.

Comment:

If one party pays for the groceries and the other pays the mortgage then the former has contributed, indirectly, to the other's asset. By paying for the groceries that party leaves more money in the hands of the partner who could presumably use it to increase the value of some other asset. It is a small step to accept Mrs Clark's argument that one party contributes to the assets of the other by contributing to that other's costs and thus reducing his or her loss (or increasing his or her overall wealth).

Tipping J in *Nuthall v Heslop* refuse to develop the law in this way. The case reinforces the need to isolate and consider each asset and then consider the contribution to it. As initially attractive as Mrs Clark's argument was, His Honour clearly illustrates the problems that could arise by its adoption. A partner with a lower income, but with some asset, could easily find him or herself in the unenviable position of having to part with the asset to meet the other's claim if that other had, with the higher income, provided more to general living expenses during the relationship.

This decision, clarifying as it does, *Lankow v Rose* illustrates the Courts' approach to defacto property disputes, an area that some would consider in need of legislation.

Nicky Richardson
University of Canterbury

The negation of humanity

That slogan ["Better Red than dead"] is an infallible sign that the speaker has given up his humanity. For he has given up the ability personally to guarantee something that transcends him and so to sacrifice, in extremis, even life itself to that which makes life meaningful. Patocka once wrote that a life not willing to sacrifice itself to what makes it meaningful is not worth living . . . The slogan "Better Red than dead" does not irritate me as an expression of surrender to the Soviet Union, but it terrifies me as an expression of the renunciation by Western people of any claim to a meaningful life and of their acceptance of impersonal power as such. For what the slogan really says is that nothing is worth giving one's life for. However, without the horizon of the highest sacrifice, all sacrifice becomes senseless. Then nothing is worth anything. The result is a philosophy of sheer negation of our humanity.

Vaclav Havel
Open Letters : Selected Writings 1965-1990

The Australia-New Zealand relationship in the 21st century

By Hon Justice Michael Kirby AC CMG, now a Justice of the High Court of Australia and formerly President of the Court of Appeal of New South Wales

This article is based on a discussion paper prepared by Justice Kirby for the Institute of Policy Studies of Victoria University of Wellington as a comment on a more general paper on the Trans-Tasman Relationship. His Honour notes that there is a real risk of our taking, what he calls the close and relaxed relationship for granted. He favours the development of institutional links and recommends the idea of an Australia-New Zealand Advisory Council, which he notes favourably would have the acronym ANZAC.

The paper on the Australia/New Zealand relationship prepared by the Institute of Policy Studies deals mainly with economic and trade policy issues. In so far as I have any useful comments on such matters they are contained in earlier writing. See eg "CER, Trans-Tasman Courts and Australasia" [1983] NZLJ 304 and "CER – A Trans-Tasman Court?" in CER – Business and Law Essentials, Part I, Legal Research Foundation Seminar Papers, University of Auckland, 22-23 July 1983, 16 et seq. I recently wrote an essay with Philip A Joseph "Trans-Tasman Relations – Towards 2000 and Beyond" now published in P A Joseph (ed) *Essays on the Constitution*, Brooker's, Wellington, 1995, 129ff.

My general conclusions are not dissimilar to those in the Institute's paper. There is a real risk in taking our close and relaxed relationship for granted. That risk derives from the imperatives which are changing Australia's view of itself and of its place in geography and history. From a comfortable imperial and post-imperial outpost of European civilisation, along with New Zealand, we are now coming to terms with our indigenous people (as you, partly, did earlier) and with our relationship to South Asia. There is no doubt that the great economic lift-off in South Asia presents remarkable opportunities for an English-speaking advanced economy, such as Australia, to seize. This is being reflected not only in trade policies but also in constitutional discussion and in immigration policies of Australia.

Because of a quite marked increase in immigration to Australia from sources other than the traditional sources in Europe, which were hitherto shared with New Zealand, it is likely that Australia, more quickly than New Zealand, will change quite markedly in its racial composition. Whether our constitutional institutions will be strong enough to withstand pressures for changing institutional and social values, remains to be seen. But whereas Australia generally looks north, New Zealand tends to look out to the Pacific. The relationship of our two countries is in this sense complementary. It could give a combined utility to the two countries with so many overwhelmingly similar institutions and beneficial links. The risk is there that our two countries will, looking in generally opposite directions, tend to ignore and under-value the precious relationship with each other. It would be a tragedy if the result of this were that we discovered, without noticing it at first, an important gulf emerging when it was too late to do anything really effective about it.

When we shared the same Head of State, Privy Council appeals, constitutional arrangements, defence interests and general population composition, the relationship could, to a very large extent, be taken for granted. We just *felt* that we were basically the same. But as these links are being severed or questioned, the "bonds that bind" slowly and even imperceptibly are pulling apart. The instance drawn to attention in your paper concerns the aviation agreement. But even more startling was the virtually unnoticed imposition by Australia of visas for New Zealand citizens. Whilst most of the rest of the world is moving towards the abolition of visas (and New Zealand has a much more liberal policy in this regard), the Australian Parliament imposed visas on New Zealanders with hardly a whimper from either side of the Tasman.

True, at present they are largely nominal. But immigration bureaucrats have a way of turning nominal visas into real ones. Contrast the furore which emerged when passports were first introduced for Trans-Tasman travel. The apathy reflects the declining reality of the *feeling* of a link. Australia with its urgent press towards Asia and its many Asian faces in the streets now seems increasingly foreign to New Zealanders. Perhaps New Zealand, with its large Islander population and Pacific outlook seems increasingly foreign to Australians. These appearances may be no more than the coming to terms with historical anachronisms – two European settler nations on the far side of the world, as far away from Europe as you could get. Perhaps at last our geography is reclaiming each of us. But where does that leave the long-term relationship with each other, unless we work at it? The "crimson thread of kinship" which Sir Henry Parkes said linked Australians and New Zealanders is now looking thin and frayed. Geography is not on its side.

That is why I too favour institutional links. One of the advantages

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Why choose mediation?

By Peter Salmon QC, Barrister of Auckland

Questions about the alternative resolution of disputes continue to be discussed. Settlements arranged or negotiated by solicitors on behalf of their clients are of course still the most common way in which disputes are often concluded. This is a traditional function of responsible practitioners when acting for clients. More formal means for resolving problems are arbitration – see the article by Austin Forbes at [1995] NZLJ 414 – or by mediation. In this article Peter Salmon QC explains the usefulness of mediation as a technique for resolving disputes, and its difference from a formal arbitration. He emphasises the need in the mediation process to have openness between the parties, but at the same time to avoid the possible abuse of the system by using it as a means of discovery.

How many clients faced with possible litigation would like a method of dispute resolution that has a 90 per cent or better chance of success, that will not involve any adverse publicity, that will be much less expensive than conventional proceedings through the Court and will take very much less time and which is almost guaranteed to leave the client feeling a winner. It seems an almost irresistible combination. It is mediation. Due in large part to the success of the LEADR (Lawyers Engaged in Alternative Dispute Resolution) organisation and the workshops it runs an increasing number of lawyers are coming to recognise the value of mediation. However it is probably fair to say that in terms of its potential the process is still very much in its infancy. The purpose of this article is to help those who have had little to do with the process to gain some better appreciation of its benefits.

What is mediation?

Effectively mediation is a process whereby a facilitator (the mediator) helps the parties to the dispute reach their own agreed resolution. The mediator is not a decision maker. He does not impose his views on the parties, although he will when appropriate make suggestions as to ways in which the dispute might be resolved. Sir Lawrence Street, perhaps Australia's most successful mediator has described the three fundamental characteristics of the process. First, mediation originates in an agreement between the disputants to call in the aid of a facilitator to assist in the structuring and conduct of settlement negotiations which will include as part of their very essence private consultations with each disputant. Secondly the facilitator has no authority to impose a solution on the disputants as does a Judge, arbitrator or expert appraiser. And third the whole process remains at all times entirely flexible and dependent upon the continuing willingness of the disputants to continue it until such time as either they themselves agree upon the terms of a settlement or one or other of them terminates the negotiations; it is in short consensus oriented.[1]

A successful mediation is a very satisfying process for those who participate in it, both disputants and mediator. For the disputants issues which have kept them apart and caused tension and misunderstanding are removed, a resolution is arrived at which each side finds satisfactory and the mediator has the immense satisfaction of having assisted the parties achieve this result.

What types of dispute are suitable for mediation?

In fact there is virtually no dispute which is not suitable for mediation. Whether there are two parties or twenty, whether the dispute is a major commercial one or a domestic one or an industrial or environmental dispute, all have been satisfactorily dealt with by mediation. Two examples in which I have been involved as mediator will give some indication of the suitability of the process for widely diverse disputes. In the first case two parts of a family were locked in a bitter dispute arising from the terms of a will. They had hardly spoken to each other for three years. Proceedings had been issued in the High Court and were shortly to be heard. Had the case gone to hearing it would have taken

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of the present international constitutional monarchy which we share is that it is a link between Australia, New Zealand and indeed other countries in the region. The reversion to geographical nationalism may be irrelevant to the age of cyberspace. But its siren call seems to be potent in Australia at this time. And I do not think that New Zealanders would ever agree (or outside a federation should agree) to surrendering final decisions on their legal matters to the High Court of Australia. Yet the Australian Constitution makes the birth of a hybrid Court for Australasia impossible without major constitutional amendments, difficult to procure.

For these reasons, I favour the idea of an Australia-New Zealand Advisory Council. Rekindling the acronym ANZAC in a way suitable for the 21st century has my complete support, as a citizen of Australia, who feels a special connection with New Zealand, like no other country. Before things change too much, we should initiate the institution that takes CER beyond trade to reenforcement with the bond we have assumed and accepted but which should no longer be taken for granted. ❑

at least a week. A Court hearing would probably have increased the bitterness. The mediation lasted for a day, a resolution satisfactory to each side was reached and the parties ended up shaking hands and laughing with each other.

The second could not have been more different. It was a dispute between a regional health authority and a major group of service providers. Relationships had deteriorated to the extent where allegations of bad faith were being made and the arguments seemed destined for litigation. A very large number of issues were raised, issues which if allowed to blossom in the litigation context would become complex and difficult of solution. Once again after a day-long mediation the parties resolved their differences and were able to work together again. Whilst the two cases were very different, they had one thing in common. They involved people who were inevitably involved in an ongoing relationship. Mediation because it allows both sides to win is ideal in such a situation.

Mediation is of course a voluntary process so that the necessary prerequisite is for the parties to want to engage in it.

The role of the legal adviser

The essence of mediation is that it is an informal, although structured, meeting between the parties themselves in a non-legal context. The parties must be able to engage in a free and completely confidential person-to-person exchange of views about the dispute and the ways in which it might be able to be settled. Legal advisers can play an important part in the process so long as they do not engage in adversarial tactics. It is crucial that legal advisers appreciate this and their appropriate role. The LEADR organisation and its workshops is particularly helpful in this respect. Very often mediations take place without the presence of legal advisers, though it may be important to have them available for the parties to call upon if necessary. Legal advisers are able to play three roles in a mediation. First to advise and assist their clients in the course of the mediation. Secondly to resolve between them legal issues that might arise and thirdly to prepare the terms of the agreement recording the result of the mediation. What is absolutely crucial to the success of a mediation is that the parties present should have authority and be prepared to settle without reference back to a head office or other parties.

Witnesses

Generally speaking mediation does not involve the presentation of evidence. However it may be important in some circumstances for the parties to provide each other and the mediator with experts' reports. If this is to be done it should be done in advance of the mediation. The expert might be present during the mediation to answer questions or provide advice to the parties.

The mediation process

Mediators trained in different ways will have different approaches to the conduct of a mediation. The LEADR model is in my view a very practical and successful one. It involves the parties meeting together with the mediator in an opening session where each party outlines its case and issues are identified. The parties then meet individually with the mediator and later come back together for a full meeting. This process can continue with variations until a resolution is reached. A mediator treats what is told him in private sessions in total confidence unless authorised to disclose to the other side. It is of the essence of mediations that the whole process is confidential and parties sign confidentiality agreements before entering into it. In an unreported decision of the Supreme Court of New South Wales 24 February 1992 *AWA Ltd v Daniels* Rogers CJ said of facts which had come to light in the course of a mediation:

> If the fact be that the other side has absolutely no inkling of some matter which, if known about is capable of being established by objective evidence, but which would not ordinarily come to the knowledge of the other side in the normal process of litigation and its existence is revealed only by a statement made in the course and for the purposes of the mediation, I would hesitate long before concluding that the objective evidence so revealed is admissible. It is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them. As well were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic penalty-free discovery process.

I have not heard of any abuse of the mediation process in New Zealand but parties and their legal advisers must be scrupulous to avoid it. As conventional litigation becomes more extreme and time consuming it is very much in every client's interest for the possibility of mediation to be considered. I strongly recommend the process. Indeed I predict the time will come when mediation – at least as a first (and often last) stage in the dispute resolution process – will become the rule rather than the exception. ❑

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1 Sir Lawrence Street AC KCMG "The Language of Alternative Dispute Resolution" 66 ALJ 196.

Law and human rights

However, I prefer to see the dispute before us as concerned with the existence of rights (or, more accurately immunities) which are better identified as individual or personal rather than as "human rights". The latter expression, at least when it has not been given a particular statutory content, is narrower. This is because "human rights" focuses attention upon the human actor and away from the artificial legal entity even though it may stand in front of the human actor or beside that person as a co-defendant. The term "human rights" may also operate more widely. This is because, at least without specific statutory foundation, it evokes deep concerns of natural law which are not necessarily those of civil law. Finally, the expression "human rights" may encourage circularity of reasoning, by posing a question, in relation to corporations, in terms which answer it.

Gummow J
TPC v ABBCO
(1994) 123 ALR 503 at 535

Australia calling:
Canadian star bright Convention highlight

By A O Ferrers, formerly an Auckland practitioner, and now of Queensland

I shall light a candle of understanding in thine heart, which shall not be put out until you have finished ...

2 Esdras xiv 25

A spirit of wisdom and understanding, a spirit of counsel and knowledge shall rest upon him... he shall judge the poor with justice and defend the humble in the land with equity

After Isaiah xi 2,4 NEB

It was spring. The sky was blue. The temperature warm. Jacaranda time in Brisbane. River breezes rustled the flowers of those trees, causing the blossom to cascade around their feet into a carpet of that wonderful hue which hovers between lavender and blue. This was the season when lawyers from all over Australia and from around the world met together in the new convention centre for the 29th Australian Legal Convention. It was a grand gathering, everyone being *en fête*: a time for a contemporary, but relaxed, look at issues, new and old, which impact on the law.

Catherine Fraser CJ caught the spirit of the season when she delighted her audience with her fresh air and good sense, which touched us all, as she discussed "awareness" and judicial awareness in particular. Her address was described as "powerful" by Chief Justice Black of Australia's Federal Court. This lady is also a Chief Justice – of Alberta, where, she proudly told us, women full-time Judges outnumber men, 7 to 6, in the Court of Appeal.

Canada

Speaking of the Canadian situation, Her Honour pointed out that all law there is now set in the context of the *Canadian Charter of Rights and Freedoms*, which demands that there shall be an inclusive system of justice that is fair and equal. Today that means "often choosing values rather than choosing precedents... acting from a position of full knowledge and understanding." Canadian Judges are now committed in the result to taking positive steps to see they are properly prepared to fill their judicial office and dispense justice in a way which our society is demanding.

> The Canadian Judicial Council has committed itself to the concept of comprehensive, credible and in-depth social context education for all of Canada's judges on issues such as gender equality, racial equality and aboriginal rights.

In answer to a questioner at the end of her address, Her Honour made it clear that, while she had spoken of Judges, such awareness was not simply for Judges alone, but for everyone involved with the law, whether lay, law-enforcing, Court officials, teaching, professional, student or academic.

By being aware, the Judge is alert to recognise and focus on discrimination in its many and varied forms as found today. Chief Justice Fraser referred to the leading Canadian case of *Andrew v Law Society of British Colombia* [1989] 1 S C R 143 where "discrimination" was defined as:

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

Such discrimination, according to Her Honour, may be direct, indirect, adverse effect or systemic.

Barriers to change

Chief Justice Fraser spoke of there being any number of barriers to setting up awareness training, though most of these have been overcome.

There were those who denied that any discrimination existed in the administration of the law; there were those who said "prove it", that is demonstrate there is a problem involving bias; some feared judicial independence would be compromised; others feared special interest groups would gain too much influence; and yet others felt a reluctance to examine personal values; and so on.

Benefits of awareness training

Chief Justice Fraser indicated that training first and foremost led to fairness and equality in the justice system. The law is for everyone and everyone has the right to expect equal fair treatment under it. At this juncture we might well recall Lord Hewart CJ's ringing dictum pronounced more than 70 years ago,

> Justice should not only be done, but manifestly and undoubtedly be seen to be done: *R v Sussex Justices* [1924] 1 K B 256, 259.

Bias has to be eliminated in whatever form. In this context the Chief Justice found a most apt quotation from a 1989 article by Peggy McIntosh when she speaks of the advantages of being white:

> White privilege is like an invisible, weightless knapsack of

> special provisions, maps, passports, code books, visas, clothes, tools and blank cheques... I was taught to see racism only in individual acts of meanness, not in invisible systems conferring dominance on my racial group.

She lists many examples. I take one at random: a white person does not have to educate his or her children to be aware of systemic racism for their own daily protection.

Awareness training also prevented "improper reliance on myths and stereotypes", which otherwise could lead to unfair treatment. The Judge suggested that there must be a continual evaluation of one's underlying beliefs and assumptions to test for the presence of such myths and stereotypes.

Awareness training was also very important when Judges made new law in their decisions, particularly so in jurisdictions where there was a bill of rights. This will, in Her Honour's view, very often involve the choosing of values;

> Judges must ensure that they have heard all the dialogue before they make their decisions. To... make informed choices, we must understand. We must respect diversity and strive to overcome our own limitations and biases... That is why an understanding of the values of others and an awareness of how one's values affect the judicial decision-making process are key to judicial fairness... judges must understand people and powerlessness ...

Structuring training

To meet the criteria of the Canadian Judicial Council, the model for judicial education on social context issues has been designed to include these principles:

- a process-orientated approach, that is it must be on-going;
- judicial leadership – senior Judges must take part wholeheartedly;
- judicial faculty – Judges teaching Judges;
- skills training for judicial faculty;
- public involvement in the education process by academics and community representatives (native elders, workers in battered women's shelters etc) to bring "a real life perspective".

Australian unawareness

Awareness, at leat as far as gender is concerned, has been a live issue in Australia only in the last year or two, thanks largely to media beat-up on television and in the press.

According to the media, who have echoed the outbursts of women's groups, some at least of Australia's Judges are not living in today's world so far as rape is concerned. There has been lively debate. To some extent this has been fanned from a few sturdy flames into something of a conflagration by the media highlighting certain judicial remarks (damning when read in isolation) and shaking them to death, as a terrier would a rat.

Three statements have been put under the spotlight –

Per Bollen J in the Supreme Court of South Australia: he told a jury in a rape in marriage case that husbands had the right to be rougher than normal to persuade their wives to have sex.

Per Judge Bland in the Victorian County Court: when women said "no" to sex, "no" often subsequently meant "yes".

O'Brien J in the Supreme Court of Victoria: he imposed a lesser sentence on a rapist because his victim was not "traumatised", because she was unconscious (by being beaten by her attacker) during the crime.

In each case the remarks have been lifted out of their context and subjected to scrutiny and ridicule.

Editorial comment in Brisbane's *The Sunday Mail*, under the headline JUDGES BLINKERED, was:

> ... judges seem to have little grasp on reality and (a light sentence) is another indication of how our legal system is failing our women and children... when rape victims and abused children face up to the court ordeal and police conduct scarching inquiries and spend valuable time bringing the offender to book, they (*sic*) should be jailed. Yet many are freed to offend again.

Bill Keough, a Melbourne solicitor, has called for Judges to be compelled to hear pre-sentencing reports on the psychological harm caused to rape victims. He considered that if Judges understood better the trauma caused by sexual assault, their sentences would be more consistent and public faith in the criminal justice system would be restored.

Of course, sexism does sometimes have its funny side. The Goons had many famous jokes. One concerned the picture of a lady in her flimsy underwear on a certain page in *The Radio Times*. The Goons were quick to point out that this was an advertisement – and not a programme!

I was reminded of this when Police arrested some young women for defacing a hoarding. The giant billboard, atop a commercial building, displayed to the populace of Sydney a recumbent young lady in her Berlei bra being sawn in half by a male magician. Some passing motorists were even alleged to have almost lost control of their vehicles, as a result. Its caption read "You'll always feel good in Berlei", to which the women added "Even if you're mutilated".

The Magistrate soon put paid to any shock horror at such a dastardly deed of daubing. Pat O'Shane SM in her Balmain Local Court dismissed the charges. Her view (as expressed to a later Women and Management conference) was "women are being violated every minute of every day by the ways in which they are portrayed in the media – in advertising in particular". She said as soon as she looked at photographs of the billboard advertisement, which reflected an "implicit invitation to violence", she knew she was going to free the Berlei Bra Four.

In the same address, describing herself as "an Aboriginal female (not coming) from the right side of the tracks", she lashed out at some of her male colleagues:

> If any of us is labouring under the delusion men on the bench have more enlightened attitudes towards women than men on the street, then let me disabuse you of that. I think the kinds of things we have heard about Justice Bollen exemplify what are very widely held attitudes on the part of male judicial officers.

Even more recently, a Melbourne billboard has displayed a young Adonis (a 17-year-old still at prestigious private school in fact), likewise

in recumbent posture, with his boxer pants around his ankles and a sign amidships, for the sake of decency, proclaiming "Every day every man should drop his pants, look down and smile". At the time of writing, this poster has not been the subject of additional artwork or magisterial comment. I am tempted to say, "Watch this space".

Justice for women

When I first began to study law over forty years ago, a joke was made one day in class that (married) women had recently no longer been classified with lunatics and prisoners as having less or no rights under the law compared with men. Funny what you remember from your student days!

In the years since then women have been struggling, and do so still, to establish their rights in full. However, in the last year or so discussion of gender bias in the law has been increasingly in the spotlight. While we have laws on affirmative action, equal opportunity and against discrimination, it is only in comparatively recent times there has been a focus on the law actually operating against women.

The Law Reform Commission has been studying the problem and has recently released its proposals for a *National Women's Justice Program*.

There were eight areas of particular concern: violence; the cost of justice; information on rights and remedies; women's credibility in Court proceedings; many aspects of family law; sex discrimination and harassment; cultural problems of non-English speaking women when using an interpreter; legal services for women Aborigines.

The Commission found evidence that there is certainly not equal *access* to justice for all women in Australia. Measures must be taken to help those women who find barriers, arising from such things as culture, remoteness, race and so on.

It believes that there should be at least six programme areas: legal representation; legal advice and referral; community legal education; development of the law; research and data collection; Court processes and facilities.

Many women can only find a remedy for their plight in Court and with constantly diminishing legal aid, they often cannot afford to seed redress there, whether to obtain criminal compensation, a protection order, custody and access, etc.

Women's specialist legal centres are few, although women are found to have confidence in the ones that do exist. There should be more and would be if the money were there. At least there should be, according to the report, a toll free telephone legal advice and referral service available to all women throughout Australia.

The Commission also urges ways of making Judges aware of the realities of women's lives. Most women do not live the lives of Judges' wives. It suggests education outside the Court as one way and the Australian Institute of Judicial Administration has been looking into this.

Another way it to bring into Court information about women's lives so that the Court has an opportunity, as in test cases, to develop the law in a way which is responsive to women. But where is the money to come from to follow these paths?

To ameliorate the situation to give women a fair deal, the Commission seeks massive government funding. The government has responded positively, as appears later when I deal with its Justice Statement.

We live in a progressive society where all are said to be equal before the law, but in Australia some for the moment at least are still more equal than others.

Gender bias

Writing in the October 1993 issue of *Australian Lawyer* Katherine Hall (a lecturer at Flinders University) makes these comments, echoing in advance, as it were, many of the points made by Chief Justice Fraser:

> Eliminating gender bias is about achieving greater fairness in the judicial process. It is not just about the intentional acts or comments by judges which discriminate against women. More particularly, it is about the unconscious systemic bias which permeates the judicial system.
>
> Gender bias in the law means the use and enforcement of socially induced assumptions and stereotypes based on gender which prevent the reality of the individual being seen. These... can be about the nature, role or capacity of men and women or involve myths and misconceptions about the economic and social realities of their lives and the relative value of their work.

It is not a new idea that the life experiences, values and assumptions of judges can affect their decision-making, even if subconsciously. As stated by Lord Macmillan:

> The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognised by their possessor... every legal mind is apt to have an innate susceptibility to particular classes of arguments.

Nor is it surprising that judges have trouble understanding and empathising with situations and individuals with which they have had limited contact.

It must be recognised that gender bias is a sensitive issue and strong reactions to the existence of the problem and to appropriate solutions may have to be overcome. Firstly, there is the implication that judges are not fulfilling their professional obligation to act fairly. Secondly, discussions on gender bias may raise personal questions about judges' attitudes and behaviour in their private lives, their upbringing and perhaps their notion of chivalry. Finally, there is the issue of judicial insularity from political pressure.

I have taken the liberty of giving this extended quote as Ms Hall sets out many of the main points to be considered. All is not to be corrected in a day, nor perhaps in a generation, but to highlight the key points is a significant beginning.

Gender bias issues are most frequently associated with cases involving domestic violence, sex offences and family law matters generally. But also they can and do occur in civil claims, employment disputes and property transactions, to say nothing of inter-action in Court and advancement within the profession.

To some extent the Senate Standing Committee on Legal and Constitutional Affairs has come to the rescue of the judiciary. In its report, "Gender Bias and the Judiciary", it

says that too much publicity, some even being "mischievous", has been given to a few, if unguarded, judicial remarks. "The committee believes the vast majority of judges are intelligent and thoughtful and undertake their task conscientiously and well, and with no suggestion of any wilful bias."

But the report sides with Katherine Hall: the focus must be on the legal system, not on a few, scattered words of Judges.

As for solutions, the Committee favours two main approaches: the manner in which Judges are chosen; and better education of Judges and lawyers.

As to the first, it suggests committees be formed to assist in evaluating candidates. One for Federal Judges and one in each State and Territory for their Judges. Greater diversity should be sought to allow women and academics to be included, as long as the fundamental criterion was merit.

The Law Council of Australia is opposed to any such committees, but agrees that Attorneys-General should consult more widely than at present on candidates. As to the other, it believes continuing education should be asked for, though on a voluntary basis, through awareness programmes conducted by the Institute of Judicial Administration.

Another recommendation was that the Australian Law Commission conduct a survey of legislation and cases which need to be changed and overruled because of "their discriminatory potential".

Cultural awareness

Speaking at the same convention session, Justice Colleen Moore of Australia's Family Court, pointed out awareness was not just a gender issue in Australia, where the population has just topped 18 million. Today, one in three Australians do not have Anglo-Australian descent; fifteen per cent speak other than English at home. Awareness and understanding of ethnicity was therefore also vital.

Justice Seaman, who has recently retired from the Supreme Court bench in Western Australia, has always been very interested in the Aborigines.

In 1993 he took part in a pilot project to enhance understanding by judicial officers (Judges and Masters of the Supreme Court and Judges of the District Court) of Aboriginal culture. This was so successful that other similar projects are being carried out nationwide. The project arose out of a recommendation of the Royal Commission into Aboriginal Deaths in Custody.

The project consisted of a number of workshops. In one, split into groups, they were asked to return with five questions about what they would like to know about Aboriginal society in its relationship to the criminal justice system. In another there was a presentation on customs and Aboriginal customary law. And so on.

In the result the Courts have decided –

- Judges on circuit will meet local Aborigines to foster confidence and help identify problems in how the criminal justice system works.
- Families of offenders and victims will be encouraged to be in Court when sentence is passed.
- People will be sought who can speak for an offender.
- Endeavours will be made to employ more Aborigines in Court administration.
- In an ongoing effort to promote understanding a special committee will advise on how Aborigines are affected by the justice system generally and the criminal justice system in particular.

Government's Justice Statement

This long awaited statement appeared in May 1995. It addressed many of the concerns mentioned earlier. The following quotations are taken from the Justice Statement Overview:

> Access to justice for all Australian women is a key objective... the Government will establish a national network of women's legal centres... resourced to provide for the particular needs of women living in rural Australia and women of non-English speaking backgrounds. Each centre will provide a toll-free telephone legal advice service. The Government will... implement measures aimed at addressing violence in family relationships... fund gender awareness programs for judges and tribunal members... undertake further necessary law reform to protect the rights of women, including the strengthening of the Sex Discrimination Act.
>
> The Government will establish a human rights and discrimination law centre to provide specialist legal advice to individual clients and other community legal centres.
>
> The Government will fund professional development programs for courts and tribunals on cross-cultural awareness issues.

Voluntary seminars for Family and Federal Court Judges and officials on issues of ethnicity will soon commence.

Australia begins

The peroration of the Convention session on Awareness Training was in the hands of Justice Sally Brown of our Family Court. She is an electric speaker, devoted to this topic. She chairs the Awareness Committee of the Australian Institute of Judicial Administration and has set about making her judicial colleagues "aware" with relish. Her days as Melbourne's Chief Magistrate have given her a special insight into the multitudinous people who come before the Courts and their problems. This experience stands her in good stead in her new role.

She favours renaming "gender awareness" to "sex awareness", which somehow in her experience gains the matter greater attention, since it appears more personal then. Voluntary sessions under the new title now seem to have a much greater number of her colleagues attending. In addition to the elements mentioned from the Canadian model, she believes that emphasis has to be placed on issues of voice and tone and focus should be directed to answering such questions as how good is my vision and where are my blind spots?

As Justice Brown sees it, having been alerted to these components of awareness, Judges will develop the common law more and more using the age-old formula of the case by case method.

But let me leave the last word with Chief Justice Fraser:

continued on p 13

Fiduciary relationships in commercial settings:

some thoughts on recent New Zealand cases (Part I)

By Matthew D J Conaglen and Robert Hollyman, Judges' Clerks, Court of Appeal of New Zealand

This article discusses the law relating to fiduciary relationships in the commercial area where specific circumstances establish that relationship. This is distinguished from three cases in which the inherent nature of a relationship itself raises a presumption that it is a fiduciary one. In the first part of the article, published below, the authors establish a theoretical basis. In the second part, to be published in the next issue of The New Zealand Law Journal, *they discuss practical applications of the fiduciary concept.*

> There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, Courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. (*LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 26 per La Forest J.)

In *LAC Minerals Ltd v International Corona Resources Ltd* (above), La Forest J suggested that there are three different ways in which the Courts have used (and misused) the term "fiduciary". First, what may be considered as settled cases, where the inherent nature of a species of relationship raises a presumption of the existence of a fiduciary relationship (at 28). Second, in relationships outside these cases, where specific circumstances mean that the relationship is fiduciary (at 29). Third, where the Courts have found a fiduciary relationship in order to be able to give certain remedies (at 30).

In respect of the first class, the categories are numerous, well-known, and extensively discussed elsewhere. (See, eg, Ellis, *Fiduciary Duties in Canada* (1933).) Obviously the third class is an illegitimate cousin of the other two. In the words of La Forest J, "this third use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term." (*LAC Minerals Ltd*, above, at 32.) The second of the classes identified by his Honour contains the most interesting and challenging aspects for any consideration of fiduciary law, and it is those aspects which form the basis of this discussion.

Because of the size of the topic and the limited space for this article, this discussion focuses on fiduciary obligations within commercial relationships. Even that more constrained topic is wide-ranging in its own right, and has received much attention in the literature.[1] Rather than needlessly revisiting this material, we intend to discuss recent New Zealand cases implementing fiduciary principles in a commercial context. However, this cannot be sensibly carried out without first providing a brief adumbration of the nature of fiduciary relationships and their past characterisation.

The thoughts which follow are merely the result of our own reflection and, to borrow a phrase from the Honourable Justice Sir John Laws, have not been tested on the anvil of argument. They are offered as much to enliven further enquiry as to advocate their merits (Laws, "Judicial Remedies and the Constitution" (1994) 57 MLR 213).

Early formulation

One long-standing definition of the fiduciary concept was proffered by Professor Finn in 1977. It provides a useful starting point in that it summarises statements found in many cases:[2]

> [A fiduciary] is, simply, someone who undertakes to act for or on

continued from p 12

> If the judiciary is to maintain its integral role as part of a justice system that the public expects will deliver justice, then we must ensure that we ourselves meet justice's highest standard. That means an informed, open-minded judiciary, respectful of change when warranted and oblivious to change when capricious. We have to learn to know the difference and what social realities to take seriously and when... Without informed education about the realities of the world in which judges live, it is difficult to see how we can be expected to judge it fairly. ❑

> behalf of another in some particular matter or matters.

On its face, this definition would seem to include all executory contracts, for the promisor in such contracts is undertaking to do something for the promisee. Given that this simply cannot be right, one would expect some qualification or discussion of the "undertaking" necessary for the fiduciary relationship. However, Finn fails to provide that qualification. His discussion of the nature of the undertaking, while listing some of the possible features of the undertaking, does not advance one's understanding of the species of undertaking necessary for there to be a fiduciary relationship.

In an attempt to give meaning to Finn's definition one might consider the possibility of qualifying the "undertaking" by reference to the nature and content of the ethical obligations which characterise a solicitor's undertaking, as opposed to a normal contractual undertaking. However, this possibility gives a meaning to the use of the verb "to undertake" more narrow than context allows. This leaves us with a definition too broad to assist in the advance of an understanding of the fiduciary concept.

Finn's definition also takes the view that it is the assumption of obligation by the fiduciary which effectively creates the relationship. While this has received judicial support,[3] an alternative view has also been applied. The alternative view suggests that the relationship depends on the expectations of the person who benefits from the fiduciary's obligations (hereinafter referred to as the "beneficiary"). As Tipping J has put it:

> [A] fiduciary relationship will arise where one party is reasonably entitled to repose and does repose trust and confidence in the other....

This would capture the situation where one person foists confidential information on another without a voluntary undertaking by that other to keep it confidential,[5] which would fall outside the definition given above. Finn himself has revised his earlier definition and now suggests that

> [w]hat must be shown ... is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship (Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, 46.).

A third approach postulates these two views as alternatives. Gault J in *Liggett v Kensington* put it this way:[6]

> Generally it is appropriate to look for circumstances in which one person has undertaken to act in the interests of another or conversely one has communicated an expectation that another will act to protect or promote his or her interests.

The expectations of each of the parties are clearly relevant factors in delineating the relationship, but they do not really advance one towards a full understanding of a fiduciary relationship. It seems to us that the proper investigation into whether or not a fiduciary relationship exists cannot depend solely on the actions or expectations of either party. The cases posit these as indicia of a fiduciary relationship. They do not provide much assistance in understanding what lies at the heart of a fiduciary relationship.

Frame v Smith

One of the first steps towards a new definition of the fiduciary concept was taken by Wilson J in *Frame v Smith* (1987) 42 DLR (4th) 81, (SCC). She posited three general characteristics as being common to all fiduciary relationships (at 99).

(1) The fiduciary has scope for the exercise of some discretion or power.
(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

This formulation has gained much support in the Canadian Supreme Court,[7] as well as in other jurisdictions (See, eg, *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 22 per Richardson J (CA)). However, like Finn's definition above, it too has deficiencies. Our main concern is that the presentation of three distinct limbs gives the impression of a comprehensive test, whereas essentially they are part of a concept which must be understood as a whole. Dividing the concept into sub-categories and numbering those individual categories obfuscates the fiduciary concept by implying that it can be understood in discrete parts, rather than as an integral whole. Further, such sub-categorisation can lead to "a tendency to cite and interpret and apply [the] formulation as though it were a statute (*Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 WLR 64, 70 per Lord Nicholls of Birkenhead (PC)). As the Privy Council has recently pointed out, in another context, "[t]his approach [is] inimical to analysis of the underlying concept" (ibid).

Subsidiary to this methodological concern, the substantive content of her Honour's formulation also hinders a full understanding of the fiduciary concept. It claims to set out three different characteristics of the concept, whereas in fact it seems to us that it largely describes three overlapping aspects of a situation of vulnerability. Again, this does not advance one towards a full understanding of the concept.

This does not render Wilson J's statement redundant because, on a practical level at least, it still assists in determining and delineating the existence of vulnerability between parties in a specific relationship.

In comparison, La Forest J takes the view that vulnerability is no more than a hallmark, indicative but not essential:

> [V]ulnerability is not, in my view, a necessary ingredient in every fiduciary relationship. It will of course often be present, and when it is found it is an additional circumstance that must be considered in determining if new classes of relationship should be taken to give rise to fiduciary obligations then the vulnerability of the class of beneficiaries of the obligation is *a relevant consideration* (*LAC Minerals*, above, at 39 (SCC) (emphasis added); see also *Hodgkinson v Simms*, below, note 6 at 176 (SCC).).

More recently, in *Hodgkinson v Simms*, his Honour elaborated his thinking on this point:

> [T]he concept of vulnerability is not the hallmark of [a] fiduciary relationship though it is an important *indicia* of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. ...[T]he presence of loyalty, trust and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty (at 173, per La Forest J).

As we understand this, La Forest J was suggesting that the elements of trust, confidence, and expected loyalty are necessary hallmarks (to adopt his terminology) of a fiduciary relationship. With respect, this seems to obfuscate the real issue. If his Honour meant that duties of loyalty and confidence are hallmarks of a fiduciary relationship then he was plainly wrong. These duties are among the consequences of a fiduciary relationship. To suggest that these elements "give rise to a corresponding duty of loyalty" is petitio principii.

Of course these elements can be circumstances of a relationship, rather than duties, and this was probably his Honour's intended meaning. Yet, ultimately, it still seems to us that vulnerability is the conceptual link between all three of the circumstances which La Forest J mentioned. It is at the heart of a situation of trust that one party is vulnerable to a breach of that trust. Likewise, an expectation of loyalty can be cast simply as another circumstance of trust, and therefore vulnerability. Similarly the relevance of confidentiality stems from the fact that it is strong evidence of a situation of vulnerability.

In a similar vein to La Forest J, Finn has stated that "[i]t is obviously not enough that the other party is in a position of vulnerability" ("The Fiduciary Principle", at 46). Both of these objections seem to rest on the assumption that vulnerability exists in nearly all commercial relationships. This cannot be denied (see below, *Liggett v Kensington*, and accompanying text), but it misunderstands the vulnerability argument. It seems to us that in fiduciary relationships there exists a particular kind of vulnerability which *can* be distinguished from vulnerability in general.

We assume that this is the kind of vulnerability that Sopinka J had in mind when he said:

> The one feature ... which is considered to be indispensable to the existence of the [fiduciary] relationship ... is that of dependency or vulnerability (*LAC Minerals*, above, at 63 (SCC)).

In New Zealand, Cooke P has also adopted the position that vulnerability is "an important, indeed cardinal, feature of a fiduciary relationship", (see *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 315 (CA); see also below at note 9 and accompanying text; and *Auag Resources Ltd v Waihi Mines Ltd* [1994] 3 NZLR 571).

It would seem to be more conceptually clear to accept that vulnerability is fundamental to a fiduciary relationship, and then to discuss what is meant by "vulnerability" in this context. Perhaps a label such as "fiduciary vulnerability"[8] should be used in order to differentiate it. However, it is important to bear in mind that no label can ever be more than shorthand for the concept which it represents. With that in mind, we turn now to a discussion of our understanding of "fiduciary vulnerability".

Fiduciary vulnerability

It is patently clear that the concept of vulnerability per se is too broad to be useful in determining whether or not a fiduciary relationship exists. The definition in the *Oxford English Dictionary* includes "[being] susceptible of receiving wounds or physical injury [and being] open to attack or injury of a non-physical nature" (xix *OED*, 2nd ed, 786). The concept requires some qualification if "vulnerability" is to be of any assistance.

One suggestion of a more refined definition which has received judicial imprimatur is that the fundamental element of "fiduciary vulnerability" is reliance on the honest conduct of the putative fiduciary. As Anderson J expressed it (in *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 321 CA):

> [W]here the appellant's knowledge of the amount due to her for authorised use was dependent upon honest conduct by the first respondent, and where plainly the appellant would not have entrusted the dies to the first respondent except on the assumption of strict honesty by the first respondent, there was a fiduciary relationship as well as a contractual relationship between the parties.

However, in his dissent in *Liggett v Kensington*, McKay J pointed out that dependence on honest conduct is not peculiar to fiduciary relationships:

> No doubt [the plaintiff] was"vulnerable" in the sense that he was dependent on the honesty of the people with whom he was dealing, but *that is true in any commercial situation* in which one person parts with his money without immediate delivery of goods or their specific identification ([1993] 1 NZLR 257, 290 (CA), emphasis added).

Indeed, one could say the same of any commercial relationship at all, not solely of sales of unascertained goods or sales involving delayed passage of title.

One might infer that it was this line of reasoning which lead Gault J to omit the element of honesty from his discussion of the factors which, in his Honour's view, gave rise to a fiduciary relationship in *Liggett*. His Honour stressed the reliance of the plaintiff on the defendant complying with its contractual duties, rather than on the honest performance of those duties:

> Once money was paid by purchasers they relied on the company to take the necessary steps to carry out its undertakings... (at 282, (CA).

As the Privy Council commented, this amounted to no more than an obligation to comply with the contractual duties which the defendants had undertaken (*Re Goldcorp Exchange Ltd (in rec): Kensington v*

Liggett [1994] NZLR 385, 400 per Lord Mustill (PC)).

The heart of the matter

We suggest that fiduciary vulnerability can only properly be held to exist where the realities of the relationship force the beneficiary to accept the advice of, or to acquiesce in the actions of, the fiduciary, and where the beneficiary lacks any practical opportunity to supervise or superintend that exercise of power. Typically, the beneficiary also lacks adequate access to relief for misuse or abuse of the power by the fiduciary.

Obviously this is similar in content to Wilson J's formulation in *Frame v Smith*, which we discussed earlier. However, we wish to stress that it is perhaps better to attempt to understand the meaning of the fiduciary concept as a whole, rather than as a series of supposedly discrete elements. One should refer to Wilson J's earlier discussion of vulnerability in *Frame v Smith*:

> This [fiduciary] vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power (at 99, per Wilson J (SCC)).

In New Zealand dicta can be found in several cases which seem to support this understanding of the fiduciary concept. In *Liggett v Kensington*, Gault J stated:

> There are elements of reliance, confidence or trust between [the parties] often arising out of an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting their interests (at 281 (CA)).[9]

This concept does not seem susceptible of further definition without subdividing the fiduciary concept into categories separated only by spurious distinctions. The main difficulty stems from the nature of human relationships in general. The multi-faceted nature of human relationships makes it impossible, given the number of factors involved in determining the power-balance between the parties, to draw clear distinctions between relationships, both fiduciary and non-fiduciary. In view of this, fiduciary relationships may best be conceptualised as a continuum, thus:

One end of the continuum represents a situation where control of the relationship is shared equally between the parties, and the other a situation where control rests entirely in the hands of one party. Relationships regulated in tort and contract law would fall towards the left hand end of the continuum, and relationships which attract the label "fiduciary" would fall towards the right hand end. Finn has discussed this in greater depth than is possible here ("The Fiduciary Principle" at 3-4, 55-56 and passim.).

Ad hoc cases and the "settled" classes

At the start of this paper we mentioned La Forest J's division of the use of the term "fiduciary" into three classes. There is perhaps a closer link between the first two classes than his Honour appears to have allowed. It seems to us that there is much to be gained when discussing the ad hoc fiduciary relationships by referring to the already settled classes. Indeed, it is surely impossible to understand the principles which determine when a relationship will be ad hoc fiduciary without regard to the qualities which have led the Courts in the past to find them to be fiduciary, both in the settled classes and in ad hoc cases.

The relationship between these settled and ad hoc classes is perhaps best seen in terms of the starting point for imposition of a fiduciary relationship. In the settled classes, there is a rebuttable presumption of fiduciary vulnerability. In the ad hoc cases there is no such presumption.

However, such a presumption can be no more than a starting point. It must be remembered that a relationship which falls within the settled classes may, after considering its circumstances, be found not to be of a purely fiduciary nature. This may involve the imposition of fiduciary duties in respect of certain aspects of the relationship, without classifying the whole relationship as fiduciary. It is therefore necessary, as Fisher J pointed out in *Cook v Evatt (No 2)* [1992] 1 NZLR 676, to undertake in every case a "meticulous examination of its own facts (at 685; see also *National Westminster Bank plc v Morgan* [1985] AC 686, 709 per Lord Scarman). This is particularly directed to the ad hoc cases, but such an examination must also be undertaken with the settled classes. The fiduciary duties in any case meld themselves to the circumstances of the relationship (See, eg, *Cullen v Pension Holdings Ltd*, unreported, Court of Appeal, CA 304/91, 1 March 1993 p 9 per Cooke P.).

One aspect of the circumstances which must be carefully considered is the existence and content of a contract between the parties. Mason J adverted to this point in *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41, at 97 (HCA):[10]

> The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

Self-interest

The identification of a fiduciary relationship in commercial situations can be problematic, as the rationale behind the fiduciary concept is not easily reconciled with commercial dictates.

The fiduciary relationship can be characterised by the absolute subordination of the interests of the fiduciary to those of the beneficiary. It is to this end that the traditional fiduciary rules against self-dealing and conflicts of interests are imposed. Such rules are extremely proscriptive. At times their sole purpose is to remove the possibility, and therefore the temptation, of the fiduciary profiting from the relationship (See, eg, *Keech v Sandford* (1726) Sel Cas t King 61; 25 ER

223), unless the beneficiary gives his informed consent:

> The objectives which the rule [that the fiduciary cannot profit from his trust] seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage (*Warman International Ltd v Dwyer* (1995) 69 ALJR 362, 367 (HCA)).

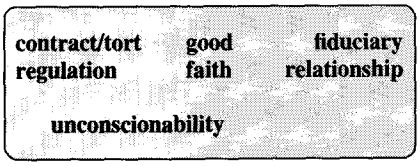
On the other hand, the motivation behind most, if not all, commercial relationships is individual profit, and each party is concerned with his own self-interest. To the extent that maximising one's own profit must be at the expense of the other party, those self-interests are in conflict. As a result, typically commercial relationships do not fit easily within the fiduciary concept.

Good faith

However, there are some commercial relationships which, whilst they do not justify the imposition of full fiduciary obligations, deserve greater protection than that provided by contractual or tortious doctrines (eg *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311). In our view such relationships fall towards the centre of the continuum. As such, although they require duties greater than those ordinarily imposed by contract or tort law, in order to give full effect to their purpose some intermediate position has to be found. These cases can be given the protection they warrant without recourse to the use of a fiduciary relationship by using an implied term of "good faith". Such terms are well known in the United States[11] and are not unknown in Australia (see eg *Hospital Products*, note 2) and New Zealand (see eg *Artifakts*, note 4.).

Similar arguments lead Finn to introduce the idea that unconscionability also occupies part of the continuum, between the protection provided by contract and tort law and the protection which a good faith term would provide ("The Fiduciary Principle" at 1, 6-10 and passim.). Unconscionability is a relatively settled area of the law and will not therefore be given extensive consideration here. Although it is clearly relevant to a proper understanding of the continuum, our discussion focuses on good faith and fiduciary duties.

In light of the above discussion, the continuum could therefore be revised thus:



equal control between parties — *one party lacking control*

The basic meaning of the duty of good faith can be summarised as a double-edged duty: a positive duty to use one's best efforts to achieve the purpose of the contract, and a correlative duty not to do anything inimical to that purpose. The duty is implied into contracts in the United States by the Uniform Commercial Code, §§ 1-203 and 2-306(2). One authoritative American definition of the duty is:

> [A]n [implied] agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made ... an [implied] agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract (Contracts, 17A *Corpus Juris Secundum* § 328).

Obviously the introduction of the concept of a duty of good faith into the discussion also raises questions as to which remedies will be available for breach of the duty. This is an issue which will be dealt with in Part II of the article. At this stage we are concerned more with a clear understanding of the concepts involved. ❑

1 See, eg, Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1; Kennedy, "Equity in a Commercial Context" in Finn (ed), *Equity and Commercial Relationships* (1987) 1; Lehane, "Fiduciaries in a Commercial Context" in Finn (ed), *Essays in Equity* (1985) 95; Finn, *Fiduciary Obligations* (1977).

2 Finn, *Fiduciary Obligations* (1977) 201; cf, eg, *Reading v Attorney-General* [1949] 2 KB 232, 236 per Asquith LJ (CA); *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815, 833 per Hope JA (CA); *Guerin v R*(1984) 13 DLR (4th) 321, 341 per Dickson J (SCC); see also *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41, 96-97 (HCA) per Mason J, Deane J concurring.

3 *Hospital Products*, ibid, 96-97 (HCA) per Mason J, Deane J concurring.

4 *Estate Realties Ltd v Wignall* [1991] 3 NZLR 482, 492. See also *Artifakts Design Group Ltd v NP Rigg Ltd* [1993] 1 NZLR 196, 230-231 per Williams J.

5 *Seager v Copydex* [1967] 1 WLR 923, 931 per Lord Denning MR; *Coco v AN Clark (Engineers)* [1969] RPC 41. In theory the requirement of a duty of confidence in this case could be met without obtaining the other's consent.

6 [1993] 1 NZLR 257, 281 (CA). See also *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311, 317 per Gault J; *Cook v Evatt (No 2)* [1992] 1 NZLR 676, 684-685 per Fisher J; *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 176-177 per La Forest J (SCC); *KM v HM* (1992) 96 DLR (4th) 289, 324 per La Forest J (SCC).

7 See *LAC Minerals*, above, at 39 per La Forest J, 62-63 per Sopinka J (SCC); *KM v HM*, above at note 6, at 324 per La Forest J (SCC); *Hodgkinson v Simms*, supra at note 6, at 175-176 per La Forest J, at 215 per Sopinka and McLachlin JJ (SCC).

8 Cf use of phrase "special opportunity" in *Hospital Products*, above at note 2, at 97 per Mason J (HCA); cf also use of "peculiarly vulnerable" in *Frame*, above, (1987) 42 DLR 4th 81, Wilson J (SCC).

9 See also *Watson*, above at note 6, at 315 per Cooke P, and at 317-318 per Gault J (CA); *Auag Resources Ltd v Waihi Mines Ltd* [1994] 3 NZLR 571 (HC), (CA 168/94, 13 October 1994, Richardson, Gault, Tipping JJ) at p 11; point not taken on appeal to the Privy Council, *sub nom Amax Gold Mines NZ Ltd v Moore* (PC 61/94, 9 May 1995).

10 See also *Kelly v Cooper* [1993] AC 205, 214 (PC); *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, 543 (HL); *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163, 166 (PC).

11 See United States Commercial Code 2-306(2); *Tillett v Deering, Milliken & Co* 88 NYS 2d 148; Contracts, 17A *Corpus Juris Secundum* paras 328, 451.

Liberalism

Nor can I think those teachers of moral wisdom much to be honoured as benefactors of mankind, who are always enlarging upon the difficulty of our duties, and providing rather excuses for vice, than incentives to virtue.

Dr Johnson
The Rambler

Perceptions of the legal provisions for child witnesses in New Zealand

By Margaret-Ellen Pipe, Mark Henaghan, Sue Bidrose and Janice Egerton, Department of Psychology and Faculty of Law, University of Otago

Since 1990 there have been a number of alternative ways in which the evidence of a child complainant can be given in sexual abuse cases. The authors of this article conducted a survey, by questionnaire, of how the new statutory provisions have been perceived to be working by different professional groups. The general reaction, they concluded, was that the new provisions were satisfactory; but perhaps understandably it was defence lawyers who expressed most concern.

The authors acknowledge the help of the Children and Young Persons Service, Police, Judges, lawyers and doctors for their participation. Assistance was also given by Beverley Bacon, Gina Priestley, Harlene Hayne, Larry Owens and an Otago University Summer Vacation Bursary.

I The legal changes

On 1 January 1990, the Evidence Amendment Act (1989) and the Summary Proceedings Amendment Act (1989) both came into force in New Zealand. These legislative changes were made in an attempt to change attitudes towards child witnesses, to make the process of testifying less traumatic for children, and to better inform juries about children's evidence. In 1991 the New Zealand Court of Appeal explained the changes in the following way:

> The interests of justice require that the presentation of the child's evidence be facilitated, both in the manner in which it is done and in making its import accessible to the jury. Recent statutory measures have been designed to achieve both objectives. As aids to the ascertainment of the truth they are important contributions to the course of justice. (*R v S*, 1991).

Where the offence is one of a sexual nature and the child complainant is under 17 years at the time the proceedings commence, the Evidence Amendment Act (1989) provides for a range of alternative modes of giving evidence by the complainant, chief of which are: by pre-recorded videotape; from behind a glass screen or wall partition placed in the Courtroom to shield the child from the view of the accused; and via closed circuit television with the child in another room. Judges have a discretion as to whether they use an alternative mode, and, in exercising that discretion, are mandatorily required to have regard to the need to minimise stress on the complainant, at the same time ensuring a fair trial for the accused. Moreover, in accordance with the Evidence Amendment Act (1989), Judges are no longer to instruct juries on the need to scrutinise the evidence of young children with special care, nor to suggest to the jury that young children generally have tendencies to invention or distortion.

The legislative changes as to modes of giving evidence are wide enough to allow the whole of a child's evidence, both evidence in chief and cross-examination, to be videotaped prior to the trial and shown at the trial. This was recommended by the 1989 UK Pigot Report (Report of the Advisory Group on Video Evidence, 1989). An advantage of completing the child's evidence early in the process is that any therapy needed by the child can proceed without undue delay.

The major legal hurdle to the admission of videotaped evidence has been the requirement of the "competence" examination that must be carried out at the beginning of the interview. While young children are not required to take the oath in New Zealand, there is still a legislative concern that they should be "competent" in terms of knowing the importance of telling the truth and promising to do so. The legal regulations require the examiner to (i) determine that the complainant understands the necessity to tell the truth and, (ii) obtain from the complainant a promise to tell the truth, where the complainant is capable of giving, and willing to give, a promise to that effect.

As the Judge is not present when the video interview is recorded, when a videotaped interview is used this task falls to the interviewer. The Court of Appeal has taken a liberal approach to this requirement (*R v Accused*, 1992). The Court observed that there is no specification in the law of how the necessity to tell the truth is to be determined. The Court said the purpose behind the requirement is that the child appreciates the full solemnity of the situation. It has been argued in the Court of Appeal that there is a distinction between determining the child witness's understanding of the necessity to tell the truth, and obtaining a promise to tell the truth (*R v Accused*, 1992). The Court of Appeal took the pragmatic position that when a child promises to tell the truth, that shows an understanding of the necessity to tell the truth, and no more is required. Arguments that the child's "understanding of the necessity to tell the truth" can only be establish-

ed by the child giving definitions of words like "truth" have failed (eg *R v Accused*, 1991).

The Evidence Amendment Act (1989) also sets out the specific points on which experts may give evidence in cases of a sexual nature involving children. "Expert" is narrowly defined for the purposes of the legislation as a child psychiatrist or a child psychologist. Both must have had experience in the professional treatment of sexually abused children. A Judge may ask the expert to give opinion evidence on: (i) the intellectual attainment, mental capacity, and emotional maturity of the complainant; (ii) the general developmental level of children of the same age group; (iii) whether or not the complainant's behaviour (as described in evidence given during the proceedings) is consistent or inconsistent with that of sexually abused children.

Experts may base their opinions on relevant scientific literature or on their own professional experience. The expert assessment is to be based on the examination of the child complainant either before the evidence is given or at the time it is given, whether directly or on videotape. The assumption behind the expert being able to comment on the specified matters is that the evidence will provide a context within which the jury can assess the child's credibility. The New Zealand Court of Appeal has commented that the use of the expert "will usually be especially important in assisting the jury to evaluate the truth of the complainant's evidence." (*R v Tait*, 1992). It is important, however, to emphasise that the legislative amendments do not allow the expert to directly express an opinion as to the guilt or innocence of an accused, or as to the truthfulness of the child complainant.

Although the 1989 Evidence Amendment Act marked a radical change within the New Zealand legal system, there has been little documentation of how the provisions of the Act are seen by other professionals, or even of how frequently the different modes of giving evidence are being used. In part, this situation reflects the relatively recent introduction of the Act, and logistical problems which meant that not all procedures – most notably closed circuit television – were immediately available in all Courts.

II Studies of child witnesses

Studies have been conducted in the United Kingdom and Australia to evaluate the effects of introducing closed circuit television as an alternative means for children to give evidence in Court (eg, Cashmore, 1992; Davies & Noon, 1991; WA Department for Community Services, 1990). Amongst their objectives, these studies have included the collection of opinions from professionals involved in the procedures, namely Judges, lawyers, Court staff, police and social workers. All have reported generally favourable impressions of closed circuit television, with a consensus, in particular, that the trauma experienced by child witnesses is reduced. There was a common perception that children were likely to give better testimony in the less stressful situation afforded by being out of the Courtroom. Also widely held was the idea that the emotional and nonverbal communications of a child witness may be less apparent to the jury when the witness is not physically present, thus offsetting the advantages to some extent. Cashmore (1992) found that some defence lawyers expressed a less favourable view of the use of closed circuit television than did other professionals, however, being more likely to believe that it may facilitate lying by child witnesses. Defence lawyers also thought that the more anxious a child appeared when giving evidence, the more likely it was that the evidence would seem credible. Cashmore reported a perception that some cases were more likely to proceed to Court when there was an opportunity for the complainant to give evidence via closed circuit television, a very positive response to the use of closed circuit television by magistrates, in particular, and a general consensus that closed circuit television did not violate the requirement of fairness to the accused.

In New Zealand, a report commissioned by the Department of Justice (Whitney & Cook, 1990) commented on the workings of the first six trials involving closed circuit television in New Zealand Courts. The authors conducted face-to-face interviews with 22 professional people – Judges, lawyers, Court staff, police officers, social workers and counsellors – who had been involved with these trials. As well as commenting on technical and practical matters relating to the use of closed circuit television, respondents gave their impressions of the effects of its use on trauma to the witness and on the quality of evidence, and were asked to compare closed circuit television with the use of screens in Court. In line with findings overseas, most people perceived a reduction in trauma for witnesses giving evidence via closed circuit television, relative to giving evidence directly in Court. Opinions on the quality of evidence were divided between those who considered that the child's more composed manner improved the testimony, and those who felt that the distancing of the witness by means of the video link lessened the "realness" and impact of the testimony. Screens were perceived as being less comfortable for child witnesses than closed circuit television, but possibly useful in overcoming distancing.

III The method of our study

We conducted a questionnaire survey of how the new provisions for child witnesses in New Zealand have been received by different professional groups, almost four years after their introduction. The questionnaire was designed to examine how professionals involved when children are witnesses perceive the legislation to be working. The new procedures for giving evidence were the focus of the questionnaire, but we also examined perceptions of the competency requirement, and of the provisions for expert testimony. Some of the questions followed those used by Cashmore (1992) in her study for the Australian Law Reform Commission, while others were tailored specifically to the provisions of New Zealand's legislation.

(i) The sample

The questionnaire was sent throughout New Zealand to High Court Judges (24), all District Court Judges with jury jurisdiction (22), Crown prosecution lawyers (51), police members of police sexual abuse teams (137), doctors for sexual abuse care (112), and social workers, evidential interviewers and other professionals (eg, child psychologists) from the Children and Young Persons Service (120). In

addition, a randomly chosen sample of 100 defence lawyers was sent the questionnaire. Response rates were as follows: 43% for social workers and interviewers; 52% for doctors; 53% for Crown prosecution lawyers; 57% for police members of police sexual abuse teams; 64% for District Court Judges; 75% for High Court Judges; 88% for defence lawyers.

(ii) The questionnaire

The body of the questionnaire was made up of a series of specific questions accompanied by 5-point rating scales, and open-ended questions which allowed respondents to make comments on any aspects of the workings of the new legal provisions. Questions related to each of the means by which children may give evidence, namely: directly in Court with no special provisions; in a pre-recorded, videotaped interview; on closed circuit television; or from behind a screen or one-way glass. Respondents were asked to rate on the 5-point scales the effect of each of these modes of giving evidence on (1) the trauma of testifying, (2) the quality of the child's testimony, (3) the probability that the child would tell the truth, and (4) the jury's perceptions of the child witness. Respondents were also asked to rate how fair or unfair they considered each procedure to be to either (5) the child complainant or (6) the defendant. These same six questions were used to assess perceptions of the usefulness of the competency requirement.

In order to control for any effect of the order in which questions about the four modes of giving evidence were presented, there were two versions of the questionnaire. In the second version, the order in which the modes of giving evidence were rated was reversed. Equal numbers of each version were distributed randomly across each professional group included in the survey.

In addition to the main questions, respondents were asked to indicate the extent of their experience with cases of a sexual nature where a child had given evidence. They were asked to show the number of such cases seen in the last three years, and the age groups of the children involved, both overall and for each of the four modes of giving evidence. Four questions sought ratings on the usefulness of the expert testimony allowed under s 23G of the Act, and a further two on whether the new provisions had had an impact on the numbers and outcomes of trials going to Court. Finally, respondents were invited to indicate the quality of the preparation of child witnesses for giving evidence, the facilities and administrative support available at Courthouses for the comfort of child witnesses, and whether screens, closed-circuit television and videotaped interviews should be available to all child witnesses (not only complainants), in cases of a sexual nature.

IV The results of the study

(i) Participants' experience with child witnesses

Of those who returned questionnaires, 220 (62%) had dealt with cases of a sexual nature in which children (defined as persons under the age of 17 years) had given evidence in the last three years. Only 19 doctors had had the opportunity to watch children giving evidence, the role of doctors most frequently being that of expert witness. Their responses are not, therefore, included in the present results. Five of the lawyers who responded had acted for both prosecution and defence, and their responses were not included. Respondents were coded as belonging to one of the following professional groups: Judges, defence lawyers, prosecuting lawyers, members of the Children and Young Persons Service, and police members of police sexual abuse teams.

With the exception of the Judges, many respondents from each professional group had not had experience with all four modes by which children may give evidence. In all, only 47 reported having had experience with all four modes of giving evidence, and only 86 had had experience with three (videotaped interviews, closed circuit television, and screens or one-way glass). There were, therefore, different numbers of respondents answering each of the questions. The data reported here are drawn from the replies of 196 respondents. Of this group, 178 (91%) reported having been present in Court when a child had given evidence in a case of a sexual nature. Experience varied a good deal in terms of the numbers of cases seen, and the age groups of the child witnesses involved. Forty-three % of respondents had had experience with no more than 5 cases per year, 27% with between 5 and 10, and 30% had dealt with more than 10 cases.

Differing patterns of experience were reported for the four different modes of giving evidence, as shown in Table 1. Forty-four % of respondents had been involved in cases where a child witness had given evidence directly in Court with no special provisions, whereas the rate was considerably higher for evidence given via videotape (74%), closed circuit television (61%), and screens or one-way glass (78%). These trends are also reflected in the numbers of cases seen, with relatively low numbers of cases for direct evidence.

Table 1. Percentage of respondents indicating each level of experience with the four modes of giving evidence.

		Level of experience (Number of cases seen per year)		
		0-5	5-10	> 10
Mode	**N***			
Direct	85	82.4	12.9	4.7
Video	144	61.8	23.6	14.6
CCTV	119	70.6	21.0	8.4
Screen/glass	153	68.7	18.3	13.1

Note: CCTV = closed circuit television
* Number of respondents

(ii) Ages of children giving evidence using each mode

Only 40 respondents had been involved in cases where the child witnesses were very young (aged between 3 and 4 years), a small number relative to those with experience with children in older age categories. Moreover, different patterns of experience emerged for the different modes of giving evidence. Respondent's experience with child witnesses giving evidence directly in Court showed an increase across age groups, with most having been involved in cases with children older than 13 years. For evidence presented by way of videotape and closed circuit television, in contrast, the experience of the largest number of respondents was with children aged between 5 and 10 years, and for screen or one-way glass testimony, most had seen cases involving children of 8 to 13 years. These patterns may well reflect the patterns of usage of the four different modes for the giving of evidence by child witnesses.

(iii) Perceptions of modes of giving evidence

Results of this main section of the study are summarised in Table 3, which shows the mean ratings provided by each professional group for six questions in relation to each mode of giving evidence.

(The abbreviation "CYPS" refers to the group of respondents working professionally within the Children and Young Persons Service.)

(a) Trauma

There was consensus across all professional groups that giving evidence directly in Court without any special provisions was likely to significantly increase the trauma for the child witness whereas, in contrast, each of the alternative modes was perceived to reduce it. Perceptions of the effects of the three alternative modes on the experience of trauma did not differ. Perhaps not surprisingly, those who work most directly with child complainants – social workers, interviewers and members of police sexual abuse teams – reported the most marked differences in the effects of the different modes on children.

Table 2. Percentage of respondents indicating experience with child witnesses in each age range, for each mode of giving evidence.

		Ages of Child Witnesses (Number of cases seen per year)				
		3-4	5-7	8-10	11-13	14-16
Mode	**N***					
Direct	85	1.2	15.3	29.4	43.5	70.6
Video	144	23.6	77.1	72.9	42.4	15.3
CCTV	119	16.0	73.9	71.4	31.1	11.8
Screen/glass	153	6.5	41.8	68.6	69.3	43.8

Note: Percentages do not sum to 100 because each respondent had experience with more than one age group.

Table 3. Mean ratings of each mode of giving evidence, for each question.

(a) Does this mode of giving evidence reduce (1) or increase (5) the trauma of testifying for the child witness?

	Defence	*n*	CYPS	*n*	Judges	*n*	Prosec	*n*	Police	*n*
Direct	3.50	10	4.78	9	3.83	18	3.94	17	4.42	26
Video	1.87	23	1.60	30	1.30	27	1.67	21	1.49	41
CCTV	2.00	15	1.45	29	1.69	26	1.77	22	1.68	25
Screen/glass	2.15	26	1.69	26	1.89	27	1.44	25	1.56	48

(b) ... have a positive (1) or negative (5) effect on the quality of the child's testimony?

Direct	2.75	4.34	2.83	2.76	3.50
Video	2.96	1.85	2.73	3.37	2.22
CCTV	2.93	1.89	2.36	3.14	2.15
Screen/glass	2.50	2.28	2.44	2.36	2.17

(c) ... make it more (1) or less (5) likely the child will tell the truth?

Direct	2.45	3.33	3.00	3.00	3.20
Video	3.75	2.55	2.95	2.95	2.49
CCTV	3.67	2.62	2.67	2.77	2.54
Screen/glass	3.27	2.64	2.71	2.72	2.63

(d) ... have a positive (1) or negative (5) effect on how the jury perceive the child complainant?

Direct	1.55	3.00	2.44	2.41	2.81
Video	2.32	2.36	2.73	3.44	2.83
CCTV	2.39	2.80	2.92	3.46	2.68
Screen/glass	2.54	2.80	2.81	2.76	2.73

(e) Is the mode of giving evidence fair (1) or unfair (5) to the child complainant?

Direct	1.91	4.33	3.06	3.41	3.77
Video	2.42	1.76	1.96	1.91	1.76
CCTV	2.13	1.71	1.96	2.24	1.69
Screen/glass	2.04	1.88	2.07	2.12	1.92

(f) Is this mode of giving evidence fair (1) or unfair (5) to the defendant (accused)?

Direct	1.58	2.30	2.44	2.35	2.08
Video	4.25	2.44	3.70	3.14	2.42
CCTV	4.25	2.52	3.24	3.23	2.39
Screen/glass	4.00	2.42	3.08	3.04	2.56

(b) Quality and truthfulness of evidence

Most groups did not perceive the reduced trauma of testifying using one of the alternative procedures as being at the expense of either the quality or truthfulness of the evidence given. In general, the use of screens and one-way glass was judged significantly more likely to enhance both the quality and truthfulness of testimony in comparison to giving evidence directly in Court. Screens and videotaped interviews were also rated more favourably than closed circuit television, with respect to quality, by all groups. However, defence lawyers believed children to be more likely to tell the truth when giving evidence directly and, conversely, less likely to tell the truth when any of the other modes of giving evidence was used. Both defence and prosecuting lawyers also expressed a more positive opinion of closed circuit television with regard to quality and truthfulness of evidence than did other professional groups, and defence lawyers in particular perceived closed circuit television to be more likely to encourage truthfulness than screens.

(c) Jurors' perceptions

Most groups believed that jurors' perceptions of a child witness were likely to be more positive when the child gave evidence directly in Court than when one of the alternative modes was used. Defence lawyers were most strongly convinced of the positive effect of a direct appearance in Court. Social workers, however, were more likely to express the opposite view. Judges, prosecuting lawyers, and police members judged the giving of evidence directly in Court as impressing jurors more favourably than videotaped interviews, but not more favourably than evidence given via screens or closed circuit television.

(d) Fairness to the child and defendant

Two questions related to whether the different modes of evidence were fair or unfair to the child complainant and to the defendant, respectively. Most respondents viewed giving evidence directly in Court as least fair to the child, with the alternative modes viewed equally positively by all professional groups except the defence lawyers. Defence lawyers viewed giving evidence directly in Court as fairest to the child. With respect to the defendant, evidence given directly in Court was seen by all groups as being fairer than any of the alternative modes of giving evidence, although, with the exception of defence lawyers, this difference was small. Defence lawyers clearly considered modes of giving evidence other than directly in Court to be very unfair to the defendant. One lawyer concluded that " 'Fairness' to an accused appears to have been given very limited consideration when the current innovations were enacted..." and another that the "pendulum in sexual cases has already swung far enough in favour of the victim. There is already a real danger of injustice being done in some cases." Cashmore (1992), in her Australian study, also found that defence lawyers' perceptions differed from those of the other professional groups.

(e) Age of child, different modes of giving evidence, and impact on the fact finding process

We invited general comments in relation to each question as well as comment as to whether the age of the child giving evidence influenced the respondent's views. These comments were coded according to a schedule based on commonly-occurring categories of opinion expressed in the questionnaires. Frequencies of responses in each category were compiled for each question and by each profession, and a description of these is provided below.

Several respondents from each professional group indicated that giving evidence directly in Court is likely to be more useful for older children, whereas closed circuit television and videotaped evi dence were seen as more useful for younger children. Individual comments indicated that if an older child is able to give his or her evidence in Court it will have most impact on the jury. However, social workers and police members of sexual abuse teams, in particular, commented that facing an abuser may be too difficult, even for older children. Conversely, the main disadvantages noted in relation to closed circuit television and, to a lesser extent to videotaped interviews, were that they distanced the child from the Judge and the jury and lessened the impact of the child's evidence. As one prosecutor commented: "There has been some feedback that jurors are 'desensitised' by seeing a video and CCTV child witness...". Another concluded that: "For very young children it [closed circuit television] is necessary. But it is certainly more difficult to convince juries of the truth of the evidence." Indeed, closed circuit television was seen by some as clearly being very effective in reducing the stress for the child, so much so that it was this, rather than depersonalisation, that might affect the impact of their evidence on the jury. For example, one High Court Judge commented:

> Juries tend to be suspicious of evidence given this way... the more relaxed attitude of child witnesses is sometimes misinterpreted.

The same comments seldom came up in relation to screens or one-way glass, which were not consistently seen as either more or less useful for a particular age group. To the contrary, one social worker noted that the "Jury often feel sympathy for [the] child when a screen is used as it highlights the powerlessness of [the child]...". Comments in relation to these procedures also included considerations such as the design of many New Zealand Court rooms and the difficulty of placing the screens in such a way that the child would feel protected yet could still be seen by the jury.

Although we did not ask respondents to directly compare the advantages and disadvantages of the different means of giving evidence, individual comments suggested that screens, in particular, may have some advantages – perhaps especially for older children – over closed circuit television, which is perceived as distancing the child from the jury and potentially reducing the impact of her or his evidence. Such comments echo those reported by some respondents in the earlier study by Whitney and Cook (1990). However, screens were perceived by some (in particular lawyers for the defence) to convey the implication of guilt, even though the Judge is mandatorily required to tell the jury not to draw any adverse inference against the accused. As one

lawyer put it:

> I feel that the use of screens is unfair to an accused person because of the negative impact it must have on the jury. In my view it very much goes against the presumption of innocence.

This problem was raised far less frequently in relation to the other procedures. Davies (1992) reported a similar perception by lawyers in his study of the use of special provisions for giving evidence in English Courts. Clearly, the age of the child was an important influence on most respondents' perceptions of the effects of the different modes of giving evidence.

(f) Outcomes of cases

Respondents were asked to indicate their opinions regarding the effects of the legislative changes on the outcomes of cases involving child complainants. Results are shown in Table 4.

Table 4. Mean ratings for questions relating to outcomes of the new procedures for giving evidence.

	Profession				
	Defence	CYPS	Judges	Prosec	Police
N	35	39	26	26	59
(a) has the provision of the different modes of giving evidence made it more (1) or less (5) likely that a case involving a child complainant will reach Court?	1.89	2.03	1.46	1.59	1.97
(b) ...made it more (1) or less (5) likely that a case involving a child complainant will result in the defendant being found guilty?	2.00	2.31	1.96	2.31	2.39

There was general consensus amongst all groups surveyed that the availability of alternative modes of evidence made it more likely both that a case involving a child complainant would reach Court and that the defendant would be found guilty. It is of interest that although the defence lawyers generally viewed the new procedures more negatively than did the other professions, they were not more likely to perceive a significant increase in guilty verdicts compared to the other professional groups.

We cannot verify whether the perceptions of more cases going to Court and more defendants being found guilty are an accurate reflection of outcomes of trials. There is, at present, no easily accessible record of how frequently these different procedures are being used in New Zealand, nor of the outcome of trials in relation to them. It is worth noting, however, that the respondents in our survey were generally much more likely to have had experience with children giving evidence using one or more of the alternative procedures, than with children giving evidence in Court directly, without special provisions. According to one prosecutor, for example, "very few cases of a sexual nature, if any, proceed without any form of protection...". Another noted that "since the passing of the Act I have only *not* been able to use screens etc in cases (two or three only) where the complainant is aged 15 or 16, has no 'powerful' relationship with the accused and has not been heavily traumatised by the offence claimed of". Consistent with these observations, only a small proportion of the respondents from each professional group, apart from the Judges, had had experience with children giving evidence directly in Court, in the past three years. This suggests that the new provisions are, indeed, frequently used and that they have become the norm rather than the exception. Nonetheless, there may be regional differences, as suggested by the prosecutor who commented: "I have prosecuted cases involving 40+ child complainants over a period of six years – I have never used screens, TV etc – I have never had a child who couldn't give evidence...". It is, of course, possible that the samples from each group who responded to our questionnaire were biased in favour of those who had had experience with the alternative procedures. We think this is unlikely. Even the sample of Judges, for whom the response rate was nearly 70%, indicated more cases using one of the alternative means of giving evidence than evidence directly in Court. One Judge commented that cases in which screens and other procedures were not recommended were "now very much the exception".

Several respondents perceived the "fit" between the child and the legal system to be still very poor, in a large part as a result of the way in which children were interviewed and questioned. For social workers and other child professionals, in particular, a major concern was that children were disadvantaged, because of the way they were questioned in Court. While this issue came up in the context of the competency requirement, it was frequently raised as a more general point also, as reflected in comments such as: "In the past cases have been lost because the children were not asked questions in a way that they could understand" or "The assumption that any adult can communicate effectively with any child needs to be abandoned...". Other respondents also raised the issue of how children should be questioned, but from a different perspective, expressing concern about "the effect that the predisposition of the interviewer may have".

(iv) The competency requirement

New Zealand retains a competency requirement and one section of our questionnaire related to this require-

ment. Many respondents indicated they believed the competency requirement to be moderately useful, as shown in Table 5. One Judge put the case for the competency test in videotaped interviews, in particular, as follows:

> The point to my mind is that the video interview is the "evidence". In Court, the solemnity of the occasion, competency, swearing or affirmation and the questioning all take place openly. In the video interview something additional to the deliberately cosy atmosphere is required to bring to the attention of the child, the interviewer and ultimately Counsel and jury precisely what is taking place and the need for sincerity, honesty and care in protection of all.

Individual respondents from each group expressed the views that passing or failing the competency requirement does not ensure that the child will tell the truth or, conversely, that failing it means the child will necessarily lie, that the jury should decide on whether or not the child is telling the truth, and that the importance of the test depends on how it is conducted. Social workers and interviewers perceived the competency requirement more negatively than the remaining groups on most questions, viewing it as of little use and unfair to the child, as well as increasing the trauma of testifying and decreasing the probability that a case would proceed through the trial process.

Table 5. Mean ratings for questions relating to the competency requirement.

	Profession				
	Defence	CYPS	Judges	Prosec	Police
N	33	39	27	26	60
(a) Do child competency tests serve a useful purpose in the trial process (1) or not (5)?	3.12	3.78	2.46	2.78	2.60
(b) ...reduce (1) or increase (5) the trauma of testifying for the child witness?	3.03	3.95	2.81	3.15	3.35
(c) ...have a positive (1) or negative (5) effect on the quality of the child's testimony?	2.82	3.37	2.58	2.73	2.58
(d) ...make it more (1) or less (5) likely the child will tell the truth?	2.85	2.85	2.52	2.54	2.37
(e) ...have a positive (1) or negative (5) effect on how the jury perceives the child?	2.26	3.06	2.27	2.19	2.17
(f) Are child competency tests fair (1) or unfair (5) to the child complainant?	2.68	4.33	2.21	2.58	2.91
(g) Are child competency tests fair (1) or unfair (5) to the defendant (accused)?	3.76	2.46	2.57	2.33	2.20
(h) Have child competency tests made it more (1) or less (5) likely that a case involving a child complainant will reach Court?	2.62	4.13	2.81	3.26	3.20

One social worker raised the point that asking children about promises and truth and lies may, in fact, confuse the child "...who is ready to tell the Court their 'story' and is then asked questions that seem to them, to be completely unrelated. It reminds the child about the promises they made to the defendant about not telling anyone about the abuse". Another noted that: "If [a] child is unable to give a clear explanation or [is] confused by language, this has a detrimental effect from the outset and is used by the defence... they score points on the child's inability to communicate". Another suggested that the implications can be quite dramatic in that: "Court cases are not getting through depositions where defence can successfully argue that the child is "not competent" due to truth, lies and promises".

Evidential interviewers are in a unique position with respect to the competency requirement. When the child gives evidence in Court, the Judge questions him or her and decides whether the competency requirement has been satisfied. In the case of videotaped evidence, the evidential interviewer must also satisfy the requirement that the child demonstrate competence but, unlike the Judge, the evidential interviewer does not have the last say in whether or not the child has met the requirement. This is the role of the Judge when videotaped evidence is presented in Court. Given that there is no standardised procedure for assessing competence, and room for considerable variation in interpretation of what satisfies this section of the Act, it is not difficult to see how difficulties may arise from the perspective of evidential interviewers. Geddis (1993), for example, concluded that:

> ...any reading of the cases leads to a conclusion that there is a certain lack of certainty as to what exactly constitutes a "com-

petency" test for children. There is no agreed protocol by which to assess competency. Judges do not appear to have a set of guidelines as to how to tackle the task for children of different ages and stages of development (p 41).

The position for evidential interviewers is even more difficult, since the approach they adopt to satisfy the requirement comes under scrutiny later, at the trial. At this point, feedback about the approach taken is, of course, of no value for the case at hand.

(v) Use of expert testimony

We also asked how useful respondents had found the expert testimony given under s 23G of the Act. The results are summarised in Table 6. In general, defence lawyers found expert opinion to be least useful (for example, one described it as "utterly pernicious"), with police, prosecution, and Judges evaluating expert testimony either positively or as moderately useful, and social workers and police officers evaluating it most positively (eg, "Expert testimony is vital to inform the jury..."). This same pattern is found whether evidence relates to the abilities of the child relative to other children, the developmental level of the child, or whether the child's behaviour is consistent with that of children who have been sexually abused. There was general consensus that the special provisions relating to expert testimony were of most use to the prosecution, a view expressed most strongly by the defence lawyers.

Criticisms of expert testimony most frequently related to whether the testimony was impartial, with some respondents perceiving experts as adopting the role of child advocate (eg, "some 'experts' have their own agenda"), the expert's understanding of their role and their expertise ("Sometimes the expert becomes somewhat partisan, believing he or she has to convince the jury that the child is competent and this demonstrates how competent the expert is"), and the constraints on the kind of testimony that can be given under s 23G. Of the 125 respondents who had been involved in a trial in which expert testimony had been given, only 24 (19%) thought that s 23G should be expanded to allow expert evidence on a wider range of issues.

Table 6. Mean ratings for questions relating to expert testimony given under s 23G of the Evidence Amendment Act

	Profession				
	Defence	CYPS	Judges	Prosec	Police
N	22	18	19	22	33
Have you found expert opinion given under s 23G, helpful (1) or not helpful (5) as it relates to:					
(a) ...the intellectual attainment, mental capacity and emotional maturity of the complainant?	4.00	1.78	2.80	2.30	1.97
(b) ...the general developmental level of children?	3.62	1.88	2.80	2.45	1.97
(c) ...whether the complainant's behaviour is consistent or inconsistent with the behaviour of sexually abused children?	4.09	1.50	3.00	1.95	1.82
(d) Do you think the s 23G expert witness is of most value to the defence (1) or the prosecution (5)?	4.57	3.78	3.61	3.95	3.53

(vi) Expansion of the new modes, preparation and support of child witnesses

We asked respondents to comment on whether the current legislation should be broadened so as to allow child witnesses (other than complainants) in cases of a sexual nature to use screens, closed circuit television, and videotapes. Overall, a majority (73%) replied affirmatively. Defence lawyers and, to a lesser extent, Judges, were much less likely than the other professional groups to favour such a change. In particular, several Judges noted that, at their discretion, it was already possible to extend the new provisions to other situations and witnesses. For example, these Judges commented: "I would not hesitate in any appropriate case to use my discretion in respect of screens, as I have done for adult complainants"; "There is already a judicial discretion available to allow witnesses to give evidence by any or either of these methods"; "They are available in all cases of a sexual nature".

In response to a specific question, respondents agreed that child complainants are, in general, adequately prepared for giving evidence, although several mentioned a wide variation in this area. With respect to facilities and support available at Courthouses, many respondents perceived these to be less than adequate. Individual comments raised the problem of complainants having to share waiting space with defendants, and also the lack of such provisions as food, drink, toys, and books, which would help to make child witnesses more comfortable.

V Conclusion

The new provisions for child witnesses were generally perceived as satisfactory by most professional

groups. In particular, there was no strong call for further legislative change, although several issues of concern were raised. Advantages and disadvantages were perceived with each of the new modes of giving evidence. To some extent the perceived benefits of the new procedures depended on the age of the child, with the giving of evidence outside of the Courtroom being seen as of most help to younger children. There was, however, general consensus that the new procedures significantly reduced the trauma of testifying for the child witness, and this effect was not judged by any group – except the defence lawyers – to be at the expense of the quality or truthfulness of the evidence given.

Of all professional groups, the defence lawyers expressed most concern about the new procedures. Their perception was that the provisions of the Acts favour the child complainant at the expense of the defendant, despite the provisions included to protect the rights of the defendant. These concerns of the defence lawyers were not, however, reflected in a perception of a greatly increased frequency of guilty verdicts. Rather, there was a general perception across *all* professional groups that cases involving a child witness were now more likely to reach Court and to result in a defendant being found guilty than was the case prior to the introduction of the new procedures.

The lack of clear guidelines relating to the competency requirement was an issue of considerable concern. Social workers and other professionals working for the Children and Young Persons Service, in particular, regarded the requirement as a major impediment to the introduction of videotaped evidence into Court proceedings. There is little doubt that guidelines as to acceptable questions and responses for establishing that children have satisfied the requirement would be of considerable help in overcoming these perceived difficulties. Any such standardisation would, of course, need to be age appropriate (cf Geddis, 1993). Although there is clearly a need for the Court to feel assured that the child is recounting her or his own version of events, and appreciates the importance of doing so accurately, there may be alternatives to the competency requirement for assessing whether this is the case. In the United Kingdom, there is a proposed new provision to the Criminal Justice Act which reads: "A child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony". The purpose of the provision is to enable a Court to hear a child's evidence when the child can give an intelligible account of relevant events. It is then up to the Court to decide what weight to give the evidence. It remains open to argument, of course, as to what constitutes "intelligible testimony", and whether this provision would resolve the difficulties surrounding the competency requirement experienced in the New Zealand context. The experience in the United Kingdom, should the provision be introduced, will be of considerable interest to individuals and groups working with child witnesses here.

Some other aspects of the legal process which seem poorly adapted to the particular needs of children were identified. Several respondents referred to the need for the legal system to adapt to the abilities and characteristics of child witnesses at several different levels of development. Of prime importance is an understanding of children's comprehension and use of language and a willingness to give explanations and put questions to child witnesses in ways which will facilitate their giving of evidence. Long delays before the case and on the day of the trial may well affect children differently than they affect adults, and in many jurisdictions the physical facilities available for child witnesses were perceived by many to be far from ideal. These comments came particularly, but not only, from those working most directly with the child prior to the hearing of the case and point to an area in which adjustments should be made in order to better accommodate child witnesses within the legal system. ❑

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Law and ethics

And what of the second modern objection – that the ethical standards of different cultures differ so widely that there is no common tradition at all? The answer is that this is a lie – a good, solid, resounding lie. If a man will go into a library and spend a few days with the Encyclopedia of Religion and Ethics he will soon discover the massive unanimity of the practical reason in man . . . he will collect the same triumphantly monotonous denunciations of oppression, murder, treachery and falsehood, the same injunctions of kindness to the aged, the young, and the weak, of almsgiving and impartiality and honesty . . . he will no longer doubt that there is such a thing as the Law of Nature. There are, of course, differences. There are even blindnesses in particular cultures – just as there are savages who cannot count up to twenty. But the pretence that we are presented with a mere chaos . . . is simply false and should be contradicted in season and out of season wherever it is met.

C S Lewis
A Bent World

The oath

By P J Carrigan, Barrister and Solicitor, of Whangarei

Some people are slow readers. This brief comment on the value of retaining the formal oath in Court proceedings is by way of a response to a short article by Mr Donald Dugdale. In that much earlier article Mr Dugdale had argued that oaths were too old-fashioned to be meaningful in the present secular age, and that they should therefore be abolished. The article was published at [1991] NZLJ 136. The author pleads, in mitigation of the delay in responding, that he practises in Whangarei, which is far from such centres of modern civilisation as Fanshawe Street.

The abolitionists have a point. Society is indeed secularised and conducts itself on the basis of a morality without God, as if God does not exist. Suddenly a member of that society is plucked from his everyday life and called as a witness where not only does everyone act as if God most certainly does exist, but that He is, as it were "on the phone" awaiting a solemn promise to tell the truth – and we are all going to listen in.

So it has been suggested we should skip the oath and get on with it.

But what about the accused!

If I were an innocent man on trial for my life, I'd prefer to take the prosecution witness straight to torture if I could. But there are drawbacks, not the least of which would be a reciprocal right of the prosecution to torture me back.

So torture is out. But the next best alternative is requiring the witness to face eternal torture should he dishonour his oath. Granted, the torture is deferred – but it certainly gives the witness something to consider. A stern warning about the penalty for perjury would be a very pale and weak substitute.

People who want to abolish the oath have reasons other than confidence they will not be on trial for their life in the foreseeable future. The metaphysical system behind the oath offends them and they feel it is time society freed itself of the last vestiges of medieval superstitions, got rid of the childish concept of God and at the very least pushed the Church out of state affairs.

Before we do that maybe, out of deference to all those people who lived under the British legal system starting in, say, 1066, we should give at least a passing consideration to the notion they may have known what they were doing.

Origins

The oath as we use it is derived from Judaism. It was a type of covenant. A covenant was a promise which bound the two parties closer than a family blood tie. An oath is a covenant made with God.

Covenants were sometimes reinforced with curses. We see echoes of this in the children's rhyme "Cross my heart, hope to die, stick a needle in my eye".

To a believer a false oath would be a hideous sacrilege meriting punishment in eternity, if not also during his lifetime.

By 1066 torture was by no means eschewed but the oath had been long in use amongst both conquerors and conquered – as one would expect in a society totally Catholic where religion was an integral part of everyday life and particularly pertinent to the legal system. (All the Lord Chancellors until Thomas More [the only saint amongst them! – Ed] were ordained priests).

Erosion of Belief

The oath presupposes a belief in the doctrines of the immortality of the soul, a final reckoning. Heaven and Hell, not to mention God. The abolitionists say that these ideas are outdated and it is for that reason the oath is an affront to modern man.

The notion of rejecting the whole metaphysical system on which the Judaeo – Christian world outlook is based found favour with the French Revolutionaries. The goal of the French Revolution was the overthrow and elimination of Church and Crown and the substitution of the "rule of reason".

Like most revolutionaries, they were not a lot of fun. The British had the good sense to reject their ideas but the revolutionaries managed to export their revolution to Mexico, South America and ultimately Russia. One might be forgiven for thinking these countries did not benefit greatly from it.

There have of course been other movements since the French Revolution which have also contributed to modern man's befuddlement viz Darwinism, Communism, Freudianism, Existentialism and the like. All devised by suspicious-looking men with more free time than was good for them. All destructive and barren in their results.

But the ideas persist. They hang in the air like poison gas. They permeate our thought, our education system. The more educated we are, the more befuddled in many cases.

Retention of the oath

It is amazing how our befuddlement dissipates when our life, liberty or property are at stake. The Court-room oath (and ritual) are then seen in a different light – no longer quaint and amusing but a minimum requirement. To date no stronger method of impressing upon a witness his awful responsibility has been found. So to this day the oath persists even in those countries ravaged by the revolution eg France and South America. (Courts might be a luxury in Russia at present.)

Familiarity breeds contempt. There is a danger that lawyers can become blasé about their surroundings, the Court-room procedure and so forth. But we forget that to the man in the street a Court-room is a "terrible" place – a place of solemnity and authority – where all involved seem more mindful of the concept of accountability in the next life than at any other time in their lives. And of course he is right. Judging a fellow man on the word of other frail mortals is indeed frightening. When the crime is serious the

continued on p 28

The concept of "tangata whenua" and collective interests

By Jeremy McGuire, Barrister and Solicitor of the High Court, Lower Hutt.

The Treaty of Waitangi – for such a simply and casually drafted political document – has developed an extraordinarily complex jurisprudence. In this article Jeremy McGuire considers the legal implications of meanings to be attached to the term "tangata whenua", and the related question of vicarious responsibility of present and future taxpayers for what are felt to be historical injustices. As an aside, answers to this latter question raise interesting issues about the jurisprudence of limitations. If a tangata whenua can claim for historical wrongs done to earlier generations why in principle, should not a family, say, be entitled to be likewise – at least from the Crown? This article does not address that interesting question. The author emphasises the need for greater social tolerance and social harmony in discussion on the meaning of the principles of the Treaty of Waitangi. He expresses concern about the current programme as being too rapid. He also questions the concept of Maori sovereignty.

Introduction

This short paper is a continuation of the expression of my opinion on aspects of the elaboration of the principles of the Treaty of Waitangi. To briefly recap, I have previously mentioned reservations about the second limb or, more precisely, subordinate or minor premise, of the political and legal syllogism that presumably is *implicitly* accepted in the reasoning and argument in support of the relative liberalisation of the principles. I intentionally say relative because some, whom I shall call either "claimants" or "Maori" in recognition of previous theoretical difficulties posed over the identification of "Maori" ([1995] NZLJ 168) might argue that the current political and legal approach to the meaning of the principles of the Treaty is not liberal but is, or should be regarded as normal. Claimants might argue that the previous approach to the elaboration of these principles, most notably illustrated in *Wi Parata's* case ((1878) 3 NZ Jur (NS) 72, 78 per Prendergast CJ) where the Treaty was dismissed as a "simple nullity", was an unjustified calamity. They might also argue that the Treaty was and is a binding document that preserved the constitutional and property rights of Maori and created corresponding duties and obligations on the Crown. These latter duties have been continually breached since 1840.

This paper will address one of two more minor facets of the debate on the meaning of the principles of the Treaty of Waitangi that appear to this author to be responsible for causing some concern among many "non-Maori" New Zealanders. This is the elusive meaning of the concept of "tangata whenua". How is this term derived and what are its implications? The second, related, issue is the question of how the current and future generations of "non-Maori" can be held vicariously responsible and liable for the historical injustices and breaches of fundamental rights of former generations. To some extent it is suggested that this latter issue overlaps with previous discussion on group dynamics that was previously mentioned in another article ([1995] NZLJ 168). I shall not discuss this issue in this paper. Opponents of the present Treaty discourse might also argue that the concept of the "tangata whenua" is now a myth and metaphor that is practically meaningless. There is not any reality of a separate and identifiable group loosely called "Maori" who now qualify as victims of colonial and imperial hegemony and oppression. The reality of contemporary New Zealand society is that the races are mixed and assimilated. The issue of how this occurred and whether it was, in fact, a policy of cultural and political guerilla warfare, is redundant. Opponents of change might argue that such argument is eminently suitable for the higher realms of moral discourse and philosophising but is not strictly relevant to modern New Zealand society. In response, it is suggested that this stance, if held, would be simplistic. The fact is that there are still at least pockets of communities that have retained their essential Maoriness and are, therefore, essentially different to "non-Maori". I say that this proposition is one of the huge difficulties confronting New Zealand politicians, Judges and

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consequences of conviction are horrific – shame, obloquy, incarceration. The black, semi-clerical robes, the covenant with God to tell the truth, – these are all reminders we are dealing with matters that have consequences in eternity for all involved.

The oath is not "an ancient ruin still standing". It is the tip of an edifice with firm foundations. □

academics. How can material differences within a single category of individuals all of which are defined as "Maori" be accommodated in the modern liberal body politic?

Cosmetic rhetoric and the principles of the Treaty

Personally I am alarmed at what I perceive to be the current method towards the elucidation of the principles of the Treaty. Undoubtedly this elaboration is an extremely difficult and challenging exercise. The consequences are also potentially enormous. Arguably the political and social future of this country is largely dependent upon the resolution of this single meta-issue. It is for both of these reasons that I would counsel informed debate and caution before important decisions are made. I think that it is vital that all associated and underlying issues and all angles of debate are thoroughly canvassed before any binding and irrevocable political or legal commitment is made. I would suggest that the effects of a rapid form of "utopian social engineering" against which Popper warned may be disastrous for this country if, in retrospect, it turns out that such social engineering is misguided, uninformed or, to put it bluntly, simply wrong. It is most difficult to change changes once these have been initiated, for reasons that I shall not mention in any detail here. In very brief summary, changes raise legitimate expectations in individuals who would have benefited but for the subsequent change in policy direction. The difficulty then faced by policy-makers is placating those individuals whose interests have been detrimentally affected by such reversals of fortune.

In view of this possibility I suggest that decision makers should reverse the method by which they attempt decisions in this area of Treaty discourse. Popper elsewhere argued that rather than seek to prove the correctness of some hypothesis it is better to concentrate on finding reasons and grounds that refute or falsify proposed conjectures. This "Refutation Theory" may be particularly useful in relation to the elaboration of the principles of the Treaty of Waitangi as it may encourage a more rigorous and thorough approach. If so, the validity of conclusions may be improved leading to a more lasting settlement of the outstanding issues.

These preceding comments apply to both sides of the argument. I can appreciate claimant restlessness and frustration at the seeming lack of progress on this issue, which issue has been the focus of discontent since the date that the Treaty was first signed. Historical reasons and grievances responsible for "Maori" discontent and activism have been very thoroughly documented elsewhere and will not be recounted in this article. I would suggest, notwithstanding this litany, that the current revolutionary discourse on the meaning of the principles of the Treaty of Waitangi is moving too rapidly to allow the average, reasonable New Zealander, regardless of age, sex, religion or ethnicity, to keep up. I suspect, judging from the tenor of the letters to the editors of the metropolitan newspapers for instance, that many members of the general public are puzzled, concerned and threatened by what are considered to be rapid and unmerited developments in this area. I would urge that the "silent majority" of inherently conservative New Zealanders need to be convinced by academics and politicians that change is a positive improvement and is not actually going to be destructive. I would suggest also that theoretical and complex philosophical and jurisprudential arguments directed mainly at the small elitist audience of fellow Platonic "philosopher kings" are of limited benefit and will not suffice to gain the vital support of the "ordinary person". Rather, it is suggested that much effort should be expended on educating the average New Zealander in the reasons for the apparently enlightened approach to the elaboration of the principles of the Treaty of Waitangi and also the ultimate aim of this exercise. Presumably this latter aim of the discourse is directed at some indeterminate goal of justice. If this suggested programme of public education is executed then I would feel more confident that the general level of debate on the topic would be elevated. More individuals might be able to participate meaningfully in the discussion. Thus a positive benefit of this suggestion may be the incorporation of a greater range of values in any final resolution on the meaning of the principles of the Treaty. A second benefit of my proposal may be to raise incidentally the level of tolerance towards any effected change. As a greater degree of understanding of the reasons for change are uncovered and discussed in an open way then hopefully greater scope for appropriate redress may also be accepted by the public.

Conversely, it is suggested that this current failure to explain adequately the underlying rationale for the current approach to the meaning of the principles of the Treaty of Waitangi is likely to cause increasing future friction if this issue is not dealt with reasonably promptly and more thoroughly.

Incidentally, this point is not original and has already been recognised by at least one scholar who has been most active and productive in this area. McHugh has stated:[1]

> That there has been real change in New Zealand political and economic life, not to say its cultural and social aspects, as a result of Maori claims is signified by ...the so-called "white-backlash". These "rednecks" hardly see the last decade as any diminishment of Maori power but quite definitely are worried by its perceived growth and threat. This change is symptomatic of the deeper-seated reorientation of New Zealand society....

However, it is suggested that Dr McHugh's (and others) failure to address possible reasons for this defensive response by some members of the community is a major omission to date.

Tangata whenua and sovereignty

It seems to me that the presumption of the validity of the claim of "tangata whenua" forms the major premise for the Maori claim for sovereignty of New Zealand. In brief, some but not necessarily only,[2] claimants have tended to argue that prior discovery and colonisation of New Zealand before the discovery and arrival of Europeans validates their claim for sovereignty. Sharp briefly mentions the concept in his well known book.[3] He says that the term roughly translates to "people of the land". In elaboration Sharp says that the term is associated with the idea that Maori are born of the land, their generations are buried in it, and they are attached to it by

indissoluble spiritual ties in a way that Pakeha are incapable of comprehending. He says further that the loss of land was more than merely material. It went to the roots of Maori culture.

I am unable to fully respond to Sharp in the short space available in this paper. I would argue however that these comments are a vast generalisation and are not necessarily wholly intellectually honest. It is probably true that historically Maori, much like Celtic, culture was intimately linked to land. However I am unsure about the nature of this relationship within the context of contemporary urbanised Maori. Also, I would suggest that the "spirituality" that Sharp cites may now have been superseded by more mortal, capitalist-related considerations.

Sharp elsewhere briefly mentions the importance and relationship of the concept of tangata whenua to the modern issue of sovereignty and Maori radicalism (ibid, 11):

> ...those whose racial descent and ethnic identification as Maori give them a unique and overriding right of occupation and sovereign political power in Aotearoa, which, arrogating the Maori right of naming, others call New Zealand.

Presumably the argument is that since Polynesian ancestors arrived in New Zealand first and also enjoyed undisturbed possession of the land for centuries prior to European invasion then they have the justified right to claim sovereignty.

I have serious logical and commonsense objections to this reasoning which I shall now briefly discuss. I find it difficult to justify sovereignty simply on the grounds of "queue logic". The principle of "first come first served" is not an appropriate analogy to justify any claim for sovereignty. Queuing for a scarce resource, such as tickets to a concert or sporting event, is materially different to claiming political sovereignty. These are vastly different contexts and, therefore, cannot be truly compared. Queues are a function of supply and demand. Queues form when a commodity is in short supply; where demand exceeds supply. Clearly it is not possible to queue for sovereignty.

I might also add that conflict may often attend shortages in resources. People may often fight to get what they want if it is in short supply. This may partially explain, though not justify, the conflict over land that occurred between Maori and the settlers in the nineteenth century. Claimants may question why under-resourced, over-populated countries do not then attempt to forcefully colonise other countries that still have room to accommodate surplus population based on this reasoning. In response I feel, first, that this is a valid concern. If the world population continues to grow unchecked then I anticipate that international conflict over territory will be an inevitable consequence. The refugees of today may well be the invading armies of tomorrow. Second, I would suggest that the conditions of the early to middle nineteenth century were totally different from the present technological and social environment. We live in an era of potential nuclear warfare and mass devastation and destruction. The consequences of war are far worse now for all compared to last century. Thus I suggest that the chance discovery of New Zealand is mostly irrelevant to the issue of political sovereignty.

I have other reservations about claims to sovereignty which are based somehow on an argument of prior discovery. I would suggest that the discovery of New Zealand by Europeans was inevitable given the historical course of human exploration and discovery and the finite size of the Earth. If the claim of some Maori to sovereignty which is based on the argument of prior discovery is valid then it seems to me to also hold true that the moon was "discovered" by the physical visitation of American astronauts and that Sir Edmund Hillary "discovered" the summit of Mount Everest because he was one of two to first climb to its top. Clearly these latter two propositions would be invalid.

Hannah Arendt has made the same point more persuasively than myself thought not, of course, within the context. She argued that the effect of human exploration, after the immensity of available space on earth was discovered and humanity developed the technology necessary to enable supersonic travel, caused the beginning of the famous shrinkage of the world. Now, Arendt thinks that every person on the planet is as much an inhabitant of the earth as she is an inhabitant of her country. People now live in an earthwide continuous whole where even the notion of distance has yielded before the onslaught of speed. Speed has conquered space and made distance meaningless. No significant part of human life – years, months or weeks – is any longer necessary to reach any point on earth. She concludes, rightly in my vies, that nothing can remain immense once it has been measured (H Arendt, *The Human Condition*, 1969, 250).

In sum, it might be argued that the discovery of New Zealand by both Maori ancestors *and* Europeans was a foregone inevitability which should not count towards anything of definitive political significance, such as sovereignty. However a "thin theory" of sovereignty, to coin a phrase of the great contemporary political philosopher John Rawls[4] may be legitimate on other grounds. I shall now briefly consider some of these.

A thin theory of Maori sovereignty

More moderate commentators, which would hopefully include myself, might argue that the fact that Maori did discover and colonise New Zealand before Europeans should be, and is, of some practical importance. Undisturbed possession and occupation for hundreds of years allowed the development of a language and culture, a lifestyle that is currently identified and encapsulated in the term "te ao Maori". Also, the argument might continue by asserting that there are still sufficient numbers of individuals who identify with and speak Maori *despite* the official forced assimilationist policy that dominated much of the New Zealand political and legal rubric and agenda of the nineteenth and twentieth centuries; the philosophy of the "quaint but inferior noble savage". Thus, if nothing else, there are compelling natural law reasons for preserving Maori language and culture. It might equally be argued that the state now has a positive countervailing duty to preserve this unique and indigenous culture given its former improper efforts to have it extinguished.

This sub-issue itself raise a number of difficult problems. Opponents of the policy of "cultural safety" and forced learning of Maori

at school might argue that such policy is paternalistic, unrealistic and undemocratic. It is a form of unjustified coercion and intrusion into the liberty of the individual that is designed by apologists to appease their sense of guilt for former bureaucratic mistakes. Thus it is not any better than the former policy of the cultural oppression and hegemony of Maori because it is equally as coercive. Opponents might argue that ideally any state educational or health policy should be valid on its merits, such merits as can be reasonably ascertained by reasonably accurate public opinion. If it does transpire that a significant proportion of the population does not agree with these and other state policies then it is up to successive governments to persuade the public of their necessity through public education. Until then it is suggested that a government does not have any right to demand conformity with its policies from every citizen on some vague ground that it might somehow be a desirable act of awakened good faith, such good faith that was entirely lacking in previous state policy involving collective Maori interest.

It is suggested that the current approach to state policy towards the preservation of te ao Maori may also be criticised on other grounds. It is not necessarily true that te ao Maori is deserving of preservation in its own right. A strict social Darwinist might argue, for example, that the gradual disappearance of te ao Maori may be an entirely natural inevitability. Such individuals might cite historical examples of lost civilisations to vindicate their claims. Human culture and civilisation is naturally cyclical and evolutionary. The great Egyptian, Greek and Roman empires were eventually superseded and replaced by other empires and cultures. Why should nature not be allowed to take its course in New Zealand?

In reply, it could be suggested that post-Enlightenment Western culture cannot be compared with the barbaric conditions that prevailed in the pre-Christian world. Thus, there are natural law reasons for preserving the heritage and richness of te ao Maori. New Zealand is a better place with te ao Maori rather than without it. It provides an alternative to the dominant and pervasive Eurocentric ethos.

Secondly,claimants might argue that Maori was not allowed to die a natural death. Its decline and demise was driven and accelerated by subtle and covert state intervention which was designed to destroy it. However, unlike the ancient world where open cultural confrontation and naked aggression was the norm, the New Zealand experience was arguably more insidious. Here, the state's agenda was cloaked beneath a veil of ostensible goodwill and charity. Unlike the Australian or South African counterpart, the state attempted to incorporate Maori culture into the mainstream, United Kingdom focused, society. New Zealand attempted to overwhelm and obliterate the distinctiveness of te ao Maori by a process of inclusion and absorption. This might be contrasted with an express and deliberate attempt to separate the two cultures and to institutionally subordinate the indigenous one as was the case in Australia and South Africa. However, claimants might argue that the net result of both policies was indistinguishable. Indeed, arguably the New Zealand historical approach was worse because it was blatantly hypocritical and comparatively more devious. If there had been a more obvious campaign of abuse of civil rights then, perhaps paradoxically, the position of Maori may have been better. The Maori may have been in a better position to invoke the protection of the British Crown against the openly subversive policies of the Colonial government. Unlike the Australian aborigines and the South African natives, the Maori might have been better able to cite the Treaty of Waitangi much earlier as grounds for asserting collective rights at a time when such rights arguably had more substance. By the time the Treaty of Waitangi was eventually recognised by politicians as being of constitutional importance, say from about the 1970s on, the damage had been done because the process of assimilation had been virtually completed.

I suggest that politicians and Judges are now faced with the enormous problem of unravelling one hundred and fifty-five years of history which has harmed collective Maori interests where it is difficult to identify a discrete and neat class of victims.

Sovereignty and group dynamics

Human society is linked to group existence. A group may be defined as an association of individuals membership to which is loosely determined by factors such as kinship, common interest, attributes and origins. Distinctive cultures and languages are more obvious signs of group membership and identity. By most accounts, group membership depends upon a loose consensus and sharing of common ideals and values. Conversely, an individual who flagrantly disregards the conventional standards of some particular group may be expelled from it (P Vinogradoff, *Common-Sense in Law*, 1914, 23).

Common social history is an important general factor in the discourse on group theory. To some extent kinship and membership of a group depends upon whether an individual has been accepted by the group. The concept of acceptance imports notions of a *sharing* in the group enterprise and some element of belonging and integration. Group membership imposes what Ronald Dworkin has described as *associative* obligations. These are sustained obligations which are engendered by a sense of group loyalty. According to Dworkin they are shared among people who have a general and diffuse sense of members' special rights and responsibilities from or toward one another. They inculcate a feeling of reciprocity (*Law's Empire*, 1986, 199). For a group to be formed, the persons concerned must co-ordinate their action in the pursuit of a common goal (a group enterprise). Co-ordination, or attempted co-ordination, of the activity of members of the group is good evidence that a common purpose or joint activity is being pursued (T Honero, *Making Law Bind*, 1987, 34, 56-7).

I find it difficult for a claim of Maori sovereignty to be made out on these preceding grounds. Even if the "primacy of arrival" argument could be made out, which I do not accept, then I could suggest that the group theory argument is extremely difficult to negotiate. I would suggest that generally speaking the group known as Maori is indistinguishable from the group known as non-Maori, New Zealand born, New Zealanders. I am not necessarily saying, however, that both groups are identical.

Accepting that everybody is different the critically important constitutional and legal question is how loose similarities between individuals can be made to be institutionally important. The common feature of the group presently defined as Maori is that all individuals have Maori blood. However, for reasons previously considered, I find this reasoning specious and unrealistic. How can this one universal biological feature, shared to varying extent by members of the grouping many of whom also share "non-Maori" blood, be transformed into a constitutional claim for group sovereignty?

Claimants may argue that this argument is simplistic. Many, if not most, individuals with Maori blood see the world differently to non-Maori. They have retained different values and therefore they behave differently to non-Maori. They may have adopted traditionally non-Maori sports and an essentially capitalist lifestyle but they also have a different philosophy to many things that distinguishes them from non-Maori. This difference is reflected in social reality. Many Maori cannot compete with non-Maori. The evidence indicates that there are far fewer Maori tertiary graduates, more unemployed Maori and greater Maori representation in prison. Clearly, then, the inference that Maori must be different is true. New Zealand is not culturally homogeneous but, instead, consists of a spectrum of heterogeneous subgroups all of whom possess different attributes of "competitive fitness".

Flew would dispute this claim of the claimants. He said that the argument premised on the assumption that under- or over-representation of some groups in the population in some occupation or organisation must be due to some defect from the ideal of equality of opportunity is often false. Flew suggests that the premise assumes that the members of the subset or group may not on average be any different to the members of the population as a whole. If that assumption is true then it would be reasonable to expect the distribution of abilities, inclinations, temperaments, values and beliefs to be at least roughly proportionate and represented throughout society as a whole (A Flew, *Thinking About Social Thinking*, 2ed 1991, 78-9). Flew elsewhere says that any insistence upon the equality of all cultures reveals a failure to appreciate the enormous difference between racial and cultural identification. He appears to infer that it may not be true that all cultures are actually of equal value (ibid, 214-5).

Although Flew's remarks appear unpalatable at first sight, I would suggest that they hold some substance and that they may potentially be of huge importance to New Zealand. First, it must be reiterated that Flew is referring to "cultural values", which are collective and indefinite and impersonal, and not the comparative value or worth of the individuals or agents who form that collective entity, which is arguably racist.

Flew seems to imply that ultimately, despite the concerns of John Stuart Mill voiced in the nineteenth century, that the majority view on what is acceptable and unacceptable in the social, political and legal order is decisive. Thus the range of values, be they "cultural", "collective", "eccentric" or, generally plain "different", that may be accommodated or indulged by any society at any particular time may be merely dictated by the prevailing majority norms. Of course, there are numerous historical examples of individuals who have dared to be different and who have been forced to pay for their nonconformity by society qua the establishment. Socrates, Jesus Christ, Galileo, Joan of Arc, Van Gogh and Harold Larwood most readily come to mind. I would suggest that this social reality must be acknowledged by claimants, as the individuals and sub-groups who are attempting to introduce change, before any true progress on Treaty discourse can be made. Thus Treaty-dependent claims should be couched in realistic language and should not attempt to transform the status quo in one fell swoop. It is suggested that such behaviour which does attempt to upset the "social equilibrium" without sufficient warning is only likely to be self-destructive. It is suggested that the hostile public reaction to the occupation of Moutoa Gardens provides a classic illustration of this point. The unfortunate reality of communal, group existence which, it seems to me, is a universal feature is that some interest will always be denied by society until the rest of society is positively convinced that it is in their best interests to agree to any change. This takes time.

I do not totally agree with Flew's unevaluated latter remarks. However, I would suggest that the reasons for the incontrovertible facts that indicate substantial differences between the acceptance and incorporation of Maori and non-Maori values, accepting the loose definitions of each group for the moment, have yet to be fully explored and explained. Why do Maori appear to find it difficult to compete in modern New Zealand? (Claimants might suggest why should they?) I am not a social scientist but I would suggest that the current statistical figures used to measure Maori behavioural and economic indices may require considerable refining. It may not be accurate or correct to treat all "Maori" similarly. I would suggest that it is more meaningful to determine the social context from which any statistical figures are derived. How "Maori" is the individual in question? What is the social setting from which the individual came? For example, it may be very relevant whether the individual came from Ruatoria or Christchurch because the former has presumably retained far more Maori culture than the latter. This may have a significant impact on the social conditioning of the individual. If it transpires that the collective Maori statistics may be separated into divisible subcategories and qualifications, then it is suggested that this information may be useful for reference in future policy making. However I am unsure how any subtle differences in the profile of Maori statistics may be effectively translated into constitutional and legal practice. How can laws be made which deal with collective interests but which apply to specific classes of individuals?

Collective interests and the rule of law

One interpretation of the meaning of the doctrine of the rule of law is that the law must be sufficiently certain to enable the reasonable, average person to be able to understand it. This is one of the preceding criteria for the expectation of obedience. The rule of law requires that the law be sufficiently clear to allow individuals to know what their rights and duties may be. Also laws apply equally to all. No one individual and,

importantly, nor is the state above the law.

Characteristically, the law consists of a body of rules or principles. Theoretically rules instil more certainty in the law because they are expressed in more absolute prescriptive or proscriptive language. Rules state the legal requirements or elements that comprise the law and therefore govern social regulation more definitively. Thus it should be easier to anticipate the potential legal consequences of behaviour. Conversely, principles are more open-ended. They encompass more flexible legal standards because they usually have a wider range of application. It is easier to mould principles to facts compared to more rigid rules. In general, principles are less coercive than rules for these reasons.

I would suggest as a main proposition that it is not usually appropriate to attempt to settle disputes involving Maori rights under the Treaty of Waitangi through case law. Such disputes involve fundamental issues relating to social coherence, co-ordination and unity. Courts are not the appropriate forums to deal with these types of disputes for reasons that I shall not attempt to explain here.[5] Legal disputes are litigated by individuals. I shall attempt to argue that the resolution of cases involving Treaty rights should apply directly to those individuals whose interests are represented in any such cases and no further. I do not think that "representative" cases are appropriate when potentially collective issues are at issue. Case law on the principles of the Treaty of Waitangi, if litigated, should generate only legal propositions confined to their facts and not principles. This proposition necessarily requires some background explanation and elaboration.

The doctrine of precedent has an albeit indirect though pervasive effect on social control. The Courts form one of the three agents of Government. Therefore the rules and principles generated by case law have a coercive quality; they are state sanctioned. Also, the Courts may refer to precedents as the main premise of a future decision if the precedential authority is binding. However, in a difficult area such as the elucidation of Maori rights discourse, I would suggest that the rules of the doctrine of stare decisis should be strictly enforced to avoid the possible artificiality of fictions. When indeterminate collective interests are at stake legal certainty, as manifested as legal rules, is fundamentally important. It is suggested that this approach would better serve the interests of preserving some element of legal coherence, co-ordination and control within the legal system.

It is suggested that precedential authorities involving disputes over Maori rights are particularly vulnerable for providing the grounds to justify the contention for other, unrelated, collective Maori rights. In brief review, the usual practice of legal reasoning employs precedents from which other arguments may be devolved. Lawyers quote authorities to enable them to persuade Judges that their clients have valid claims. These case law authorities contain the law. If the facts in dispute are materially similar to the precedential facts then a relevant precedent may determine the outcome of the dispute.

I suggest that this traditional dogma should be qualified when issues over Maori rights arise in disputes. The doctrine of precedent implicitly assumes that the texture of the legal concepts in question are reasonably consistent. Most lawyers have a fairly rough appreciation of general legal concepts such as offer, acceptance, duty of care, defamation and murder. However I dispute whether the concept of what constitutes Maori rights as provided under the Treaty of Waitangi may be expressed with anywhere near the same degree of accuracy. For example, what does the elastic concept of "taonga" mean? It is by definition a very fluid concept.

At best, I would suggest that all cases involving legal argumentation over Maori rights should be treated cautiously. Cases should be confined to their facts and should not necessarily apply to future cases irrespective of the Court within which the precedent judgment was formed. Thus sweeping statements that establish the future equivalent of "the partnership principle" between Maori and the Crown are to be avoided at all costs.

In contrast and perhaps compensation, I think that the narrowness caused by a formalist application of precedents may be rectified by a relaxation of the rules relating to the admissibility of evidence. Thus the historical and sociological background to disputes over Maori rights should be more greatly emphasised. As stated, the concept of "Maori" is an amorphous concept. Also the historical background to Maori land claims and injustices tends to be historically unique. Thus the nature of the submissions permitted within each case should be relaxed. Perhaps resort to natural law principles should be more permissible during the course of the hearing and also the reasoning of the judgment. With respect, I totally agree with the view that "the austerity of tabulated legalism" should be avoided (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 651, 655 (CA) per Cooke P).

Lastly, I would suggest that it is not possible to define which collective rights may pertain to the Treaty of Waitangi simply through case law. Case law is a good method of obtaining a general "feel" of the issues relating to the Treaty discourse. A gradual, case-by-case evolution is possibly a useful way of obtaining useful background information. However, I do not think that this approach encourages consistency of Treaty discourse.

In my opinion all major claims and disputes that involve actual or potential Maori interests should be deferred to the legislature. Parliament is the only forum with the resources available to take a global view of the situation and to introduce any form of coherence in what is an extremely difficult conceptual area.

Conclusion

Undoubtedly the meaning of the principles of the Treaty of Waitangi is experiencing a process of deconstruction. For the purposes of this paper "deconstruction" will be briefly defined as the discourse aimed at challenging the traditional narrow and loaded meaning of underlying logic and rationale usually associated with communicating the ideology of the dominant political or social interest group. Thus feminist deconstructionists attack language on the grounds that it excludes feminist values and perspectives. Maori deconstructionists attack the traditional meaning attributed to the Treaty of Waitangi on the grounds that non-Maori dogma which serves the interests of non-Maori has dominated debate and policy.

I agree that the status quo requires change. New Zealand has been renowned for the conservative and narrow range of values that have traditionally dominated our society. The country was very Euro-centric and was especially English-oriented. All other cultural alternatives, whether imported from Asia, other European countries, or from the South Pacific, or the indigenous Maori culture were relegated to a secondary role.

New Zealand society and its economy have radically changed within the past two decades. There is a far greater scope for choice. The economy has been deregulated and the former social conventions and structures that governed social conformity and tolerance are less narrow and rigid. Changes to the social, political and legal status of the Treaty of Waitangi form part of the momentum of the general social transformation that has enveloped the country.

I do not necessarily agree with the present approach towards the elaboration of the principles of the Treaty of Waitangi. I accept that politicians, Judges and most interested academics dealing with tremendously difficult issues relating to the Treaty of Waitangi are acting in complete good faith and to the best of their abilities. However I also feel that the current programme to redress the problems associated with the Treaty of Waitangi is moving too rapidly. Great care is required to ensure that change is for the better and not merely for the sake of change.

I feel that it is unrealistic and unjustified to expect the social, political and legal structures of the past one hundred and fifty-five years to be reformed to the extent that te ao Maori achieves domination. It is also difficult to see how parity may even be reached simply because the majority of the population are not only non-Maori but also because most all New Zealanders, including Maori, now accept that this is not only not possible but also undesirable. It is trite political and legal theory that rival political and legal systems cannot be truly accommodated within single territorial boundaries. Any system of government cannot tolerate such conditions essentially because there are alternative institutional sources of authority. The system of Government is destabilised because it is not unified.

I do believe, however, that there is ample scope for incorporating a greater range of traditional Maori values within the limitations required for effective government. New Zealand culture should reflect local social input. Alternative methods of education and healthcare should be introduced and implemented so that the public, either as parents on behalf of children or as adults, may choose the form of education they want for their child or the type of healthcare they wish to receive. However I do not agree that the state may simply impose its will in a democracy without any justification. The state's function in a pluralist society is to provide reasonable alternatives provided these meet reasonable social demands. Claimants may argue that this is not correct because present demands for te ao Maori are not truly accurate and representative. History was distorted by the policy of assimilation. This policy deliberately reduced the intensity of social demand for te ao Maori. Therefore a period of positive discrimination in favour of te ao Maori is justified to redress the previous imbalance. Once the scales have been balanced then it may be fair to allow supply and demand to naturally determine the level of public expenditure that should be applied to the provision of services fostering te ao Maori. Until then it might be argued that the state has a political and moral obligation to force children into learning te ao Maori regardless of the sentiments of their parents and also, I think to a much lesser extent, to teach healthcare professionals traditional Maori protocols and alternative treatment methods.

The ultimate aim of the discourse on the meaning of the principles of the Treaty of Waitangi is greater social tolerance and social harmony. I feel that New Zealand is experiencing the growing pains associated with an enlightened maturity that is directed towards the achievement of a higher plane of Rawlsian "reflective equilibrium".[6] This means in practice that New Zealand public opinion is arguably more informed and tolerant to a different interpretation of the meaning of the principles of the Treaty of Waitangi although such developing tolerance, as briefly discussed, may not necessarily be shared by all members of the community.

The Treaty of Waitangi is the subject of great interest and speculation. The aim of this short article was to attempt to contribute positively to the contentious and fractious debate. ❑

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1 PG McHugh, "Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches" in G Oddie, R Perrett (eds), *Justice, Ethics and New Zealand Society* (1992), p 91, 104.

2 Ian MacDuff, a Senior Law Lecturer at Victoria University of Wellington, has stated that the framework for Maori rights is not articulated as demands based upon the promises and premises of liberal theory but rather on the unique status of the Maori as tangata whenua, as the original people of the land – I MacDuff, "Biculturalism, Partnership and Parallel Systems" in W Twining (ed), *Issues of Self Determination* (1991), p102.

3 A Sharp, *Justice and the Maori* (1990), 8. With respect, I was personally disappointed with the book. I felt that it was too descriptive. In my opinion Dr Sharp tends to cite the views of others with insufficient evaluation. There is, to adopt and adapt an idea of the author, insufficient "philosophical contestability" (12-3) in his book for my taste.

Also, it is suggested that the style of the book is not truly dialectic. It seems to me that the discussion is more of an attempted vindication of Sharp's "progressive" stance on the elaboration of the principles of the Treaty of Waitangi rather than a more balanced discussion on whether such views are philosophically valid. For example Sharp assumes and accepts, without reason, that Maori are a discrete group (although he is not alone here). I have previously mentioned that I hold real doubts about this claim.

4 *A Theory of Justice*, 1972, p 396.

5 I have attempted this in an unpublished paper called "Institutional Sources of Law and Law reform: A Comparative Study".

6 Above n 4, passim.

I think with mild and shy delight
Of all the times that I am right,
But then the Court does set to nought
The brilliance that my client bought!

Anon

Admitting business records in civil cases

By Bernard Robertson, Department of Business Law, Massey University

The hearsay rule is one of the best known rules in the law of evidence, but this does not mean it is always clear. The production of documents as proof of their contents is now covered by statute. In this article Bernard Robertson discusses the recent Equiticorp *decision on this question. He contends that the matter of just how far the business records exception extends is still not clear.*

In *Equiticorp Industries Group Ltd v Attorney-General (Equiticorp)* [1995] 1 NZLR 717, (1995) 8 PRNZ 296, the provisions of s 3 Evidence Amendment Act (No 2) 1980 fell for consideration once more. Before this case is examined in detail a brief review of the previous case law relating to this section is necessary.

Section 3 was a legislative response to the problem in *Myers v DPP* [1965] AC 1001, [1964] 2 All ER 881 (HL). Myers was charged with "ringing" cars. To show that the engines in the cars were not the ones originally installed, the prosecution sought to produce the factory records. In the House of Lords it was held that these were hearsay and that they fell within no recognised exception to the hearsay rule. The House, by a majority, held that it was unable to create a new exception to the hearsay rule. The evidence could not therefore be admitted despite its obvious reliability. The House expressed the hope that Parliament would act to deal with the problem.

In New Zealand, the Court of Appeal did not accept that the hearsay rule was incapable of judicial amendment. Nonetheless legislation was introduced with the aim of ensuring that such evidence would be admitted. The end result was s 3 which provides:

> *Documentary Hearsay Evidence*
> **3. Admissibility of documentary hearsay evidence** – (1) subject to subsection (2) of this section, and to sections 4 and 5 of this Act, in any proceeding where direct oral evidence of a fact or opinion would be admissible, any statement made by a person in a document and tending to establish that fact or opinion shall be admissible as evidence of the fact or opinion if –
>
> (a) The maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; or
>
> (b) The document is a business record, and the person who supplied the information for the composition of the record –
>
> (i) Cannot with reasonable diligence be identified; or
> (ii) Is unavailable to give evidence; or
> (iii) Cannot reasonably be expected (having regard to the time that has elapsed since he provided the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he supplied.

Subsection (2) introduces a qualification that applies only to criminal cases.

Fiefia v Dept of Labour [1983] NZLR 704

The first case on s 3 to reach the Court of Appeal was a criminal case, but subs (2) did not require consideration. Fiefia was charged with overstaying his leave to remain in New Zealand. The evidence of the conditions under which he was admitted was the stamp which had been put in his passport by an immigration officer. The prosecution put the passport in evidence. Some ten months had elapsed since the date of entry.

Anyone who has passed through immigration at Auckland airport would know that immigration officers deal with several hundred people per day. In the High Court Davison CJ had "little doubt that the officer cannot reasonably be expected to remember the date-stamping and initialling the permit in this particular passport". The Chief Justice held that the appropriate test was an objective one and admitted the evidence.

The Court of Appeal, in a unanimous judgment delivered by Richardson J, held that there must be some "evidence directed to the particular circumstances which gave rise to the supplying of the information contained in the business record" before a Court could decide whether the requirements of s 3(b)(iii) were met (p 707).

It does not appear to have been considered in *Fiefia* that the evidence ought not to have been admitted because the immigration officer was both the supplier of the information (the conditions on which Fiefia had been admitted) and the compiler of the document.

R v Hovell [1986] 1 NZLR 500

This was also a criminal case. Hovell was accused of burglary and rape. The elderly victim died prior to the trial. She had "made a statement" to a police officer which she had signed. In that statement she had simply recounted the facts of the offence, without identifying her attacker. Hovell's defence was that he had not been present or involved in the incident in any way. The defence objected to the inclusion of the statement.

Two questions arose. First, who was the "maker of the statement" for the purposes of subs (1) and secondly did subs (2) operate to exclude it? In the event the second question was found not to be applicable.

The Court divided 2-1 on the first issue. The majority, McMullin and Somers JJ, held that the victim was the "maker of the statement": in the

words of McMullin J: "A statement becomes the statement of the person interviewed when he or she signifies its adoption as an authentic record" (p 508).

It followed that the "statement" produced by the police was a statement made in a document by a person who had personal knowledge of the matters dealt with and who was unavailable to give evidence. It was therefore admissible under s 3(1)(b)(ii).

Richardson J dissented. His Honour believed that the statement was the statement of the police officer. It was cast in her words, had been typed by her and had merely been read over and signed by the victim.

It is respectfully submitted that the majority decision was correct. If Richardson J's view were to prevail there would be no clear definition of the "maker of a statement". One can imagine a range of examples commencing with a doctor who dictates a statement for typing by a secretary who makes minor grammatical alterations all the way up to the conventional police practice of composing a witness statement, sometimes after a prolonged series of questions and answers, for signature by the witness. Where on this scale would the break point come? Whether a witness were the "maker of a statement" would, on this approach, always be a marginal decision of fact.

Somers J specifically refused to rule out the possibility that the police officer could also be described as the maker of the statement, but Richardson J believed that the section required that the person making the statement was doing so on the basis of information not within the maker's personal knowledge but supplied by another.

Equiticorp v A-G
judgment number 25

This was an appeal from Smellie J's interlocutory judgment No 20, reported at [1995] 1 NZLR 717. One of the points at issue in this litigation was whether the Crown knew that a transaction in which it had been involved was in breach of s 62 Companies Act 1955. In support of the contention that the Crown did indeed know this, the plaintiff (the statutory management of Equiticorp) wished to introduce as evidence the filenote made by Mr Harford, of the Auckland office of Rudd, Watts and Stone, the plaintiff's solicitor. This filenote was said to record a conversation between Mr Harford and Mr Ratner who acted for the Crown and who worked behind a "Chinese Wall" in the Wellington office of the same firm. This note appeared to show that they had discussed a particular Deed. Had the Crown known about this Deed it would have known that the transaction was in breach of s 62. The Crown did not wish to call Mr Ratner as a witness. The plaintiff did not wish to call Mr Harford as a witness.

Smellie J held that the filenote was inadmissible. He did so on the ground that the scheme of s 3(1)(b)(iii) requires that the person who compiles the document and the person who provides the information must be separate people.

This conclusion was arrived at after discussion over several pages, including examination of the corresponding English provision, s 24 Criminal Justice Act 1988. This section is expertly dissected in Birch: "The Criminal Justice Act, The Evidence Provisions" [1989] Crim LR 15. Birch shows how the section was mangled by the practitioner lobby in the House of Lords (Legislative). Section 24 as enacted appears to envisage four different conceptual people, the "supplier of the information", the "receiver of the information", the "maker of the statement" and "the creator of the document". Clearly, these roles will frequently be combined into two people, and s 24(1)(c)(ii) specifically provides that the "supplier" may well also be the "maker" in which case all four roles may be combined in one real person.

Section 3(1)(b)(iii) of the New Zealand Act refers to two conceptual people, the supplier of the information and the "composer of the record". Smellie J held that they had to be two different real people. In this case Mr Harford was both the composer of the record and the provider of the information and so s 3 did not cover the case.

This, then, was the ruling appealed against. There were two other issues, related to each other. One was whether the test of reasonableness of expectation of recollection was "objective" or "subjective". The other was whether the Court had to hear evidence on this matter before making a decision to admit a record.

A five Judge Bench heard the appeal, of which only Richardson J had heard the previous cases. The Court divided 4-1 on the main issue. Richardson J alone persisted in the view that he had expressed in *Hovell*, that the supplier of the information and the composer of the record were intended to be different real people. Nonetheless he found that the filenote passed this test because it contained information provided by Mr Ratner and recorded by Mr Harford.

It is respectfully submitted that this last point must be wrong. This was specifically discussed by Hardie Boys J. The purpose of the admission of the note was to prove that Messrs Harford and Ratner had had a discussion on a certain topic, not to prove that anything Mr Ratner had said was true (indeed Mr Ratner might not have said anything at all). The note did not purport to record anything said by Mr Ratner but merely Mr Harford's belief that they had discussed the Deed. The majority of the Court therefore saw themselves as squarely faced with the issue of whether the two different conceptual people mentioned in s 3(1)(b)(iii) had to be two different real people.

It is difficult to respond to the long and careful argument of Smellie J except by saying quite shortly that the fact that the section discusses two different roles, two different conceptual people, to each of which different requirements apply, does not necessarily mean that these two roles must be played by two different real people. A conversation such as the following would not be nonsensical:

> *Q: "Who wrote this note?"*
> *A: "I did."*
> *Q: "Who supplied the information?"*
> *A: "I did, from my own observations."*

Only Casey J dealt with this point at length, drawing support from the wording of s 4 of the Act and also from the author of Garrow and McGechan's *Principles of the Law of Evidence*. (It was, perhaps, unfair to cite one of the two New Zealand evidence texts in support of this point since Mathieson QC, being counsel for the Crown, could hardly make use of the fact that he had written to the contrary in the other,

Cross on Evidence, 4th NZ edition). In addition, His Honour pointed out that the Richardson/Smellie rule would render the stocktaking records of a one-person firm inadmissible. In fact, if a stocktaking were undertaken by two or more people, one of whom was also recording, the parts that the supervisor had personally recorded would be inadmissible and the other parts would be admissible. After some time had passed, the supervisor might even have difficulty remembering which parts were which. Cooke P pointed out that a record compiled by a person from his or her own information must be at least as reliable as one complied from information provided by others. Hardie Boys and Gault JJ found nothing in the section to indicate that the two roles had to be played by two different people. Hardie Boys J said that the purpose of identifying the different roles was to enable different conditions to be applied to each, rather than to insist that they had to be played by different people.

Equiticorp is therefore unequivocally authority for the proposition that s 3 applies to a situation in which the supplier of the information and the composer of the record are one and the same person. The document will be admissible in evidence provided that the author had personal knowledge of the circumstances and cannot reasonably be expected to recollect them (as is required of the supplier of the information) and wrote the document in the course of business or duty (as is required of the composer of the record).

The Court was equally clear that the test of reasonableness of lack of recollection was an objective one. The question is whether the person "cannot reasonably be expected to recollect the matters". There were some reservations, however. Hardie Boys J wondered how one could assess the reasonableness of genuine forgetfulness. If the person has genuinely forgotten the matters, why should it matter whether a reasonable person in the author's shoes would also have forgotten them? Cooke P conversely, regarded the objectivity as only working the other way. He regarded it as anomalous that evidence might be admitted when examination of the supplier would reveal that the circumstances could, in fact, be recollected. These comments have, with respect, considerable force. But one is faced with the plain words of the section, in which Parliament has presumably confused evidential and definitional concepts.

On the remaining issue it is more difficult to state the law following *Equiticorp*. This is the issue of whether evidence must be heard before the Court can rule a document admissible under s 3(1)(b)(iii). In *Fiefia* a unanimous three Judge Court of Appeal ruled that it must. In *Equiticorp* no clear resolution was reached, leaving in doubt the status of *Fiefia*, which was never referred to, even by Richardson J.

Gault J alone said that the trial Judge should not rule on the admissibility of the filenote without hearing evidence as to the circumstances. This comment was, however, closely tied to the specific case. Given that statement, had Gault J made any general statement to the effect that in other circumstances a Judge could admit a document without taking evidence, it would of course have been obiter. Richardson J believed that after a lapse of seven years, with all that had occurred in that time, it was not likely that either party to the conversation would have an independent recollection of it and that the note should be admitted. It is difficult to reconcile this statement with the judgment that Richardson J delivered in *Fiefia*. Hardie Boys J believed that in some cases it would be obvious that the supplier of the information could not be expected to recollect the matters dealt with and that it would be a waste of time to call evidence on the matter. In other instances the decision might properly require that the person be called to give evidence. Thus the tally stands at two in favour of the proposition that a Court may admit such a document without taking evidence and therefore over-ruling *Fiefia* and one possibly against.

Casey J agreed with Cooke P on this point, so the law on this issue depends upon detailed interpretation of Cooke P, who expressed himself elliptically. His Honour first said (both in general and in respect of the present case) that the Judge need not rule the document admissible without hearing evidence about the circumstances, especially when the supplier of the information is available. The implication of this wording is that the Judge is also entitled, in a suitable case, to admit a document without taking evidence. But Cooke P went on to say that when absence of reasonable expectation is critical, so might be evidence of the supplier, if available. In a sense, reasonable expectation is always critical since it is a statutory criterion for admissibility. If this is what "critical" means, then the implication above is controverted. If "critical" means "of genuine importance in the case", then the implication above is a permissible one.

Counsel for Equiticorp does not appear to have invited the Court to over-rule *Fiefia* on this point and the Crown was seeking only a preliminary ruling that the document not be admitted without further consideration. Were this the first case on the question to reach the Court of Appeal one might be entitled to make the implication discussed above from Cooke P's judgment and to decide that the case allowed admission of such documents without taking evidence, by a majority of at least 4 to 1. On the other hand, given *Fiefia*, had Smellie J ruled the document admissible without hearing evidence that decision would have been per incuriam. A five Judge Court of Appeal can hardly be said to have made a decision per incuriam through failure to refer to a three Judge Court of Appeal decision. But to say that *Fiefia* is over-ruled would be, in the circumstances, to say that the previous unequivocal and unanimous ruling was over-ruled by implication, perhaps even by inadvertent implication.

One can safely say that, when the issue arises, the Court of Appeal is highly likely to rule that there are occasions when a Court may admit such a document without taking evidence. But if the issue were to arise in the High Court tomorrow, what is the Judge to decide? Is the High Court still bound by *Fiefia*, or not?

Naturally, this case leaves much still to be considered. The real problem raised in *Equiticorp* is a procedural one. At present, the Crown could call Mr Harford as a witness but would not be able to cross-examine him. Eventually we shall arrive at the state of affairs the Law Commission suggested, that a party should be allowed to introduce documents but that the other party should be able to insist that the

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The managerial revolution in law

By Nigel Jamieson, University of Otago

In this article Mr Jamieson questions the significance of the legal system of adopting a managerial ethos to replace the impartial judgmental one. He notes that both the executive and legislative arms of government have succumbed to a managerial revolution, and he asks when and to what extent the Judges will follow suit. He sees this as a crisis in legal values for the Common Law, and raises the issue of whether justice is to be managed on purely monetary terms.

Linguists know that what begins in metaphor often ends as a literal use of words. Lawyers likewise can refer to all sorts of concepts, beginning with the Crown and ending with a State-owned enterprise, by which legal fictions give birth to positive law. It is just so with the so-called managerial revolution. What was first wrong with management has never been accurately analysed, nor weighed against its rewards, but a new figure of speech implies that things were so mismanaged as to require a revolution. In pre-managerial times this would be recognised for what it is – the fallacy of ignoratio elenchi (to use a legal expression signifying ignorance of the charge to be refuted) as well as petitio principii (in begging the question for any need of reform).

Every generation of lawyers – since Moses first delegated his government to the elders when the going got too tough for him alone in the first chapter of Deuteronomy – has subscribed to some sort of time and motion study. Today's bunch of tribal elders to which we delegate professional authority is our own New Zealand Law Society. We tend to appoint people upwards now, rather than downwards, since we did away with the divine right of kings. Never since the swing from theocracy to democracy, have established values of law, order, and good government been so expeditiously upset on a global scale as by the present managerial revolution.

Those who support the current change of legal values disparage Dicey's Rule of Law and, by re-writing history, reduce constitutional law to politics. They rely on a highly explosive mixture of Marxist economics and entrepreneurial individualism. In delegating responsibility for public affairs to private enterprise, away from a constitutional monarchy held in check by parliamentary sovereignty, they extol the managerial revolution as if what went on before was merely feudalism.

It is a funny thing but feudalism was overthrown not by its opponents but by those who sought most to support and maintain it. It was Edward I who legislated towards our current value of free trade by his Statute of Merchants as well as supporting our current real property values by his Statutes of *Quia Emptores* and *De Donis*. As the English Justinian he would have been dismayed to find out that he was thereby doing away with feudalism. (By the same paradox of legislative intent the promoters of the Employment Contracts Act 1991 would be dismayed to find out the extent to which they were destroying individual initiative to secure conditions of employment in the public work force.) On the contrary, had Edward's legislation conformed to our new-look formula of purpose and object clauses, Edward's minister Burnell would have expressly promoted feudalism centuries before Coke's contemporary Sir Henry Spelman found the name for it.

Risks of monetarism

Feudalism, more than any other form of law and order, depended on direct relationships of personal service. (With the same intent of encouraging these direct relationships the Employment Contracts Act is unashamedly feudal.) It was the loss of these relationships that worried Edward no less than their loss worried the proponents of the earlier Magna Carta. These personal relationships on which feudalism relied were undermined by monetarism. Personal relations were in part revived by a new order of democratic suffrage and social welfare, but it is this new order that is now placed most at risk by extreme monetarism. This extreme monetarism when worshipped by governments as the sole standard of social policy in accordance with the managerial revolution, quickly becomes a state religion.

In a recent book, John Garrett, already author of *Managing the Civil Service* and *The Management of Government* answers his own *Westminster – Does Parliament Work?* by coming straight to the point, as he sees it, in his first chapter entitled "A Running Commentary on Decline". It is true that the tabloid press has taught us to come to the conclusion without learning to appreciate the argument. The quick fix solution of the sensational headline seems to divert our attention away from the need for sequential reasoning. We have become almost habituated to petitio principii, the fallacy of begging the question, by which the small screen of television, when viewed in the sanctified privacy of our own homes, becomes the media's most potent tabloid. The result – even if that means saving the dirty bathwater at the expense of throwing out the baby – is that law students come to college now expecting not to reason for themselves, but to be programmed, preferably with overhead projectors, with answers to questions.

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author is called as a witness by the introducing party. Frivolous requests would be disciplined via awards of costs. Then there is the relationship between s 3, s 4 and the "refreshment of memory" from notes, to which Cooke P, Casey J and Smellie J referred. As long as there is a "rule against hearsay", cases on the exceptions will continue to occupy our higher Courts. ❑

This journalistic technique of the tabloid headline – first introduced to save newsprint and dampen wimpish doubts in time of war – certainly enables us to reach quick conclusions. Sometimes these are reached so fast and furiously that only the strongly sequential thinker – who by that time is usually exhausted – can see that society is going round and round in circles. Much of the managerial revolution – with its incessant demands for mission statements, performance incentives, and quality control – is already strongly incorporated into our substantive and adjectival law. Statements of political purpose in our legislation, and increasing numbers of commissioners of complaint for reviewing executive and administrative action, are two of the most critical areas of change in our legal system.

Much of the managerial revolution proceeds in the same radical way, so that we do not quite know where to draw the line as we once did – say between plea bargaining and intimidatory corruption, between travaux preparatoires and consulting Hansard, between ministerial comment against the judiciary (which contravenes the separation of powers) and judicial reference to Hansard (which infringes the same separation), and between criminal acts and those other acts which would never have arisen but for entrapment by authorities whose first priority is prevention. It takes a rising level of litigation to resolve these disputes but the crux of this litigation, for all that it makes more work for lawyers, seems to come at one of the lowest ebbs of commitment – judging by the level of our fiduciary fund – to our heritage of common law. Whether this can be replaced by courses in legal ethics, any more than intellectual endeavour can substitute for heart-felt commitment to the law, is a moot point.

Distinctions between rich and poor

What we have experienced by our managerial revolution in law, not long after our legal system reached its highest point of development in securing public health, social welfare and human rights, is a revolt in favour of policies which have reinstituted feudal-type distinctions between rich and poor in terms of employment, education, and social security. This revolution operates like a civil war in rousting out and eliminating once settled and established values at common law. It is not a revolution at all, but a reaction. It is the same sort of reaction as Lord Hewart once aptly described as *The New Despotism*. Then what we thought to be the foundational powers of parliament were being put under the new management of the public service. Now what was under the old management of the public service is being put under the new management of private enterprise. Between public service and private enterprise is the pivotal, often exceedingly transient, and legally incoherent state-owned enterprise.

What are these old common law values especially as they were adaptable to the rights-oriented expectations of a social welfare state; and exactly how did their strength give way for them to fall with so little struggle before the oncoming managerial revolution by which almost every hitherto human value would henceforth be accounted for in purely monetary terms; and how could private enterprise so forcibly take over the management of public affairs from a once so powerful public service?

When we examine these questions we find for the managerial revolution as for most successful reactions that they hunt in packs and are part of a reactionary aura with extreme expression, sometimes in terms of conservative reform and at others in terms of anarchic rebellion, rather than being capable of being seen as the isolated, independent, and initiating events that they portray themselves to be. For the most part they succeed for a little time as responses, not initiatives, and thus eventually fail for lack of initiative by reinstituting a worse state of affairs than that from which they sought to redeem. In the end monetarism must fail as an unreal measure of the wealth of nations, in which case only those institutions will survive that have not jumped upon the bandwagon.

Weaknesses of Parliament

Garrett's *Westminster – Does Parliament Work?* is described on its dustcover as being "for realists rather than incurable romantics". As a realist I would go far further than Garrett in decrying the weaknesses of Parliament. His treatment of its shortcomings is more managerial (in so far as a sovereign Parliament must be every manager's nightmare of an institution out of control) rather than constitutional, and his conclusions, as reinforced by his concluding chapter on European federalism are politically, not legally motivated in ways that substantiate every common lawyer's fear of being conquered by continental law. What has been said by Coke, Blackstone, Bryce, Maine and Maitland by way of reiterating the strengths of our parliamentary constitution, however, is usually either ignored or dismissed as incurable romanticism by the likes of Garrett. There are many such proponents of the managerial revolution around. Joseph's remarkably revolutionary *Essays on the Constitution* voices the same Tory sentiments in dismissing the introduction to Robson's *New Zealand: the Development of its Laws and Constitution* as "an example of the vulgar Whig form". Lifelong Tories of working class descent such as my Irish blacksmith grandfather would never have dreamt that what caused them to be dismissed as vulgar was their support for parliamentary democracy and the Rule of Law. As one Tory is his denouncing of another Tory's treatment of the British constitution, at least grandpa would have had the consolation of knowing that his support for the British constitution was jurisprudentially and not politically motivated. To dismiss what ordinary working class conservatives strongly believed in as "an example of the vulgar Whig form" is not even revolutionary but merely reactionary. It resurrects an outmoded and obsolete political divisiveness between Whig and Tory in place of what took over by way of professionally legal discourse on public law. Not only has the strength of our constitution much more to its credit than the likes of Garrett and Joseph (as editor of McHugh) would lead us to believe, but it is that self-same constitution that provides the status and experience, either as Members of Parliament or lecturers in law, from which these revisionists write.

The managerial revolution and the judiciary

It is this very same status in and experience of the law that provides the standard for choosing our judiciary. Both legislative and executive have already succumbed to the

managerial revolution. The only remaining question for the managerial revolution is how far the Judges will follow suit. This is the crisis in legal values for our common law.

Anthony Kronman writes in *The Lost Lawyer*

> the bureaucratization of the judiciary and the rise of the managerial Judge are developments that threaten ... the stifling of deliberative imagination on which the work of judging centrally depends.

Kronman is concerned with what he diagnoses to be the failing ideals of the legal profession. How do we still see our Judges amid all this litigation and how do they still see us amid the managerial revolution which gives rise to it? Do we look after our Judges as well as we might, and how can we do better? Should our Courts continue to have that warm fuzzy feel in which even the most expert but conflicting of opinions can contribute confusion rather than decisiveness? Sometimes it seems that the social sciences are set to kidnap each case by arguing their own agenda. Every new technology, whether by way of ballistics in the Arthur Alan Thomas trial, or haematology in the Azaria Chamberlain case, or fingerprints in the case of the Queensland firebombing, is vulnerable not just to scientific stricture, but to the criminal misapplication of yet more recent technology. The history of forensic medicine gives us no assurance that DNA testing will be any different.

Peter Huber has described the associated phenomenon of junk science in the Courtroom as *Galileo's Revenge*. The Committee set up by Justice and the Council for Science and Technology under Judge Oddie to report on the "uneasy" relationship between law and science did so in a way which outlines many problems for both disciplines in 1991. A different approach, edited by Forster, Bernstein and Huber investigates the pseudo-scientific hysteria that can pervade environmental, sociological and occupational phenomena giving rise to legal claims. They identify the resulting problem for the Courts as that of *Phantom Risk*. Because the managerial revolution relies on the technological revolution, science and law have never before been so much at odds in deciding what is certain for society. Is the Rule of Law at present already giving way to the Rule of Science, as assisted by the managerial revolution?

At present we can do little more than ask questions. Should only the Judge and not the process be identified with making difficult decisions, or is this seriousness to be attributed to the whole process including the jury, the media, and the least important onlooker as well as the Judge in sharing a disciplined part of a rigorously recognised Court protocol? The litigation which is in process of deciding the managerial revolution for the law is already also in process of determining the future of our judiciary. As lawyers, are we all on the look out for justice being managed on purely monetary terms, because when the managerial revolution finally gobbles up the Rule of Law, the result for the judiciary could be quite shocking. The public relations people foretold to take over our declining legal system by Fuller's parable of King Rex have all but triumphed over legislature and executive. What we are most concerned to do with Kronman in opposing the managerial revolution for the judiciary is to roll back what has become the accustomed contempt for "the claims of practical wisdom" in the judicial administration of justice. ❑

A post-Christmas filler

Charles Dickens' *The Pickwick Papers* is relevant to doctors because of the character of Mr Benjamin Allen and Mr Robert Sawyer; but to lawyers of course the interest of the book lies in the record of the case of *Bardell v Pickwick*, and that list of legal luminaries involved in the action including Dodson and Fogg, Mr Pecker, Serjeants Buzfuz and Snubbin, and Mr Justice Stareleigh, as well as the various inhabitants of the Fleet prison whom Mr Pickwick joined temporarily.

Probably the best known chapters of the book however, the ones with most universal appeal, are those describing the Christmas events at Dingley Dell, the home of Mr Wardle. At the beginning of Chapter 28 Dickens has written two paragraphs that are still as meaningful as when they were first published in 1836. Having just enjoyed another Christmas it is heartwarming to read again what Charles Dickens wrote, with his typical combination of romantic nostalgia and realistic melancholy, some 160 years ago.

> And numerous indeed are the hearts to which Christmas brings a brief season of happiness and enjoyment. How many families, whose members have been dispersed and scattered far and wide, in the restless struggles of life, are then reunited, and meet once again in that happy state of companionship and mutual goodwill, which is a source of such pure and unalloyed delight, and one so incompatible with the cares and sorrows of the world, that the religious belief of the most civilised nations, and the rude traditions of the roughest savages, alike number it among the first joys of a future condition of existence, provided for the blest and happy! How many old recollections, and how many dormant sympathies, does Christmas-time awaken!
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> We write these words now, many miles distant from the spot at which, year after year, we met on that day, a merry and joyous circle. Many of the hearts that throbbed so gaily then, have ceased to beat; many of the looks that shone so brightly then, have ceased to glow; the hands we grasped have grown cold; the eyes we sought have hid their lustre in the grave; and yet the old house, the room, the merry voices and smiling faces, the jest, the laugh, the most minute and trivial circumstances connected with those happy meetings, crowd upon our mind at each recurrence of the season, as if the last assemblage had been but yesterday! Happy, happy Christmas, that can win us back to the delusions of our childish days; that can recall to the old man the pleasures of his youth; that can transport the sailor and the traveller, thousands of miles away, back to his own fireside and his quiet home!

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