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A last legal miscellany

Athenian law and justice in "Antigone"

The great painting by Raphael known as "The School of Athens" is dominated by the two figures representing Plato and Aristotle. Others known to be represented include Xenophon, Epicurus, Socrates, Heraclitus, and the two mathematicians Pythagoras and Euclid. The great dramatists, Aeschylus, Sophocles or Euripides however are not included. Nor are the historians Herodotus and Thucydides, nor the poets Homer, Hesiod, Pindar or Sappho although these latter are in another mural devoted to poetry in the same room of the Vatican Palace.

The Greek philosophers, particularly Plato and Aristotle, were concerned to a great degree with the concepts of justice and law. Plato's Socratic dialogue *The Republic* is devoted to the concept of justice and he wrote a treatise entitled *Laws*. Aristotle too, in his *Politics* dealt at length with both justice and law. Clearly the relationship of these two concepts to one another was very much an issue in Greece in the fifth and fourth centuries BC as it has continued to be throughout subsequent European history. The Greek exploration of the topic was perhaps best summed up by the Roman Cicero who had been sent as a young man to study at Athens. Cicero in his *Laws* wrote:

> There is no more ridiculous opinion than to believe that all customs and laws of nations are inherently just. Would one think such a thing of the decrees of dictators? Had the notorious Thirty Tyrants decided to enact a code of laws for Athens, or if all the citizens of Athens were happy with the tyrant's laws, would such a circumstance indicate that those laws were just? It would hardly be considered a just law if some Roman regent had decreed that any dictator could be put to death with impunity by any citizen, without even going to trial. Justice is integral. It binds society together and is based on the one law of right reason applied to commands and prohibitions. Whoever is not acquainted with this law, whether it has been put in writing or not, does not know justice.
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> If, as some people insist, justice is nothing more than a conformity to written laws and national traditions, and if everything is based on a standard of expediency, then anyone who sees something in it for himself will go ahead and break the law. If this were our point of view, we could only conclude that there is no justice. For if it does not exist in nature, and if simple expediency can overthrow it, there is no justice. If justice is not based on nature, then are the principles on which society is founded destroyed ...
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> Were the basis of justice in the decrees of the people, the rulings of kings, or in decisions of judges, then justice would permit theft, adultery, even forgery of wills, if a majority of the populace voted for them. But if such a power resides in the decisions and decrees of fools who are sure natural law can be altered by votes, then why do they not decide that what is bad and harmful shall be considered good and worthwhile?
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> In fact, we can tell the difference between good and bad laws only on the basis of nature. Nature not only distinguishes between the just and the unjust, but also between what is honorable and dishonorable. Since our common sense helps us to understand and conceptualize things, we do ascribe honorable actions to virtue and dishonorable ones to vice. Only a lunatic would assert that these judgments of ours are merely opinions and not based on natural law.

Given that the issue of law and justice was one of significance for the Greek thinkers it is not surprising that Sophocles, whose life spanned that of Socrates and Plato, made it a central theme of his great play *Antigone* – a play that has continued to resonate down the centuries as George Steiner has so brilliantly described and analysed in his magisterial book *Antigones* published in 1983. Not that *Antigone* is the only play of Sophocles that has its contemporary relevance. Everyone knows about the oedipus complex. As Bernard Knox wrote in his recent book *The Oldest Dead White European Males*, published in 1993, it was in 1900 that Sigmund Freud,

> in his *Interpretation of Dreams*, announced one of the most sensational and disturbing theories ever propounded, in a passage which attempted to explain why Sophocles' play *Oedipus the King* can stir the emotions of a modern audience as deeply as it did those of the fifth century Athenians.
>
> All through the history of the West the Greeks have continued to spur innovation; the contact of the modern mind with the ancient has time and again

Vale

This is the last issue of *The New Zealand Law Journal* for which I will be responsible. The past 13 years in the editorial chair have been interesting for me, and I hope at least generally so for readers. Inevitably, over the years, there have been occasional editorial difficulties. These have included sometimes gremlins in the production process – like the notorious publishing problem of the disappearing "not" that occurred embarrassingly a couple of times.

I am grateful to the many contributors over the years whose articles and comments have made my time as editor rewarding and satisfying.

P J Downey

resulted in a renewal or (Nietzsche's phrase) reversal of values.

Antigone is a play in which a young woman, the daughter of Oedipus, invokes divine law – the concept of justice – against the power of the state expressed as a human ordinance. Creon the king decreed that no funeral rites were to be performed over the body of Antigone's dead brother Polynices. Antigone broke this order, and for this act of defiance was condemned to death. When Creon demanded why she had contravened his order she replied:

> That order did not come from God. Justice,
> That dwells with the gods below, knows no such law.
> I did not think your edicts strong enough
> To overrule the unwritten unalterable laws
> Of God and heaven, you being only a man.
> They are not of yesterday or to-day, but everlasting,
> Though where they came from, none of us can tell.
> Guilty of their transgression before God
> I cannot be, for any man on earth.
> (Translation: E F Watling, Penguin Books 1947)

Here then is an appeal from the law as enacted or prescribed to a higher moral order – to justice. Centuries later, having had an Athenian education, Cicero had no doubt about the validity of this. Laws, as such, he recognised, can be just or unjust. They need a justification that is morally superior to themselves. Here again is the argument that divided Devlin and Hart in the 1960's; and that undermines the sophistry of Rawls, Dworkin and the philosopher Richard Rorty who are so influential today.

The greatness of Sophocles' play does not lie only in this central theme of law and justice, of the collective and the individual. It is after all a play, a literary construction involving the interaction of characters, and not a thesis or a philosophical monograph. Thus it is necessarily the complex of themes embedded in human emotions that gives it life and relevance for an audience and for readers. The question of law and justice is an abiding problem of human living and *Antigone* gives the question immediacy and poignancy, and so makes the play particularly fascinating for lawyers. But the play is more profound than this. George Steiner has described the greatness of Sophocles' play, at pp 231-232 of *Antigones*, in words that can hardly be bettered:

> It has, I believe, been given to only one literary text to express all the principal constants of conflict in the condition of man. These constants are fivefold: the confrontation of men and of women; of age and of youth; of society and of the individual; of the living and the dead; of men and of god(s). The conflicts which come of these five orders of confrontation are not negotiable. Men and women, old and young, the individual and the community or state, the quick and the dead, mortals and immortals, define themselves in the conflictual process of defining each other. Self-definition and the agonistic recognition of "otherness" (or *l'autre*) across the threatened boundaries of self, are indissociable. The polarities of masculinity and of femininity, of ageing and of youth, of private autonomy and of social collectivity, of existence and mortality, of the human and the divine, can be crystallized only in adversative terms (whatever the many shades of accommodation between them) ....
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> Men and women, old and young, individual and *communitas*, living and deceased, mortals and gods, meet and mesh in contiguities of love, of kinship, of commonalty and group-communion, of caring remembrance, of worship. Sex, the honeycomb of generations and of kinship, the social unit, the presentness of the departed in the weave of the living, the practices of religion, are the modes of enactment of ultimate ontological dualities. In essence, the constants of conflict and of positive intimacy are the same. When man and woman meet, they stand against each other as they stand close. Old and young seek in each other the pain of remembrance and the matching solace of futurity. Anarchic individuation seeks interaction with the compulsions of law, of collective cohesion in the body politic. The dead inhabit the living and, in turn, await their visit. The duel between men and god(s) is the most aggressively amorous known to experience. In the physics of man's being, fission is also fusion.

Negligence in the Privy Council

The decision of the Privy Council in *Invercargill City Council v Hamlin* (PC 12-2-96) has caused some misunderstanding. It is not authority for the proposition that the Privy Council will never upset a judgment in which the Court of Appeal refers to developing its own jurisprudence, as seems to be suggested by some commentators – see 19 TCL 5, of 20 February 1996. There has to be a realistic basis for local divergence from the principles of the common law. As an aside it is worthy of note that Sir Michael Hardie Boys was a member of the Board that heard this appeal – presumably therefore his last New Zealand case.

Hamlin's case was a building one. A building inspector for the Invercargill City Council carelessly approved the foundations laid by a builder for Mr Hamlin as owner. In fact the foundations were defective, not being laid in accordance with the local ordinance. It was 17 years later that Mr Hamlin discovered the true cause of subsequent damage to his house. The builder, being no longer in business could not be sued in contract, so the Invercargill City Council was sued in tort.

There were two separate issues. The first was the problem of the limitation period in the light of the House of Lords decision in *Pirelli* [1983] 2 AC 1. That case had decided that the cause of action accrued when the damage to the house came into existence, and not when it could reasonably have been first discovered. The second question was that of the duty of care, whether the Invercargill City Council owed such a duty to the claimant in view of *Murphy's* case [1991] 1 AC 398 – being one of the cases that overruled *Anns* [1978] AC 928.

In the event the Privy Council might be said to have side-stepped both questions and upheld the Court of Appeal decision in favour of Mr Hamlin. On the limitation question the Board referred to an article by Stephen Todd in 10 *New Zealand Universities Law Review* and recognised that the loss for which recompense was claimed was economic damage rather than physical dam-

age to the house. It was held by the Board that the loss occurred when the market value of the house was depreciated by reason of the defective foundations. If the house had been sold before the defect was discovered so that the market value was not affected, then no loss would have been suffered. While not being explicitly reversed, the decision in *Pirelli* was simply declared to be irrelevant. On the particular facts of this case, therefore, there was held to be no limitation period problem. The judgment, however, does not refer to the possible implications for a new purchaser – or even subsequent purchasers before discovery of the defect.

On the duty of care issue – much the more interesting one – their Lordships referred to judgments in various common law jurisdictions, but were careful to emphasise that this was not done to cast any doubt on *Murphy's* case. The Judicial Committee noted that the Court of Appeal had consciously departed from English case law "on the ground that conditions in New Zealand were different" from those in England. The judgment quoted from the Report of the Commission of Inquiry into Housing 1971 where it was expressly stated that in New Zealand homeowners rely on local authorities to ensure compliance with by-laws. Furthermore the judgment noted that the line of New Zealand cases from *Bowen v Paramount Buildings* [1975] 2 NZLR 546 to *Williams v Mount Eden Borough Council* [1986] 1 NZBLC 102, 544 and *Brown v Heathcote County Council* [1986] 1 NZLR 76, had not been affected by any provision in the Building Act 1991 so as to bring New Zealand law into line with *Murphy's* case. Since the New Zealand Parliament had not chosen to do so legislatively their Lordships considered it would not be appropriate for them to do so judicially.

In effect the larger issues of the duty of care yet remain to be clarified. The Privy Council will look at local mores; but this is hardly a statement of new principle. That their Lordships may be more sensitive about this than in the past would only be a change of emphasis, perhaps a marked change of emphasis, but not the establishment of a new principle. Some of the expressions used in the judgment seem to be of a very open nature and explication will have to await further argument.

Appointments to the Court of Appeal

In December 1995 the Attorney-General, Hon Paul East, announced that the Rt Hon Sir Ivor Richardson would become President of the Court of Appeal in the new year following the elevation of the Rt Hon Sir Robin Cooke to the House of Lords.

On 9 February 1996 the Attorney-General announced the appointment of Sir Kenneth James Keith and of the Hon Justice Peter Blanchard as permanent Judges of the Court of Appeal. These appointments are consequent on the retirement of the Rt Hon Sir Robin Cooke and the Rt Hon Sir Michael Hardie Boys. Biographical notes on the Judges involved in these three new appointments are published at pp 92 and 93.

The announcement of the appointment of Sir Kenneth Keith and Justice Blanchard as the two new permanent Judges of the Court of Appeal is interesting because of the similarities (both negative and positive) in the careers of the appointees. Both of them are Harvard graduates; both of them were Fulbright scholars and also Frank Knox fellows; both of them have been members of the Law Commission; neither of them practised as barristers or litigators; both of them have published books and written extensively; and the wife of each of them has her own entry in her own right in *New Zealand Who's Who!*

Both of the new appointees have had judicial experience, Sir Kenneth as a member of the Courts of Appeal of both Western Samoa and of the Cook Islands since 1982, while Justice Blanchard has been on the Bench of the High Court of New Zealand since 1992. The fact that Sir fenneth and Justice Blanchard have been appointed to the Court of Appeal although neither of them had been in practice as litigators is merely an extension of the policy change on judicial appointments described by the Solicitor-General at the swearing in of Justice Blanchard. Mr McGrath's remarks were published at [1992] NZLJ 269. The Solicitor-General acknowledged that it had been usual to appoint to the Bench those who had demonstrated outstanding performance at the Bar. He then went on:

> Undoubtedly the traditional approach has served New Zealand well, and in future most appointments to the Bench will continue to be able barristers in active practice in the Courts. The Government believes however that it should be recognised that the lawyers who go to Court do not provide an exclusive source of those lawyers who have the qualities to be good Judges. In general the best advocates are at the Bar but the qualities sought from Judges go beyond the able presentation of one side of a case. They encompass the ability to appreciate the strengths of both sides, reaching decisions fair to the parties while upholding the law. Those further qualities are present in advocates but also in some other able lawyers whose careers have been moulded in different applications of the law.

It is noteworthy that the American-educated influence on the Court of Appeal will now be very substantial. The new President, Rt Hon Sir Ivor Richardson, is a graduate of the University of Michigan, Hon Justice Thomas spent a full academic year at Harvard and the two new appointees are both graduates of Harvard. To round the matter off Hon Justice Elias, recently appointed to the High Court is a graduate of Stanford; and the Attorney-General the Hon Paul East who was responsible for these appointments, is a graduate of the University of Virginia.

Local legal history

The publication of *A New Zealand Legal History* by Peter Spiller, Jeremy Finn and Richard Boast (Brooker's 1995, ISBN 0-86472-202-8) is to be welcomed. Into some 290 pages, the authors have packed a considerable amount of information, have related history directly to contemporary issues, and have made many pertinent comments. Sometimes the reader gets the feeling that the emphasis on current concerns is overdone so that the book is more a survey of legal issues placed in an historical perspective than a history strictly speaking. On the other hand it helps make for interesting reading.

The book is in six chapters, but with numerous sections within the chapters. This leads to some odd groupings. For instance chapter 6 is entitled "The Legal Profession", but includes substantial sections on law reporting, and legal education. The chapter on "The Courts and the Judiciary" has two pages on the history of the Privy Council as the New Zealand final appellate Court, followed by four pages on the movement for abolition of this right of appeal – and abolition has not yet happened so as to become history!

The six chapters are: 1 "The English Heritage", 2 "Colonial Government, Colonial Courts, and the New Zealand Experience", 3 "Development of the Law in New Zealand", 4 "The Law and the Maori", 5 "The Courts and the Judiciary", and 6 "The Legal Profession". As will be obvious from this listing the work really consists of six loosely related separate essays, by three separate authors from Waikato, Wellington and Canterbury Law Schools, rather than a continuous chronological historical narrative. Consequently the title description of it as "a legal history" is slightly misleading.

The first chapter rightly emphasises our English legal heritage. In some 50 pages Jeremy Finn skims expertly through the development of the English legal system from 1066 to "the 19 century and after", and then looks at the development of Parliament, the legal profession, and law reporting and legal writing. A somewhat breathless dash, but adequate as an introduction to the New Zealand legal experience.

In the Preface the editor, Professor Spiller, recognises that the work reflects current issues and concerns. He acknowledges that the writings of today's scholars will no doubt seem dated to future generations because of the present "fixation, say, on questions of ethnicity". Even now the space given to the law and the Maori seems unbalanced as if New Zealanders with some Maori blood are not as subject to the general law as the rest of us. It might be argued that this is not the intention; but the references to the pakeha legal system (pp 181 and 274), to legislation of the 1860s having a pro-European slant (p 193), to under-representation of Maoris in the legal profession (p 287), and to the now standard denigration of Prendergast J for the decision in *Wi Parata* (p 194), could be taken to indicate otherwise. This matter will no doubt correct itself in due course since historians as a profession are notoriously given to revisionist theses, as indeed the present day emphasis on ethnicity demonstrates.

For many readers the most interesting chapter will be the one on the profession. This deals separately with various regions, Auckland, Wellington, Canterbury, Otago and the Waikato. Much of the material is a summary of what is contained in *Portrait of a Profession* brought up to date with references to *The New Zealand Law Journal*, *Lawtalk* and recently published histories of some firms. This is also true of the section dealing with the organisation of the profession. It is gratifying to note that this final chapter quotes extensively from articles and interviews published in *The New Zealand Law Journal* over the last 10 years or so – and even this reviewer gets his name in a footnote (p 281).

There are occasional infelicities of expression in the work. For instance at p 235 there is the statement that "the English terms barrister and solicitor were imported into New Zealand". This is an odd way of expressing what happened. It was not the terms that were important but the status, functions, standards and *obligations* of the English professions that were important. This reference to "terms" is a peculiarly academic way of looking at things, as is made more obvious by the fact that the text goes on to describe the functions "denoted" by these terms.

A New Zealand Legal History is a valuable book. It does not replace *Portrait of a Profession* or the much more substantial book *New Zealand: The Development of its Laws and Constitution* edited by Dr J L Robson and published in 1954. There is a useful, though specialised, historical section in Philip Joseph's recent *Constitutional and Administrative Law in New Zealand*, and the essay by Dr P G McHugh on "The Historiography of New Zealand's Constitutional History" in *Essays on the Constitution* is also of interest on constitutional and more general historical writing.

A New Zealand Legal History is an excellent introduction and a most useful survey that can be read with interest and with benefit. However, it does need to have a bibliography of New Zealand writings, and not just the list of useful books on the English legal system. The work is sufficiently up-to-date to have a footnote on p 220 referring to the appointment of Justice Hardie Boys to be Governor-General, but the time required for the publishing process meant that it missed the appointment of Sir Robin Cooke to the House of Lords. Which only goes to demonstrate that history does not stand still.

P J Downey

Correspondence

re Arbitration Bill [1995] NZLJ 414

Dear Sir,

There are a number of matters in the recent article by Austin Forbes on Alternative Dispute Resolution which require either correction or clarification.

The Arbitration Bill, standing in my name, is presently with the Justice and Law Reform Select Committee. This Committee, ably chaired by Alec Neill, MP for Waitaki, has a heavy workload but will be considering the Bill shortly.

My "flight from the coop" as Austin Forbes quaintly puts it, will have no effect on the progress of the Bill, and hopefully it will be passed during the current session of Parliament.

Mr Forbes has incorrectly referred to the timing of the Bill being subject to the balloting procedure of Private Members Bills. This procedure does not apply in this case as the Bill has been introduced into Parliament without the need for me to participate in the normal balloting procedure.

It was done with the leave of the House as I was able to persuade all Members present that there was an urgency in the introduction of the Bill. I look forward to its return and ultimate adoption by Parliament.

Peter Hilt

Member of Parliament for Glenfield

Case and Comment

Acts of unlawful interference with civil aviation in New Zealand and Australia

R v Whiteman (1993); *R v Takahashi* (1995)

Two prosecutions have been brought in New Zealand Courts under the Aviation Crimes Act 1972 within the recent past. The Act gives effect to the Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft, the Hague Convention 1970 for the Suppression of Unlawful Seizure of Aircraft, and the Montreal Convention 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation. It was the subject of a legislation note in (1975) NZULR 305, Johnston. Since then it has attracted little attention.

The three Conventions are sometimes loosely and generically described as the "hijacking Conventions", although their scope is much wider than the crime of "hijacking" and are intended to give any state which is a party to the Conventions the power to deal with any offence whether the offence is committed on board an aircraft or on the ground, and whether or not the aircraft is in flight. The penalties for offences under the Act are severe, ranging from life imprisonment for committing the crime of hijacking, a maximum of 14 years imprisonment for other crimes relating to aircraft (s 5) and a maximum of 5 years imprisonment for the crime of taking firearms, explosives, etc, on to aircraft.

The two prosecutions are thought to be the first brought under the Aviation Crimes Act. Both offences against the safety of aircraft and thus were covered by the Montreal Convention 1971. That these two prosecutions were brought may be an indication of the seriousness with which the New Zealand government recognises its obligations under the three Conventions and the dangers to the community and to those on board aircraft which can follow from acts threatening the safety of air navigation. Indeed the offences, which were the subject matter of these two prosecutions, are serious and, unlike a prosecution under the Crimes Act 1961, require the consent of the Attorney-General before the prosecution can be brought. (Neither of these two cases has been reported in the law reports. *R v Whiteman* (T 18/93; hearing: 5 August 1993; sentencing: 20 August 1993) was a jury trial and there was no appeal against either the verdict or the sentence. In *R v Takahashi* the defendant, Takahashi, a Japanese tourist, had pleaded guilty in the District Court and came before the High Court for sentence (S30/95, 7 March 1995).)

Australian case

Australia is also a party to the three Conventions which, in Australian law, are given effect to by the Crimes (Hijacking of Aircraft) Act 1972 (Cth). There, the High Court of Australia, in *Sillery v R* (1981) 35 ALR 227, an appeal against sentence, had to consider whether in the context of the Australian legislation the construction of s 8 (3) required the imposition of a mandatory sentence of life imprisonment for the offence of hijacking contrary to s 8 of the Act. Section 8 (3) of the Act provides that: "The punishment for an offence against this section is imprisonment for life". In contrast the New Zealand Aviation Crimes Act, s 3, provides that:

> Everyone commits the crime of hijacking and is **liable** on conviction on indictment to imprisonment for life, who, while on board an aircraft in flight, whether in or outside New Zealand, unlawfully, by force or by threat of force or by any form of intimidation, seizes or exercises control, or attempts to seize or exercise control, of that aircraft.

The Hague Convention 1971 is silent as to the actual penalty for the offence of hijacking. The usual practice in international criminal law Conventions is to require member states to prescribe penalties commensurate with those prescribed for comparable offences. The intention of the international community is that an offender will be subject to appropriate penalties in whatever jurisdiction the offender comes to trial. Under Article 2 of the Hague Convention "Each Contracting State undertakes to make the offence [of hijacking] punishable by severe penalties".

In *Sillery* the defendant had been found guilty by a jury in the Supreme Court of Queensland of hijacking contrary to s 8 of the Crimes (Hijacking of Aircraft) Act 1972 (Cth). He had attempted to take control of a large TAA commercial flight carrying 41 passengers between Brisbane and Coolangatta, using a sawn-off shotgun to menace every member of the flight crew. Because of this, both the flight path and the altitude at which the plane flew had not been authorised, and most of the usual safety checks were not carried out. For a short period the plane was not under any control. It eventually landed down wind in the wrong direction. No physical harm was done, but the lives of the passengers, the crew, and persons residing in Brisbane beneath the plane's path were at grave risk.

The question at issue before the High Court was whether the trial Judge had any discretion not to impose life imprisonment. Both the trial Judge in the Supreme Court of Queensland and the Court of Criminal Appeal of Queensland had thought that the wording of s 8(3) required that it was mandatory that life imprisonment be imposed, Indeed the trial Judge said during argument that, while he regarded the offence as serious, he would not impose life imprisonment if it were a maximum rather than a mandatory penalty.

The decision is important, not only because it is a decision of the highest authority but, for its discussion of the unusual wording of the penalty provision. Counsel had informed the High Court that no similar form existed in any legislation which had come to their notice. The penalty applied to classical hijacking (in terms of the

Hague Convention), but went further in that it could also apply to offences in relation to Commonwealth aircraft on the ground with no passengers or crew and which might be the subject of an industrial dispute. The High Court took the view that the general presumption is that legislation affecting the liberty of the person is to be construed favourable to the person. If the penalty were mandatory, the draftsman had contravened an elementary principle of drafting by requiring the imposition of the same penalty for different offences which are not of the same nature and gravity. The Parliamentary Debates also showed that in both the House of Representatives and the Senate in the second reading speeches it had been said that the penalty of life imprisonment was a maximum. It had not been said that the penalty was mandatory.

The Crown had argued that although the penalty of life imprisonment would be excessive for some of the offences covered, Parliament had intended these to be dealt with by the application of executive discretion to reduce the penalty by remission of the whole or part of the sentence. Murphy J said that this suggestion was very dangerous to civil liberty

> It would mean that the judicial sentence is a sham, and the real sentence would be by the Executive. This goes much further than the traditional exercise of executive clemency. It raises a question of whether legislation so construed would violate the constitutional separation of powers. If applied generally it would call for an executive decision parallel to the judicial processes of hearing and determination involved in sentencing.

The High Court concluded that to construe the punishment of life imprisonment as mandatory in relation to the less serious offences covered by the definition of hijacking would be cruel and unusual. If the life sentence was to be interpreted as mandatory then a question would arise as to whether the Federal Parliament was competent to pass such a law. The defendant had committed a serious offence but sentences should take into account other relevant considerations both in aggravation and in mitigation. He had imperilled passengers, crew and others by taking control of an aircraft in flight. On the face of it this called for severe punishment but there were mitigating circumstances which required that the case should be remitted to the Supreme Court for sentencing.

New Zealand cases

In *R v Whiteman* the defendant was charged under s 5(a), in that on board an aircraft in flight, he committed an assault which was likely to endanger the safety of the aircraft. The defendant was a passenger in a rescue helicopter which at the time was being used as an emergency ambulance service to transport a victim who had received stab wounds to the nearest hospital. Whiteman, the defendant, was a friend of the injured person who had asked that his friend might accompany the party which also included the pilot, two ambulance personnel, and a police officer in addition to the injured person. The flight was to be a short one of about twenty minutes. During the course of the flight the defendant expressed a wish to be put off the helicopter before it landed at the hospital. The defendant attempted to persuade the pilot to land the helicopter and apparently tried to pull one or other of the pilot's arms backwards and away from the controls a number of times. He also knocked the headset and spectacles from the pilot's head. This affected the safety of the helicopter as the pilot temporarily lost partial control of the aircraft while his attention was distracted, his arm was being dragged from the controls and while he was unable to use his headset to maintain radio contact with emergency services on the ground or with other aircraft. At the time the aircraft was outside controlled airspace and the pilot needed to keep in radio contact with other aircraft which might be operating in the vicinity of the helicopter.

In *Whiteman* two issues were before the Court first whether an assault had been committed on the pilot and secondly whether that assault was likely to endanger the safety of the aircraft. The defence was that the accused was attempting to attract the pilot's attention. The case was heard before a Judge and jury in the High Court, and it seems that the jury deliberated for six hours. During the course of the jury's deliberations it returned to ask the Judge to redefine the meaning of the word "likely" in the context of "likely to endanger the safety of aircraft".

The defendant was found guilty of the offence. The Crown argued that, since this was the first prosecution under the Act, a custodial sentence should be given. The maximum penalty prescribed for this offence was fourteen years imprisonment, which, it said, indicated that a clear warning of the Court's approbation of such an offence should be given. Nevertheless in view of the defendant's circumstances, including his drug and alcohol problems, Justice Doogue, the presiding Judge, did not regard a custodial sentence as warranted.

The second and more recent prosecution, *R v Tsutoma Takahashi*, was brought under s 11 of the Aviation Crimes Act, which states that:

> Everyone commits a crime, who, without lawful authority or reasonable excuse, or without the permission of the owner or operator of the aircraft or of any person duly authorised by either of them to give such permission, takes or attempts to take on board any aircraft –
> (a) Any firearm; or
> (b) Any other dangerous or offensive weapon or instrument of any kind whatsoever; or
> (c) Any ammunition; or
> (d) Any explosive substance or device, or any other injurious substance or device of any kind whatsoever which could be used to endanger the safety of the aircraft or of persons on board the aircraft.

This prosecution received wide publicity in the media before the defendant, who was a 24-year-old Japanese tourist, was brought to trial. The defendant had been stopped as he went through the security checking system prior to boarding an international flight from Auckland. He was found to have a small knife, a stun gun, handcuffs and a canister of mace spray in his carry-on baggage. Subsequently, in a search of the defendant's checked baggage, another canister of mace, a saw-wire, a second pair of handcuffs and a replica Glock semi-automatic pistol (which was capable of discharging

plastic pellets) were found. (The latter had been bought in a toy market in Australia and the defendant had apparently intended to use it in a target airgun club in Japan.)

The defendant pleaded guilty. His excuse was that he feared for his safety as a traveller within New Zealand and that he had brought the various articles with him as a means of protection. He had no intention of hijacking the aircraft.

The penalty for a breach of s 11, which also requires the Attorney-General's consent before a prosecution can be commenced, is a maximum of five years' imprisonment. It seems therefore that the legislature did not regard this offence as serious an offence as one brought under s 5.

In sentencing the defendant Speight J imposed a fine of $5000 and pointed out the seriousness of the offence. (He also ordered that the defendant be put on the next flight to Japan.) He said:

> It is a matter of concern by aircraft operators, by crew and by passengers that stringent tests must be made to prevent the carrying onto aircraft of articles which have the potential to harm, such as the small knife, the stun-gun and the mace spray. The authorities at the airport are to be commended for their vigilance.

He added that the security standards at New Zealand airports are as high as the levels of security in other countries.

The three cases, Particularly *Sillery* and *Takahashi*, show that in prosecuting offenders both Australia and New Zealand recognise the importance of the Tokyo, Hague and Montreal Conventions for the safety of aviation throughout the world. Every state which is a party to the Conventions has a duty at international law to police civil aviation and to enforce the Conventions. Air terrorism has no frontiers, and as the Lockerbie Disaster made clear, it show no compassion to its victims. Prevention begins with security vigilance, followed by strict enforcement of breaches of the law and penalties commensurate with the nature of the offence.

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The accessory liability principle

Royal Brunei Airlines v Tan
[1995] 2 AC 378 (PC)

Royal Brunei Airlines Sdn appointed Borneo Leisure Travel Sdn Bhd (BLT) to act in various places in Sabah and Sarawak as its general agent for the sale of passenger and cargo transportation. BLT was to be paid a sales commission. The agreement was subject to the regulations of the International Air Transport Association and it was common ground that the effect of this was that BLT was a trustee for the airline of the money it received from ticket and cargo sales. The money received by BLT on behalf of the airline was not paid into a separate bank account. It was paid into BLT's ordinary current account with its bank. Mr Tan, the defendant had founded BLT, he was the managing director and principal shareholder. BLT was required to pay the airline within 30 days but from 1988 onwards it got into arrears. In 1992 the airline terminated the agreement and early in 1993 commenced this action against Mr Tan in respect of the unpaid money.

At the trial Mr Tan was held liable as constructive trustee. The Court of Appeal of Brunei Darussalam allowed the defendant's appeal. The Court held that it was not established that BLT was guilty of fraud or dishonesty.

Issue

The Airline appealed to the Privy Council and the issue on this appeal was whether the breach of trust which is a prerequisite to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee. The judgment of their Lordships was given by Lord Nicholls of Birkenhead.

Judgment

The airline's claim was based on the much quoted dictum of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244, 251-252:

> [The responsibility of a trustee] may no doubt be extended in equity to to others who are not properly trustees, if they are found ... actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But ... strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

The first circumstance in Lord Selbourne's dictum is known as "knowing receipt" and the second "knowing assistance". The latter concerns liability of an accessory to a trustee's breach of trust.

Lord Nicholls of Birkenhead first considered the example of an honest trustee and a dishonest third party solicitor, where the beneficiaries have been defrauded by the solicitor. If the law is to allow accessory liability at all then this example would be a strong case for third party liability. The Court held that the position would be the same if instead of procuring the breach the third party dishonestly assisted in the breach. The trustee will be liable for any breach of trust, even if he acted innocently (unless excused by an exemption clause in the trust document or relieved by the Court). Nevertheless his or her state of mind is essentially irrelevant to the question of whether the third party should be made liable to the beneficiaries for the breach of trust. Dishonesty, his Lordship held, is sufficient basis for the third party's liability.

> It is difficult to see why, if the third party dishonestly assisted in a breach, there should be a further prerequisite to his (sic) liability, namely that the trustee also must have been acting dishonestly. The alternative view would mean that a dishonest third party is liable if the trustee is dishonest, but if the trustee did not act dishonestly that of itself would excuse a dishonest third party from liability. That would make no sense. (at 385.)

The accessory liability principle

The Court rejected two extreme possibilities. The first possibility related to a third party who did not receive trust property. Here, he or she cannot be liable. The second possibility rejected by the Court was

that third parties are to be liable for unknowingly assisting in a breach of trust. The next step was to identify the touchstone of liability. It was noted that all agreed dishonesty fulfils this role, but that judicial opinion and academic commentators were divided as to whether negligence would suffice. The Court reviewed the cases and observed that the law, including that of New Zealand could not be regarded as settled.

Dishonesty

Dishonesty was held to be synonymous with lack of probity and means "simply not acting as an honest person would in the circumstances" (at 389). This is an objective standard. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he or she will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. Honest people do not take other people's property nor do they deliberately close their ears and eyes or deliberately refrain from asking questions. Lord Nicholls of Birkenhead acknowledged that it was difficult to be specific in considering honesty in the context of risk taking, but that at the end of the day an honest person should have little difficulty in knowing whether a particular course of conduct offends the normally accepted standards of honest conduct.

Third parties who act for trustees owe a duty of care to those trustees and the Judicial Committee considered that "it is difficult to identify a compelling reason why ... third parties should owe a duty of care directly to the beneficiaries" (at 391). The third party is liable to the trustee and this will include, where appropriate, the loss suffered by the trustees, being exposed to claims for breach of trust. Others, besides those who owe a duty of care to the trustees, also deal with trustees; similarly there is no good reason why they should owe a duty directly to the beneficiaries. If a third person is dealing with a dishonest trustee the third party must act honestly but he or she need not, in effect, check that a trustee is not misbehaving.

Finally the Court held that whilst the term "unconscionable" had an immediate appeal to an equity lawyer it is a term best avoided in this context. Similarly the word "knowingly" should not be used.

Conclusion

A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition the trustee was acting dishonestly. Applied to the facts of the case BLT committed a breach of trust by using the airline's money instead of simply deducting its commission and holding the money intact until it paid the airline. The defendant, Mr Tan, knowingly assisted in that breach of trust. Thus the defendant's conduct was dishonest. The fact that Mr Tan hoped to repay the money and did not intend to defraud the airline was irrelevant.

Comment

Lord Nicholls of Birkenhead opened his judgment by stating that

> [T]he proper role of equity in commercial transactions is a topical question. Increasingly plaintiffs have recourse to equity for an effective remedy when the person in default, typically a company, is insolvent. (at 381.)

This decision must be welcome as it clarifies and settles the requirements for knowing assistance in New Zealand.

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Recent Admissions

Barristers and Solicitors

Adams J	Wellington	19 December 1995	Drayton-Glesti NM	Wellington	19 December 1995
Afeaki TB	Auckland	15 December 1995	Ennor RE	Wellington	19 December 1995
Armstrong KA	Wellington	19 December 1995	Fernandez BZ	Wellington	19 December 1995
Baird NJ	Wellington	19 December 1995	Fisher KR	Wellington	19 December 1995
Bale MG	Wellington	19 December 1995	Fitzgibbons SM	Wellington	19 December 1995
Barclay AG	Napier	2 November 1995	Flannagan DK	Wellington	19 December 1995
Blakelock V	Wellington	19 December 1995	Foote SH	Wellington	19 December 1995
Body MD	Wellington	19 December 1995	Freeland GJ	Wellington	19 December 1995
Brookman GE	Christchurch	18 December 1995	Fulton JEG	Christchurch	18 December 1995
Buckingham AC	Wellington	19 December 1995	Goodwin AP	Auckland	20 November 1995
Bush TM	Christchurch	18 December 1995	Gough KA	Wellington	19 December 1995
Callaghan CE	Wellington	19 December 1995	Greenfield DJ	Wellington	19 December 1995
Carrigan DM	Auckland	15 December 1995	Hawke AG	Wellington	19 December 1995
Clarke DG	Wellington	19 December 1995	Hay MJ	Christchurch	18 December 1995
Coleman SJ	Christchurch	18 December 1995	Hearnshaw A	Wellington	19 December 1995
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Constable LS	Christchurch	18 December 1995	Hodgkinson L	Wellington	19 December 1995
Conte FA	Wellington	19 December 1995	Howe CG	Wellington	19 December 1995
Cox ML	Christchurch	18 December 1995	James RJ	Wellington	19 December 1995
Crombie GS	Wellington	19 December 1995	Jones MG	Wellington	19 December 1995
Currie PA	Christchurch	18 December 1995	Joyce AP	Wellington	19 December 1995
Davidson SM	Wellington	19 December 1995	Jurgeleit CE	Wellington	19 December 1995

The vile intrusion/magnificent intervention of the Fair Trading Act into contracts

By Raynor Asher, QC, Barrister of Auckland

Contract law is one of the essentials of social intercourse and business efficiency. Its importance is summed up neatly in the old saying that the business of government, the only real point and purpose of government is to maintain the twin principles of keeping order and seeing that promises are kept. On these two depend the law and society. In order and seeing that promises are kept. On these two depend the law and society. In this article Raynor Asher QC considers the effects – good and bad – of the statutory concept of fair trading. His conclusion is in favour of the reform which he says deals not so much with a duty to disclose, but rather a duty not to mislead.

It depends on your point of view. If you are a contractual purist, a person who has seen merit in the symmetries of the law of contract, the Fair Trading Act has mucked it all up. Its effects have been described as "cancerous". (*Crump v Wala* [1994] 2 NZLR 331 at 343, 4 NZBLC 103,383 (1994) 6 TCLR 40.) Hammond J has put the matter this way:

> I turn next to the position under the Fair Trading Act. Although that statute has found widespread employment in commercial litigation, enough ought by now to have been seen of its operation that some cautionary notes can appropriately be sounded. There is no question, that, in common with its progenitors in both Australia and North America, this statute was originally conceived as a consumer relief measure. But Courts have allowed the statute to float like oil across water. The water in this context is turning out to be practically the whole spectrum of commercial law. There are two effects to be concerned about here: such an approach raises a real possibility of large chunks of established commercial law being swallowed up and, whilst remedial flexibility is a good thing (and in any event our Court of Appeal has sanctioned such flexibility as a general proposition), remedial incoherence would be quite another matter. (at 340-341.)

He went on to say in relation to remedies that "... one does not lightly jettison hard-earned intellectual capital carefully evolved by Judges over several centuries". (*Crump v Wala.*)

On the other hand the Act has its supporters, again particularly in the damages field. As has been said recently by Temm J:

> When the case began counsel for the plaintiff chose to draw only one arrow from his quiver and he aimed it firmly at the target of the Fair Trading Act. This is a practice I commend. In these times the implications of the provisions of the Fair Trading Act are overtaking some of the common law provisions relating to breach of contract and to negligent misstatement but the reality is that the power which is given to the Court under section 43 of the Fair Trading Act makes it simpler for parties to see where damages lie and the remedies they are likely to obtain. It is simply a fact of life that the law relating to damages on breach of contract and negligent mis-statement is extraordinarily complicated. Under the Fair Trading Act it is comparatively simple. (*Duncan v Perry* unreported, High Court Auckland, 13-8-1993 CP2042/91.)

The fact is that in all areas of commerce, both public and private, the provisions of the Fair Trading Act offer simpler and more powerful weapons in the area of misrepresentation and damages than do our orthodox contract laws and statutes. The Act also has some effect, but of less generality and substance, in the area of breach of the terms of a contract. This is because the Fair Trading Act works in the area of statements, and not unfulfilled promises. There has to be a misrepresentation about an existing fact before the Act can be invoked. If that misrepresentation can be found, there are simple and drastic consequences under the Act, rather than the preconditions required for an actionable misrepresentation. There is also a big basket of easy to get at remedies available, rather than the compartmentalised Chinese cabinet that is available in contract. This paper will now deal with the areas where the Fair Trading Act can be seen now as offering broader relief than contract, where the two remedies are in competition.

1 A wider type of actionable misrepresentation

In a number of respects the Fair Trading Act casts a net over a wider area of actionable misrepresentations than representations than did the previous law, even though there has been the useful reform of s 6 of the Contractual Remedies Act 1979, which abolished the distinction between innocent and fraudulent misrepresentations and made damages available for both. The major ways in which the Fair Trading Act covers more misrepresentations than does contract law are as follows:

A Misrepresentations of law are not excluded

The wording of s 9 does not limit the nature of the actionable conduct. There is no reason why the definition cannot extend to any sort of misrepresentation, where the representation is a matter of law or fact. Thus where there was a misstatement as to whether a worker's compensation insurance policy would cover employees, this was held to be actionable under the Fair Trading Act. (*SWF Hoists Industrial Equipment Pty Ltd v State Government Insurance Commission* (1990) ATPR 41-045.)

B Silence/general conduct may be actionable

Section 9 refers not just to statements but to "conduct". Conduct is actually defined as including an omission to act. (Fair Trading Act 1986, s 2.) The silence of course must be misleading or deceptive, so that there will generally not be a breach of s 9 without some conduct that is ancillary to the silence, and when construed with the silence creates the misrepresentation. Of course under the general law a representation could be false because it positively asserts a literally true proposition, but failed to say something which if stated would have altered the meaning of the representation. Every document against its author must be read in the sense which it was intended to convey, and a half truth can be the same as a falsehood. (*Gluckstein v Barnes* [1900] AC 240 at 250-251.) The Fair Trading Act in referring to conduct generally seems to go further than the existing law. In Australia where a fungicide was sold to the public without revealing that the sales were illegal in that the fungicide had not been registered under State law, and as a consequence the purchasers were exposed to the risk of seizure and forfeiture of the product, it was held on appeal by Bowen CJ and Lockhart J that there was no general duty to talk to the purchasers in the circumstances. However where a restaurant was advertised as being able to seat 128, this was held to be misleading because the restaurant was licensed to serve only a lesser number. (*Henjo Investments Pty Limited v Collins Marrickville Pty Limited* (1989) ATPR 40-968.)

There have been no New Zealand cases that have affirmatively stated that the law in relation to silence has been extended by the Fair Trading Act. However it is likely that as a consequence of the Act the Courts are more willing to accept that silence combined with other facts constitutes misleading and deceptive conduct and a misrepresentation. In a recent case the basic principle was expressed to be that the conduct of the party in question must be looked at to see whether it has deceived or mislead the party complaining. (*March Construction Ltd v Christchurch City Council* (1995) 5 NZBLC 99-356.) A test widely accepted in Australia is that silence can amount to misleading conduct where the circumstances are such as to give to rise to the reasonable expectation that if some relevant fact exists it would be disclosed. (*Kimberley NZI Finance Limited v Torero Pty Limited* (1989) ATPR (Digest) 46-054 at 53,195, French J; *Demagogue Pty Ltd v Ramensky* (1993) ATPR 41-203; Don McMorland *"Is there Safety in Silence"* (1995) 7 BCB 53.)

Thus, a claim by a disappointed tenderer may give rise to relief under the Fair Trading Act in the situation where a plaintiff would not succeed in contract, although a contract existed. (*Gregory v Rangitikei District Council* [1995] 2 NZLR 208.) The qualifying wording in that case to the tender that "highest or any tender not necessarily accepted" imposed an insuperable barrier in contract to any asserted obligation that a party who invited tenders proceed on to a second or principal contract with the successful tenderer. However, the Council had publicly called for and received tenders, then decided not to sell by tender, but by private treaty, a matter which was kept secret. The Court found it was deceptive and misleading to so proceed without disclosure of the private treaty possibility to tenderers. The council should have notified those concerned that its intentions had changed. It was held that the plaintiff had lost an opportunity to acquire property. The value of the lost chance and measure of damages was left to another hearing.

Certainly, the existence of s 9 now makes it easier to consider silence in the context of misrepresentation. It will not at the end of the day be a matter governed by any rules, but rather whether on an overview the conduct with the silence is misleading and deceptive.

C Puffs

This is another area where the definition in s 9 may have extended the law, possibly both in relation to the Fair Trading Act and in contract, by broadening judicial attitudes. The distinction between a puff and a misrepresentation was always a rather difficult one to define in words, although a distinction generally proves relatively easy to apply in practice. Probably in general terms the law remains the same both under the Fair Trading Act and in contract. The issue will not be considered in the context of "materiality" or "inducement", but rather whether as a matter of fact the recipient of the representation would be likely to be misled. The more specific the statement, the less likely it is to be a puff.

The general philosophy that if a statement is important enough to be included in an advertisement it is important enough to be true (M Handler, *Cases and Materials on Business Torts* (1972), p 476) is likely to be applied more rigorously.

Thus it has been held that a representation that a building is "bigger and better" than another building close by is sufficient to sustain a claim under the Fair Trading Act. (*Buyers v Dorotea Pty Ltd* (1987) ATPR 40-760.)

D Inducement

The law of contractual misrepresentation emphasises materiality and inducement. The distinction between the two has always been difficult. They are both distinct yet again from the concept of causation.

These nice distinctions do not exist under the Fair Trading Act. The approach appears to be to simply consider whether there has been a misrepresentation, and then to consider whether it has been causative of any loss. (*Cumberworld Contracting v Foseco* (1993) 5 TCLR 534.) In *Cumberworld* despite allegations by the plaintiff that it was induced to enter into a contract for the purchase of a product by a representation in the product specification sheet the Court considered that there had been no inducement. However the Court held that the promotional brochure had had a relevant influence. It was held to be misleading, and the plaintiff was influenced by it, and this influence was one of the causes of the plaintiff's loss.

Accordingly as it was more than 50 per cent influential the plaintiff was held to be entitled to recover two-thirds of its loss.

All misleading or deceptive conduct or which which is potentially so is covered. There does not need to have been inducement. However for a plaintiff to recover a monetary remedy it is still necessary to establish a quantifiable loss. (*Contract Law in New Zealand* Nicoll and Perkin CCH 1991, p 182.) It may be that the distinction between inducement and influence is in practical terms a distinction without a difference. It can be said generally that inducement is irrelevant in proving a breach of s 9, but still relevant in terms of any award of damages. The misrepresentation must be causative of loss.

E Privity of contract

It hardly needs to be said that the concept of privity of contract has no relevance where the Fair Trading Act is relied on. Obviously, no contract needs to be entered into at all. Persons who are not party to the contract who have relied on representations or conduct made in relation to that contract may sue under the Fair Trading Act. All the traditional notions of privity of contract, or whether there was a meeting of the minds and a contract formed, are quite simply irrelevant. Thus where the misleading conduct is a false contractual term, the complainant needs no contractual privity with the defendant to obtain relief. (*Accounting Systems 2000 (Developments) Pty Ltd & Anor v CCH Aust Ltd* (1993) ATPR 41-269 at 41,647.)

The breadth of the Act is illustrated in the situation of a land agent. Where it would have been pointless for a disappointed purchaser to sue an insolvent vendor under the contract there was a remedy obtainable for the misleading and deceptive conduct by the land agent in the way the property was promoted by the agent for sale. (*Smythe v Bayleys Real Estate* (1993) 5 TCLR 454.)

In another situation where there was purchase of a commercial property suitable as an investment, and the rental being paid and the financial position of the lessee was misrepresented, the purchaser recovered both from the vendor under the contract, and the same losses from the land agent under the Fair Trading Act. (*Richmond v Heskett Holdings and Catley and Bayleys* unreported, High Court, Hamilton, M 187/92, 23-02-1995.)

F State of mind/intention

The state of mind of the representor is irrelevant under both the Act and the Contractual Remedies Act, save where the representation relates to that state of mind, in which case both in contract and under the Fair Trading Act a false statement about the representor's state of mind is actionable.

It is not necessary for any proof that a defendant knew its representations were false or that it was intentionally deceptive. (*Smythe v Bayleys Real Estate* supra, 464.)

2 Damages

A general rule in contract is that the plaintiff is entitled to be placed in the same position as if the contract had been performed properly. In respect of a sale and purchase agreement the plaintiff is entitled to the difference between the value of the subject matter as in fact delivered and the value as it would have been if the representation had been true. Consequential loss is recoverable provided it falls within the relevant remoteness rules. The losses must have been caused by the misrepresentation. Consequential loss for anxiety and stress is not easily recoverable and generally depends on the loss of a bargained for expectancy. Conceptually there is the famous categorisation of Professor Lon Fuller of expectancy, reliance, and restitution interests which has been accepted in New Zealand. (*Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 and *Thomson v Rankin* [1993] 1 NZLR 408, 410 (CA).)

The Fair Trading Act confers very wide remedial powers, including the power to declare the whole or any part of a contract to be void, including an order that it was void ab initio, an order varying a contract, an order directing a guilty party to refund money or return property, and an order to pay to the person who suffered the loss or damage the amount of the loss or damage. Thus the rights incorporate the power to make an order equivalent to or even more extreme than cancellation, and an order for damages. No criteria are set down in the statute. There are no rules.

There has been a suggestion in some of the Australian authorities that tort damages rather than contract damages should apply under the Fair Trading Act. (*Gates v City Mutual Life Assurance Soc Ltd* (1986) ATPR 40-666, at 47,364.)

However it is plain that the Courts are not bound by the tort measure, or even bound to choose between contract or tort damages, when they are considering losses under the Fair Trading Act. The only limitations which exist in proceedings under the Act are those expressed or inherent in the statutory provisions themselves. (*Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213, 232.) The statutory right to damages serves a wider purpose and is intended to have a broader ambit than the tort or contract actions provide.

It is clear that the losses can include expectancy and restitution losses. (*Corbidge v Bakery Fun Factory Pty Ltd* (1984) ATPR 40-493.)

Thus, despite the suggestions that the traditional approach not be lightly disregarded, (*Crump v Wala* at 343) the Court of Appeal has confirmed that the damages section should not be interpreted restrictively. (*Goldsbro v Walker* [1993] 1 NZLR 394(CA).) In the Court of Appeal, speaking in the context of an argument that an award of damages should be reduced to allow for the fact that the solicitors who passed on misleading information were also the victims of the principal's misconduct, both Cooke P and Richardson J emphasised that the governing principle is to impose a remedy which gives effect to the policy of the Act, without at the same time being draconian or doing an injustice (at 399). Ultimately justice must be done between the parties in the circumstances of the particular case.

Thus in a contractual context damages will be awarded which will put the plaintiff in the position that would have applied but for the false statement. This is not dissimilar from the contract measure, but it is clear that where on the basis of causation only a percentage of the loss has been caused by the representation, then that apportionment will be made. (*Cumberworld Contracting v Foseco* at 544.) This is not an easy option open to the Court in terms of contract. It remains to be seen whether the new line of authority which limits contract damages to

areas where the conduct complained of has been the effective or dominant cause of the loss, rather than merely a step in the process, will apply. It may be that rather than the in or out approach shown in *Galoo* and the cases (*Galoo v Murray* [1955] 1 All ER 16; *Fleming v Securities Commission* [1995] 2 NZLR 514) that followed it, the Court will under the Fair Trading Act simply allocate a portion of the loss, where the conduct has just been one factor in the chain.

Indeed the Court of Appeal has considered that where the contravener of s 9 has played a minor role, justice would not require that the full loss to be so attributed to that contravener. However there is no intention to be gleaned from the Act that the Court should adopt an "all or nothing approach", whereby the full amount of loss is paid by the infringer, or by the Court declining to make any order at all. (*Goldsbro v Walker* at 404.)

It is clear that damages for emotional distress can be recovered under the Fair Trading Act. (*Smythe v Bayleys Real Estate* above; *Sinclair v Webb & McCormack* (1989) 2 NZBLC 103, 605 at 103, 612.) The Courts have taken this view despite the fact that there is no specific provision for the recovery of such losses in the Act.

It has been stated that there is no provision for exemplary damages in the statutory scheme. (*Tucker v Bell* unreported, High Court, Auckland, CP 1909/90, 5 September 1991.) However in a recent decision McGechan J left open the question of any entitlement to exemplary damages. (*Gregory v Rangitikei District Council* [1995] 2 NZLR 208 at 235.)

3 Injunctions

An injunction may be granted to restrain anyone from engaging in conduct which contravenes any of the provisions in Parts 1 to 5 of the Fair Trading Act or in attempting, aiding, abetting, inducing, conspiring or being knowingly concerned in a contravention. (s 41.)

An injunction may be granted regardless of whether the conduct will be repeated or continued and may be granted to restrain conduct which the Court considers is likely to occur.

Furthermore as the object of the Act is consumer protection an injunction may be granted on the application of a person who will not suffer any harm as a result of the conduct in question. It is sufficient if harm will be caused to members of the public. Thus even in a contract case, an injunction may now be obtained where no loss or potential loss can be proven.

4 Exclusion clauses/disclaimers

Exclusion clauses already have limited value in the contractual context because of s 4 of the Contractual Remedies Act 1989, which gives the Court a discretion to exclude those clauses which purport to preclude the Court from relying on any representations made. However it is still possible to draft an exclusion clause and avoid s 4 and preclude liability where it would otherwise exist in a contractual or even tortious context.

Under the Fair Trading Act exclusion clauses can only work where there is a contract. However disclaimers may still have some effect. If they have the effect of making it clear that the representor is not vouching for the accuracy of the information nor accepting responsibility for it, it is most unlikely that the representee could validly claim that the conduct was misleading. These cases are likely to be rare. (*MK Hutchence v South Sea Bubble Co Pty Ltd* (1986) ATPR 40-667 at 47,378.)

It has been held in New Zealand that in situations such as auctions where information sheets and "flyers" are provided which include disclaimers such that the purchaser will purchase in reliance on his or her own judgment and not that of the vendor or the vendor's agent, or that the vendor does not warrant the accuracy of any fact or statement by the auctioneer, the provisions of the Act are not excluded. The requirements of the Act are mandatory, as the objective is to protect the consumer from unfair trading. (*Smythe v Bayleys* at 472.)

It has been held in Australia that if the statement is actually false and contrary to fact, then disclaiming responsibility for the accuracy of the statement will not prevent it from being false and therefore will not prevent it from being a contravention of the Act. (*Given v CV Holland (Holdings) Pty Ltd* (1977) ATPR 40-029 at 17.388.)

Once a representation has been made which is either false or misleading, subsequent contractual provisions may not be ineffective to overcome the statutory consequences of the contravention. (*Petera Pty Ltd v AJ Pty Ltd* (1985) ATPR 40-605 at 46,887 and *Byers v Dorotea Pty Ltd* (1987) ATPR 40-760.)

The matter has not been addressed in New Zealand. However it seems likely that if there has been truly misleading and deceptive conduct, then an exclusion clause will be ineffective against a plaintiff. However properly drafted clauses which effectively state that the information being provided by the representor cannot be relied on, should be effective if the ultimate result is that on an objective test a representee should not have been misled or deceived because it was inappropriate in the circumstances to place any reliance on the statement.

5 Conclusion

Section 9 of the Fair Trading Act should now be the primary remedy for pre-contractual misrepresentation. There is no sign that such an intrusion of this new and expanding growth into commercial law will cause any real haemorrhaging. If it is a tumour, it is benign and may be better seen as a Darwinian mutation of our law for the better. It provides a simpler more accessible remedy, which is proving to be relatively easy to understand and apply. There cannot be discerned in any of the cases any injustices or inconsistencies arising, and if ultimately the common law and the Contractual Remedies Act as they apply to misrepresentation cease to be used, this will not be a bad thing.

Contract litigation will be more limited to breaches of the promises made in the contract, rather than the statements made before the contract. Unwelcome surprises resulting from exclusion clauses and the old rules as to damages are avoided. Basic concepts such as caveat emptor remain unaffected. The Fair Trading Act does not deal with a duty to disclose, but rather a duty not to mislead. Seen in this light the reforms can be welcomed, and pleadings, in the area of misrepresentation can become simpler, once counsel have the courage to disregard the old traditional contract causes of action and rely entirely on the new. ❑

How do we treat our Judges – well or badly?

By Nigel Jamieson, of the University of Otago

This article looks at the question of criticism that is made of Judges in New Zealand and compares it against what occurs in other nations in terms of comparative jurisprudence. The author expresses concern at the development of what he describes as the present managerial revolution of control from above, being applied by politicians to the judiciary. Ministers, and of course Members of Parliament, are no more private citizens than are Judges and, it is argued, constitutional conventions apply in each case.

We have grown so accustomed to referenda, questionnaires and opinion polls, that we are apt, even at an academic level, to accord more weight to opinion than fact. Some days ago a very serious survey with a three days' deadline canvassed my views on some constitutional issues very dear to my heart, but, as I was then in the middle of marking five hundred examination scripts, my answers to the survey questions were so absurd that if I had been doing the exam I was marking and not just answering the survey I would have failed the exam.

In today's universities some of the biggest research grants go towards canvassing public opinion. This is done in ways that would trouble previous generations of teachers who gave first priority to finding out the facts. We were told at first that canvassing public opinion is a vital means of quality control, but a recently imported management consultant now directs us to forgo quality control in favour of improving our image. Lawyers who put public opinion now on a par with legal values would also once have scandalised their profession.

Contempt of Court or libel

In criticising the Courts for their tendency to substitute the law of contempt for the law of libel, Henry Burmester [1985] *Melbourne University LR* 313 asks what does it take to scandalise the Judges? In *R v Dunbabin* (1935) 53 CLR 434 where the High Court of Australia asserted that "the authority of the law rests on public confidence" it may take little more than an unfavourable opinion to scandalise the Judges. This is very different from jailing for contempt one who insists on disrupting Court proceedings or who insists on substituting some other protocol for that of the Court; but do the Judges unwittingly accord precedence to public opinion when they take issue with merely unfavourable views of the judicial process and judicial decisions?

Who can have forgotten the highly controversial quiz carried out by Jenni McManus for *The Independent*, 2 September 1994, pp 14-15, on barristers' views of the judiciary? In [1980] NZLJ 239 and [1982] NZLJ 390, first Bill Hodge then Peter Haig reviewed Woodward and Armstrong's *The Brethren Inside the Supreme Court* as being either fact or fiction. A very telling remark by Peter Haig in trying to determine the book's authenticity was the lack of "any serious challenge to its main conclusions" – but then one does not deny the worth of a novel by proving it to be a work of fiction. The corollary, in disputing any factual work, is to admit there being a case to answer.

Often being asked for an opinion only alters our opinion – thus demonstrating that Heisenberg's principle of uncertainty (presuming the process of experimentation itself to effect a change in reality) operates in the social as well as the physical sciences. Of course previous generations would have dismissed most of today's social sciences – from Margaret Mead to Kenneth Galbraith – as merely gossip. What do you think?

In the present climate of opinion, as the current phrase goes, the obvious means of finding out how we treat our Judges is simply to ask them. I had half a mind to secure a fat research grant for such a purpose, but, having been brought up to believe that opinion rarely substitutes for facts, could not convince myself of the project's credibility. It also struck me that people in positions of public responsibility can be constrained to turn a brave face towards treatment they would not tolerate in a private capacity. A simple case of courage under adversity could completely falsify the results. I therefore resolved to apply what was left of my mind to finding out the facts for myself; and to do so as neutrally and objectively as possible by weighing up our country's criticism of its Judges against that of other nations in terms of comparative jurisprudence.

Extremes of position

There are two extreme positions for any judiciary in the balance of power. The first is where the balance of constitutional power lies with the Judges. This was not a pleasant period for ancient Israel as outlined in the Book of Judges, and a poor precedent for the United States to follow. The other extreme is marked by the complete lack of judicial freedom as experienced under totalitarian regimes. The point at issue in considering how Judges are treated at each extreme is determined not just by the extent of their judicial independence but by the direction from which criticism of the judiciary is coming – up or down.

In formerly Soviet circles, for example, almost all criticism of the judiciary came from the top down.

This is symptomatic of totalitarian regimes in which criticism from the top down can go so far as to remove the Judges from office and life from the Judges. Top-down criticism of the judiciary also occurs in theocratic forms of government. Kings supplanted Judges in ancient Israel just as the Cromwellian Republic extinguished the divine right of kings to have cases decided as the kings would have of the Judges in seventeenth century England.

Control from above

It is one of the first principles of the present managerial revolution among western democracies that quality control be applied from above, but to enforce this from the head of state on the common law Judges would be to contravene several long-held constitutional conventions – among them, most importantly, the separation of powers and the independence of the judiciary. This is why it troubles constitutional lawyers for a Minister of the Crown to criticise a Judge. The Minister, in being a Minister, no more enjoys the freedom of being a private person, than does the Judge. Each in his own way serves the Crown and is bound by constitutional convention to observe state protocol. There is something particularly demeaning to the authority of the Crown and the Judiciary when the criticism comes across with the informality of a talk-back show. Such is our respect for freedom of speech and the principles of democracy that we are prepared to swallow the incongruency of having a Minister of the Crown with enough time on his hands to broadcast in this fashion – although it gives good grounds for reviewing ministerial salaries. Prime Minister Norman Kirk was the first to stun the nation by phoning-in from Parliament to such a show, but it was a poor precedent and one which by breaking down barriers would eventually tempt a Canadian talk-back host to get the Queen of England on the air by his impersonating the Canadian Prime Minister.

Such improprieties would not have been allowed to happen in Soviet circles, although since Kaminskaya wrote her *Life as a Soviet Defence Lawyer*, eastern legal practice is remarkably westernised, and, with the collapse of communism, it is riskier to run a talk-back show and be shot for what one reveals than it is to run for President.

The tradition of the west, especially in English speaking legal circles, has been to let criticism of the judiciary come only from the bottom up. At times this has gone to extremes: the London mob set fire to Lord Mansefield's house during the Gordon riots. There is also the tradition of scholarly criticism from the universities. The constitutional rôle of faculties of law arises from the fact that the universities sided with the Crown against the Judges in their support of the Commons. This constitutional freedom of faculties of law (based on a jurisprudence which had probably more going for it at the time than Coke, Blackstone and Dicey were to have as champions of parliament) does not have the prestige given to legal commentary at civil law. Even in common law countries, however, the sideways status of legal scholarship in criticising the judiciary can come very close to continental legal commentary, especially now in staffing our Law Commissions almost entirely with academics.

Criticism from academics

Academic criticism of the judiciary can be quite trenchant. I doubt whether in New Zealand we would refer to "one of the brat pack of newly appointed High Court Judges" as Beloff QC did recently in writing on "Wednesbury, Padfield, and all that Jazz" in [1994] *Statute Law Review* 147, 157. Is there any reason why a Judge who "has the charming habit of rejecting applications for judicial review with the words 'I smell no unfairness'" should not be exposed to the comment that "the reach of natural justice nowadays depends on the sensitivity of Mr Justice MacPherson's nostril"? (ibid, 149). After all, Mr Justice MacPherson's nostril for natural justice may be an extremely sensitive one. It may be that in New Zealand we are still more English than the English in maintaining somewhat stiffer standards of decorum.

A short time ago, according to a former law student who gave up the legal profession for journalism, a visiting Judge took the wrong door on retiring from the Invercargill Court and ended in a broom cupboard. After waiting five minutes there until the Court should be clear enough for him to make his exit, he was surprised to find everyone still standing at attention. Why not – everyone else knew that he had only gone into a broom cupboard. I tell this tale, apocryphal or not, because the moral of it lies in the respect still accorded to the judiciary both by the legal profession and the general public of Invercargill.

None have ever thought less of the judiciary for being human. Megarry, now himself a Judge after compiling *Miscellany at Law*, reminds us of Pollock CB's judgment in *R v Webb* (1848) 2 C&K 933 at 938 where the Judge, in deciding that "indecently" has no legal meaning, recounted how, even with ladies present, "in our older Courts of justice, the Judge retired to a corner of the Court for a necessary purpose". In the *Lives of the Chief Justices of England* (vol 3 (1857) p 85) Lord Kenyon CJ emerged from his own corner of the Court in some consternation when, after exercising the same function, he found that some law clerk had used the intended receptacle as an ink well. The judiciary can only benefit from being shown to belong to the rest of long-suffering humanity.

It is not so long ago that "one of the brat pack" that sits at our Business Roundtable instead of on the High Court bench complained of New Zealand universities that their faculties of law were not up to the international mark in commenting on the judiciary. Perhaps we can expect a takeover by big business from professional interests in the writing of legal commentary. Will it read right? Who can say? It might seem healthier for the legal profession in the long term to be prepared to be confrontational in the short term. If the managerial revolution finally reaches a showdown with the judiciary the issue will doubtless be waged between big business and the common law. Will it be waged with words without wealth, or wealth without words, or will it be even more openly confrontational, as the issue becomes in less egalitarian societies, by opposing wealth with words and words with wealth?

As skilled professionals in the use

of words we extol forensic fencing as a civilised alternative to trial by combat. Every thrust of our tongue is but the opportunity for another tongue to parry, and the skill of the match is displayed before all in open forum. We may even appeal the judgment to higher Courts where we would seek its severest censure.

Criticism of the House of Lords

There is a far more insidious form of criticising the judiciary than this sort of forensic fencing. It still uses words but in a more insidious and therefore subversive way. Because of its pre-eminently respectable format, the degree of substantive untruth which it insinuates remains carefully hidden. Huge institutions may fall under its attack, yet when all the facts are carefully considered, all that remains is a mere matter of opinion. Academic argument often provides the worst example of such criticism, since too much time and effort devoted to a task often only increases the risk of self-deception. Take *After the Ancien Regime* by W T Murphy and R W Rawlings for example. Here is a highly polished criticism of the judgments in the House of Lords 1979/1980, published in the Modern LR beginning at page 617 in 1981, and running to a total of sixty-seven pages by 1982.

On the face of such a pretentious undertaking we would assume it to be a work of serious academic scholarship. Indeed, if because of its horrendously radical conclusion completely demolishing the credibility of the Law Lords we presume it must be valid then we are guilty of lynch law as if we had hung the prisoner without proper trial. On the strength of Murphy and Rawlings' article, for example Walter Merricks, writing in the *New Law Journal*, 1981 p 1244 asked "Why is it that our most senior Judges are performing so inadequately?" Should one care to consider the issues rather than be carried away by Murphy and Rawlings' conclusions, however, one finds outrageous shortcomings of scholarship in their paper. Some of these were first dealt with in this journal at [1982] NZLJ 416. I had submitted the paper under the title "Dons in Disarray", but for some reason the then editor published it as "Who Judges the Judges?" Over and over again, the judgments of the Law Lords had been misquoted or abbreviated by the authors of the original review. In almost every case the abbreviated or misquoted judgment advanced the authors' conclusion and reduced the credibility of the Law Lords.

There are no less than 156 major quotations of judicial dicta in *After the Ancien Regime*. The present author has painstakingly examined every one of them in comparison with the reports. Most of the 156 quotations are no more accurately dealt with by the authors of *After the Ancien Regime* than is the omission, between the first one and a half sentences and the last sentence of the authors' quotation from Lord Scarman's judgment in *Re Racal Communications Ltd* [1980] 3 WLR 181 of more than three paragraphs of argument which completely contradicts the conclusions of the academic critics. If *After the Ancien Regime* is any indication of how other countries treat their Judges, New Zealand should be content to be cautious and conservative in its academic criticism.

Employment Court criticism

Just recently the Business Roundtable commissioned an Australian academic, Professor Colin Howard, to comment on the decisions of the New Zealand Employment Court. The report is said to have "savaged a variety of Employment Court findings on point of law" and to have "singled out Chief Judge Tom Goddard for special criticism". Being privately commissioned, the report operates like a Soviet samizdat by circulating beneath the surface. My only source is hearsay,[1] but if the Business Roundtable cares to commission opposing counsel on the same scale of remuneration many would be glad to come up with far more credible conclusions. As Peter Huber quotes in *Galileo's Revenge* "you get a Professor who earns $60,000 a year (which being far less than Professor Howard's salary is roughly mine) and give him the opportunity to make a couple of hundred thousand dollars in his spare time and he will jump at the chance" like one of "a bunch of hookers in June". Alas, it only takes a little Aussie-Kiwi confrontation to lower our somewhat stiffer standards of decorum. The constitutional role of our faculties of law in criticising the Judges makes it hard for us to support the judiciary without scandalising the Professors. ❑

1 This report has been published subsequent to the manuscript being written and typeset; and while the author is overseas. **P J D**

Hypocrisy as a social virtue

We have given up the socially useful and constructive pretence that we all behave better than we normally behave, or believe more hopeful or creative things than we really do believe, and have sunk unto that stupor or "realism" so encouraged by TV pundits, socially relevant novelists and the like. The implication seems to be that we have gained in honesty at the expense of social stability: but ... I would question it. What [is called] "hypocrisy" seems to me a mixture of common sense and normal idealism: it was an aspect of the belief, almost equally part of the Hebrew, Greek and Christian traditions, that we must continue to honour and celebrate our highest ideals and principles, even though we may personally fall short of them. As long as man realises that his ideals *are* high, and that they make for dignity, and promote happiness, and are worthy of service, then his own failures are beside the point. The important thing is that he should honestly repent his failings and fight against them, and not pretend to be better than he is. To behave in this manner is not hypocrisy but wisdom. It is worth remembering that the Christian doctrines of original sin and salvation by grace are specifically concerned with this issue, and that to all traditional cultures of any stature the truth would seem clear. The great majority of men have never made their flawed behaviour the measure of the universe or indeed the measure of themselves.

A E Dyson
Critical Quarterly (1970)

Judiciary

Appointments to Court of Appeal

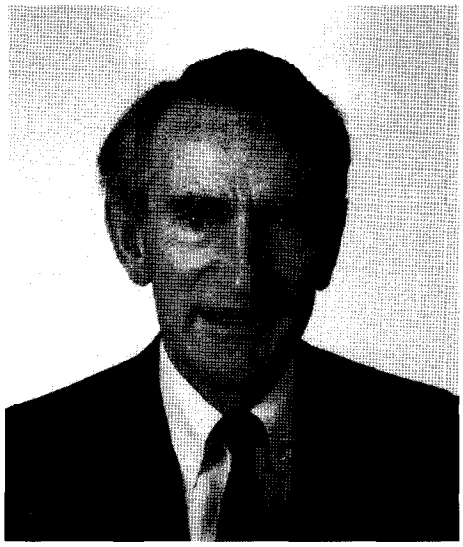
For a brief editorial comment on these appointments see p 79.

The Rt Hon Sir Ivor Richardson, President of the Court of Appeal

On 19 February 1996 the Rt Hon Sir Ivor Richardson assumed office as President of the Court of Appeal succeeding the Rt Hon Sir Robin Cooke who nevertheless continued to be a Judge of the Court of Appeal pending his retirement in April 1996.

Sir Ivor was born in Ashburton on 24 May 1930. He was educated at Timaru Boys High School and he subsequently graduated with an LLB degree from what was then the University of New Zealand. This was in 1953. In 1955 he graduated LLM, SJD from the University of Michigan in the United States. He has two honorary doctorates. The first was awarded by Canterbury University in 1987 and the second by Victoria University in 1989.

His Honour practised in the city of Invercargill from 1957 to 1963 when he was a partner in the firm of Macalister Brothers. From 1963 to 1966 he was Crown Counsel in the Crown Law Office in Wellington. In 1967 he became Professor of Law at Victoria University, being Dean of the Law Faculty from 1968 to 1971. In the years 1973 to 1977 he was a partner in the Wellington firm then known as Watts and Patterson.



His Honour was appointed a Judge of the High Court in 1977. He sat in Auckland and later in 1977 he was appointed a Judge of the Court of Appeal. He has been a Judge of the Court of Appeal from 1977 until his elevation to the office of President this year.

His Honour has chaired two Committees of Inquiry, as well as the Royal Commission on Social Policy in 1987-1988. He was Chairman of the Committee of Inquiry into Inflation Accounting in 1976 and Chairman of the Committee of Inquiry into Solicitors Nominee Companies in 1983. He has been Chairman of the Council of Legal Education since 1983.

Sir Ivor has taken a very active interest in education generally. He was Chancellor of Victoria University in the years 1984-1986 after having been Pro-Chancellor from 1979 to 1984.

His Honour lives in Wellington. He is married and has three daughters. ❑

Hon Justice Peter Blanchard

The Attorney-General announced on 9 February 1996 that the Hon Justice Peter Blanchard had been appointed a permanent Judge of the Court of Appeal of New Zealand.

The new Appeal Court Judge was born in Auckland in August 1942 and graduated Master of Laws from the University of Auckland in 1968. He had been educated at King's College. He subsequently did a postgraduate degree at Harvard where he obtained his LLM in 1969. His Honour was awarded a Fulbright scholarship and was a Frank Knox Memorial Fellow.

Justice Blanchard was originally with the firm then known as Grierson Jackson & Partners from 1968. In 1983 that firm merged to create the firm which is now Simpson Grierson. He was a senior partner of that firm. He specialised in Commercial Law and Land Law. His Honour was formerly a member of the New Zealand Council of Law Reporting. He was also a member of the New Zealand Law Society's Legislation Committee. He has taken an active interest in law reform and was appointed a member of the Law Commission in 1990.

At one time the Judge was very

involved in the commercial world. He has been on the Board of a number of companies. These include Fletcher Challenge Limited, New Zealand Oil & Gas Limited, Mineral Resources (NZ) Limited, United Resources Investment Holdings Limited and other companies in Australia and New Zealand that are listed on the Stock Exchange.

His Honour is well known as the author of *A Handbook on Agreements for Sale and Purchase of Land*. He also wrote a book *The Law of Company Receiverships in New Zealand and Australia*, a second edition of which was published in 1994, with Mr Michael Gedye as co-author. This book was awarded the Northey Memorial Prize for the best legal text published that year. The Judge wrote three of the commentaries in *The New Zealand Commentary on Halsbury's Laws of England*. The topics that he wrote on were "Corporations", "Receivers", and "Sale of Land".

The Judge was appointed to the High Court Bench in 1992 and was based in Auckland.

Justice Blanchard has an interest in both music and literature. He has described himself as an infrequent sedate jogger. The Judge is married with two children now in their 20's.

His Honour's appointment as a permanent Judge of the Court of Appeal takes effect from 15 April 1996. ❑

Sir Kenneth James Keith KBE, QC

Sir Kenneth has been the President of the Law Commission since 1991 having been a member of the Commission since 1986. Sir Kenneth has also held judicial office being a Judge of the Western Samoan and Cook Islands Courts of Appeal to each of which he was appointed in 1982.

The new Judge is 58 years old having been born in Auckland in 1937. He was educated at Auckland Grammar School and then at Auckland University and Victoria University of Wellington. In 1964 and 1965 he attended Harvard University from which he graduated with an LLM degree. He had been awarded a Fulbright travel grant and was made a Frank Knox Memorial Fellow.

From 1956 to 1959 Sir Kenneth worked for the Department of Justice in Auckland, and from 1960 to 1962 he was with the Department of External Affairs in Wellington. He then joined the staff of Victoria University of Wellington and was appointed Professor of Law in 1974. He was Dean of the Law School between 1977 and 1981.

In 1968 he became a member of the UN Secretariat in New York where he remained until 1970. Between 1972 and 1974 Sir Kenneth was Director of the New Zealand Institute of International Affairs. In 1981 and 1982 he was Visiting Professor at Osgoode Hall Law School in Toronto.

Sir Kenneth has been active on committees and commissions of a public nature. He was a member of the Danks Committee on Official Information, a member of the Royal Commission on the Electoral System (to which we owe MMP), the Legislation Advisory Committee and then the Law Commission. Sir Kenneth has published many papers on legal topics and edited several books. He was awarded a KBE in 1988 for public services.

Sir Kenneth is married to Lady Jocelyn Keith and they have four children, two boys and two girls, and two grandchildren. It was announced that Sir Kenneth's appointment would take effect from 1 April 1996. ❑

Privy Council appeals – The principal alternatives

By Ronald Pol, Barrister and Solicitor of Auckland

The question of appellate Court structures continues to be a problem. The author has recently returned to New Zealand after some practice in England. He is now a senior litigation solicitor with Russell McVeagh McKenzie Bartleet in Auckland. In this article Ronald Pol considers the problem of possible alternatives to the present appellate system. He finds the cost-saving recommendation of the Solicitor-General, merely to reduce the tiers of appeals from two to one, to be unsatisfactory in principle. The Solicitor-General's recommendation was discussed at length by a number of practitioners at [1995] NZLJ 205 to 218. The four options considered by the Solicitor-General are set out fully at p 206. Mr Pol is of the view that any proposed alternative has unsatisfactory features, and that the whole question needs further careful consideration.

Introduction

The government has decided, "in principle", to abandon appeals to the Privy Council. It has, apparently, however, chosen to seek "all-party support" before implementing its decision.[1] The process by which the government has reached its decision to abolish appeal rights to the Privy Council appears, however, to be based less upon reason than upon emotive rhetoric. The principal justification is apparently the desire to assert New Zealand's "self confidence as a maturing nation".[2] This provides fertile ground for nationalistic rhetoric. It also dovetails well with republican aspirations. Objectively, however, it is misconceived and irrelevant.

The proponents of retention of Privy Council appeal rights appear to have lost the argument. The task of identifying a suitable replacement now becomes compelling.

This paper examines the principal alternatives and, in particular, identifies areas of concern exposed by the proposed alternatives. It also considers whether it is appropriate to re-examine the "in principle" decision.

Single right of appeal

The Solicitor-General's preferred alternative, "option 2",[3] would allow a single right of appeal from the High Court, to be heard either by a civil or criminal division of the Court of Appeal (three Judges) or by the full Court of Appeal (five Judges). Cases considered most "important" would be heard by the full Court, but whether the Court sat as a full Court or as a division, its decision would be final. This alternative is apparently favoured by the Chief Justice, the President and Judges of the present Court of Appeal,[4] and by the present government.[5]

The Solicitor-General's preferred alternative would, if implemented, represent a significant step backwards in the principled development of New Zealand jurisprudence. This is because it would remove the ability, in appropriate cases, to mount a second appeal. Currently, this represents a valuable asset.

The existence of a single appeal right is fundamental. The existence of a second appeal right (whether by right or with leave) is more controversial. It is, however, equally fundamental. Second appeals generally deal with "hard" cases and are more concerned with the development or clarification of legal issues. Second appeals also provide a forum in which, following additional reflection and the refinement of argument, legal analysis may be enhanced. This will ultimately assist the Court in reaching a better quality of decision than might otherwise be available within the constraints of a single appeal structure. The awareness, both at first instance and on first appeal, that a decision may potentially be subject to close scrutiny by a higher appellate Court also provides a very real motivation for careful deliberation and, consequently, the maintenance of high judicial standards.

That a right of second appeal is inherently superior to a structure restricted to single appeals does not reflect upon the quality of the Judges in either forum; rather, it is a result of the process itself, including the formulation of a more focused argument, the provision of a different perspective, and the greater emphasis on key issues which results largely from a full analysis of the judgments at first instance and on first appeal. In achieving the best quality of decision, both the first and second appeals are equally important.

In presenting his arguments in favour of removal of the existing second level of appeal altogether, the Solicitor-General asserts that the chance to re-address arguable issues before a higher appellate Court is often inherently attractive to a litigant's advocate. (Footnote 3, below, at para 54.) This general imputation of unprofessional motivation is, at best, unhelpful, and its accuracy doubtful. Instead, the focus should remain solely upon whether it is in the *litigant's* interests to pursue a second appeal.

Putting this to one side, however, the Solicitor-General's principal arguments boil down to the delay and cost consequences incurred by a second appeal. On the other side of the ledger, however, rest the perceived advantages of a second level

of appeal. The basis upon which the Solicitor-General has arrived at his conclusion (reached after balancing the perceived advantages against the perceived disadvantages of a second appeal) is misconceived. He is not the right person to strike the balance, at least not without full (and genuine) consultation with appropriate organisations that have a direct interest in the Court system. The Solicitor-General's conclusion should be formulated after, not before, such consultation.

In any event, the task of balancing the disadvantages (delay and cost) against the advantages (the greater refinement of argument and the perceived superior quality of decision) should, in so far as possible, properly be undertaken by potential litigants themselves, for they must bear the costs and reap the benefits of litigation.

In this regard, at least one representative body of a group of potential litigants has already come down strongly in favour of the retention of a second level of appeal.[6] In determining such issues, the submissions of principal user groups of appellate Court services should be given great weight.

That the Solicitor-General's preferred alternative involves "minimal structural change to our existing system (footnote 3, below, at para 70.10) fits in well with the requirement that alternatives should seek to be "fiscally neutral".[7] This, however, misses the point. The most appropriate alternative (which necessarily includes considerations of reasonable expense) should be selected; it should not simply be a Treasury driven search for the least expensive structure. We should not be satisfied with justice on the cheap. One commentator has aptly summarised the position:

> ... [T]o deny the creation of a [second level of appeal to replace the Privy Council], for reasons of economy, could be a very unwise saving for the taxpayer in the long germ. (Cato, "Privy Council: The Takaro Properties case" [1988] NZLJ 110 at 115.)

The assertion that the option 2 alternative "seems to fit well the size of our society (footnote 3, below, at para 70.10) merely adds insult to injury; should we emasculate our legal system simply because New Zealand is a relatively small country? We cannot credibly assert that we have come of age so as to enable us to reject, in a fit of nationalistic fervour, the Privy Council appeal whilst also asserting that we are not yet of an age to enjoy the most appropriate alternative.

Second level of appeal

The ideal system would allow two appeals; the first by right and the second by leave. It has been said that it may not, however, yet be possible to adequately implement such a system utilising the resources currently available within New Zealand. Compared with other common law jurisdictions, such as Australia and the United Kingdom, New Zealand's pool of users of legal services and, consequently, its pool of legal practitioners, is very small indeed. Whilst we can draw upon a population base of about 3.5 million people, the legal professions of Australia and the United Kingdom can draw upon some 18 and 60 million respectively. Furthermore, there has in recent years been a dramatic fall in the number of new filings in the High Court. Consequently, far fewer cases would be heard in a New Zealand Court of second appeal than, for example, before the High Court of Australia or the House of Lords, both of which hear a great range of complex cases. Accordingly, there is a risk that both the depth and breadth of experience of such a Court would necessarily be less than that which is currently available on appeals to the Privy Council.

There is also a very great risk that, in establishing a "Supreme Court"[8] of second appeal, New Zealand's best Judges would effectively be sidelined, with comparatively little work, with most appellate work being dealt with by the Court of first appeal. A further concern results from the likelihood that the membership of the Court of first appeal would then draw heavily upon the current membership of the High Court. The result may be:

> ... that at one stroke we would weaken both the present Court of Appeal and the premier first instance Court. ("Chief Justice at the Privy Council; Interview with Sir Thomas Eichelbaum" on 2 March 1994, concerning the Privy Council and other topics [1994] NZLJ 86 at 88.)

In the Solicitor-General's opinion, the risk that New Zealand's best judicial minds would not be fully employed represents the "greatest disadvantage" of a two-level structure. (Footnote 3, below, at para 70.18.) Such arguments are valid. Any proposed alteration to the present structure of New Zealand's Courts should therefore carefully guard against the possibility of weakening the existing Court structure. However, it also provides a valuable opportunity; a relatively light case-load may prove to be a positive boon to "Supreme Court Judges". With adequate time for study, reflection, discussion and the formulation of fully considered decisions, the Judges of a Court of second appeal may well be able to provide a quality service, even within the constraints of a small population. It would clearly be advantageous for the Judges of a Court of final appeal to operate "in the same kind of rarefied atmosphere as the institution which they replace". (Withnall, "Responses from the profession" [1995] NZLJ 210.)

This also fits in well with the Solicitor-General's recognition that the present Court of Appeal is "grossly overworked" (footnote 3, below, at para 70.15) and, without a reduced workload, would be unable to "maintain public confidence that it is [capable of] providing a quality of service appropriate for a final appellate Court". (Footnote 3, below, at para 70.2.)

With the potential underemployment of New Zealand's best judicial minds thereby transformed from the "greatest disadvantage" into a positive asset of an option providing a second right of appeal, the Solicitor-General's options 3 and 4 should, in a single stroke, become the favoured alternatives. Both of those options provide for the retention of a second level of appeal.

All that remains would be the need to achieve the depth and breadth of experience that a country with a small population may otherwise be unable to offer. This point is addressed below.

International or regional Court of final appeal

Various alternatives have, over the years, been presented in which New Zealand's Court of final appeal would also fulfil the functions of such a Court for other common law jurisdictions. Candidates include a High Court of Australia and New Zealand, a Pacific Court and a Commonwealth Court of Appeal. It seems reasonably clear, however, that such alternatives would be impracticable, not least because it seems likely that its intended participants would be unwilling to accept the imposition of a supranational Court of final appeal. Furthermore, Australia and Canada, for example, already have well-established second levels of appeal, within a constitutional framework in which a supranational Court such as that proposed would be ill-fitted. It would also be absurd, if we abandon the Privy Council appeal for reasons of "national identity" or "sovereignty", to replace it with a regional Court which may be based in Sydney, Ottawa or Suva. Any alternative to the Privy Council appeal is, therefore, likely to be home-grown.

"Supreme Court" with judicial exchange

Given the likelihood that New Zealand's new appellate structure will be based upon the current Court of Appeal,[9] an alternative which has recently been advocated would be to invite, on a regular basis, senior Judges (one at a time) from other common law jurisdictions to sit, together with "resident" Judges, on New Zealand's highest appellate Court. (Brown, "After the Privy Council: returning a compliment" [1995] NZLJ 82.)

This alternative recognises that, although New Zealand's Judges may well be as knowledgeable and wise as their overseas counterparts, New Zealand has only a small pool of top judicial talent, and that it would be beneficial to supplement those resources from the much wider pool of jurisdictions which share common legal traditions. It also recognises the increasing importance of New Zealand's international legal obligations and the growing importance of transnational dispute resolution, both of which necessarily accompany the international growth and outlook of New Zealand's economic and social institutions.

The presence of such judicial invitees would:

> ... especially in private pre-judgment deliberations ... be salutary whether as accelerant, or as gentle brake, upon the development of local doctrine. (Brown, above at 84.)

The implementation of a judicial exchange programme within New Zealand's new Court structure would both reduce the risk that a New Zealand Court of final appeal would "become insular and isolated from developments in ... other [common law] jurisdictions" (Clark, "When the Court of Appeal is wrong" [1990] NZLJ 175 at 176) and, generally, would bring to judicial deliberations a "fresh perspective, especially in matters which have become clouded with political overtones". (Paine, "Responses from the profession" [1995] NZLJ 210 at 214.)

It has been suggested that the implementation or operation of this alternative should allow for the "quiet suspension" of judicial interchange arrangements in cases involving constitutional crises or political sensitivities. (Brown: [1995] NZLJ 84.) If such suspension is to occur, it should not be done "quietly", as an ad hoc arrangement agreed to by unelected functionaries or judicial officers. The ability to suspend, and the circumstances in which suspension may occur, should be circumscribed by the relevant empowering legislation.

More important, however, is whether it is appropriate to allow suspension at all. This must be carefully examined. Politically controversial and "hard" judicial decisions will, from time to time, be required, particularly of Judges in a country's highest appellate Court. It is in respect of such "hard" cases that judicial invitees may offer the greatest assistance. They may be able to offer an impartial, non-politicised view that a resident Judge may sometimes fail to see. This can be invaluable.

In any event, the views of the judicial invitee would not act as an impediment to the development of New Zealand's law, particularly as such a Judge would be outnumbered, probably four to one by resident Judges.

The "judicial exchange" suggestion would represent a practical alternative only if senior Judges from other common law jurisdictions were both able and willing to sit on New Zealand's "Supreme Court". Equally, it may be necessary for senior New Zealand Judges to be willing and able to reciprocate. Such other common law jurisdictions would then be required to alter their own appellate Court structures in order to accommodate the occasional New Zealand Judge sitting in judgment on their nationals. This may be some time coming.

The "judicial exchange" alternative is commendable. It is sensible. A fully reciprocal form of judicial exchange is, however, likely to be discarded on grounds of impracticability, at least in the short term.

In any event, whether fully reciprocal or merely unilateral, what more does the "judicial exchange" alternative offer than that which is currently provided, free of charge, by the Judicial Committee of the Privy Council? The principal advantage of this alternative is that senior outside Judges can offer an impartial, non-politicised view that a resident Judge may sometimes fail to see. This role is currently, and most ably, filled. The only (some would say, very important) difference is that the suggested alternative allows for that advantage to be brought largely on-shore, within a more New Zealand-oriented structure. There may be some truth in that, though it too may represent little more than emotive rhetoric.

Conclusion

No alternative has yet presented itself which represents an objective, demonstrable improvement on the present system, by which final appeals continue to be heard by the Judicial Committee of the Privy Council.

The most appropriate alternative may, in time, be represented by a Court of Appeal restructured to allow a second appeal, together with the introduction of a judicial exchange programme which may, hopefully, develop into a fully reciprocal arrangement with selected common law jurisdictions. The implementation of significant new

elements within the current Court structure cannot, however, adequately proceed in light of the government's apparent insistence on "fiscal neutrality"; it is an exercise in futility to realistically expect to be able to introduce an appropriate, yet inexpensive, "internal" structure to replace a superior Court whose running costs are currently met by the taxpayers of another country.

Whilst recognising that, in time, an appropriate alternative will undoubtedly replace the Privy Council appeal, it is necessary now to acknowledge that, in the exercise of New Zealand's independence and sovereignty, the Privy Council continues to offer a valuable service which should not yet be dispensed with. It is not too late to reverse the "in principle" decision. A politically more acceptable alternative, however, may simply be to reaffirm the decision, but to acknowledge that suitable alternatives are not yet viable.

In the meantime, the manner in which the Judicial Committee delivers its "advice" should be modernised to enable the Judicial Committee, on appeals from New Zealand, to deliver a formal judgment without reference to the Queen. The removal of the Queen's symbolic role would simply reflect current legal realities concerning the nature of the Privy Council's "advice".

Similarly, the limit on Privy Council appeals by right should be increased, from the current $5000 to, say, $250,000, whilst retaining the ability, with leave, to appeal in respect of cases involving important issues of a non-monetary nature. This would create an increased, though not insurmountable, barrier to the mounting of appeals. It would also reflect the current reality that it is appropriate that only the most significant cases be put before New Zealand's highest appellate Court. ❑

1 *New Zealand Herald*, 21 February 1996.
2 Prime Minister's statement to Parliament, 20 February 1996.
3 "Appeals to the Privy Council: report of the Solicitor-General to the Cabinet Strategy Committee on issues of termination and court structure", 10 March 1995 (released 5 May 1995), at paras 70.3-70.12. In the Prime Minister's statement to Parliament on 20 February 1996, Mr Bolger indicated that work and consultation to designate the Court of Appeal as New Zealand's final Court was "well advanced".
4 Ibid, at para 16.
5 The Prime Minister's statement to Parliament, 20 February 1996.
6 New Zealand Business Roundtable, "Appeals to the Privy Council: a submission to the Attorney-General on the Solicitor-General's report on issues of termination and Court structure in relation to appeals to the Privy Council". July 1995.
7 Cabinet Strategy Committee minutes, 5 October 1994, annexed as Appendix A to the Solicitor-General's report.
8 The selection of an appropriate name for such a Court is not yet necessary. Possible alternatives include Supreme Court and Court of Final Appeal, both of which are sufficiently descriptive of the principal function of such a Court.
9 This seems particularly likely in light of the Cabinet Strategy Committee's apparent insistence on the "fiscal neutrality" of any alternative to the Privy Council appeal: Supra, note 7.

Euthanasia

The title of the [Northern Territory Euthanasia] Act – "Rights of the Terminally Ill" – implies that terminally ill patients in the Northern Territory have been given rights that are additional to those they already possess under common law and statute. This is not so. The law does not regard suicide, which is "the act of killing oneself intentionally" in the sense of personally putting the death-producing cause(s) in motion, as a crime. At the same time, according to the House of Lords in *Airedale NHS Trust v Bland*, the law prohibits others, including medical practitioners, from taking active measures to cut short the life of a terminally ill patient either by intentionally killing him or her, for instance, in the form of injecting the patient with a lethal drug or by aiding and abetting such a person. The Northern Territory legislation does not grant patients any rights additional to those which they already possess for, although they "may request" a medical practitioner to assist them to "terminate life", a medical practitioner who receives such a request, may "for any reason and at any time, refuse to give that assistance": s 5. Thus, despite the title, the purpose of the Act is not to expand directly the rights of patients – they are not given the right to *compel* medical personnel to assist in any way in the furtherance of their wish to die. Instead, it provides legal immunity to medical practitioners who, in accordance with the provisions of the statute, comply with their patients' request to end their life by either aiding their suicide or directly and intentionally killing them ....

One of the dangers inherent in the *Rights of the Terminally Ill Act* 1995 (NT) is that, although its proponents may have been motivated by concern for the rights of individual patients who suffer pain which cannot be alleviated, or whose pain relief has been mismanaged, this kind of legislation can lead to a decrease in research into pain relief, and a reduction in funds provided for end-of-life care. It is much less expensive for physicians to provide assistance to a chronically ill patient or a patient suffering from an incurable disease by terminating his or her life than to provide adequate medical and palliative care. The emphasis on medical cost-containment is a constant theme of contemporary political discourse which is based on the doctrine of "the human capital" developed to measure the strictly economic costs of disease. This doctrine is one of the most influential determinants of the nature and level of funding provided by all Australian governments for our health system. The aim of "the human capital" method of evaluating the value of life is to "remind the society that the burdens of disease are borne not only by the sick but by all those who would benefit from the contribution to society that would be made if the patient were whole again"; or alternatively, that savings would accrue to society if the patient were either to refuse treatment or request that his or her life – which is now an "unproductive" human capital – be terminated.

Danuta Mendelson
Deakin University
Journal of Law and Medicine
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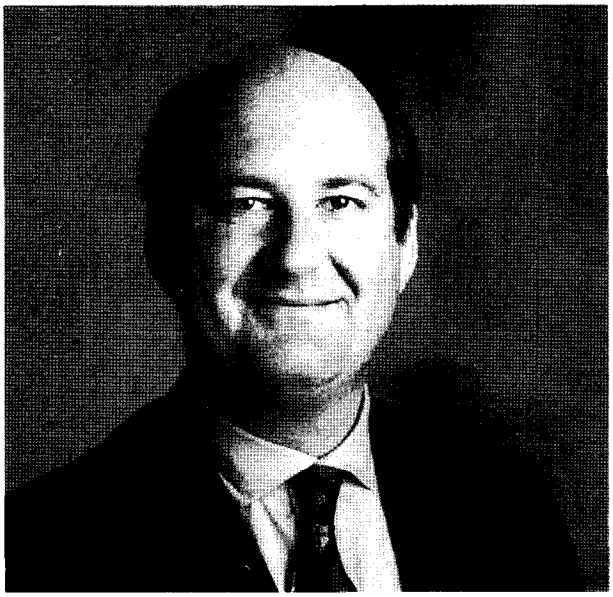
New Editor for

The New Zealand Law Journal



The publishers – Butterworths of New Zealand – are pleased to announce that the next issue of *The New Zealand Law Journal* will be the first under the Editorship of Mr Bernard Robertson. Mr Robertson has been a frequent contributor in recent years not only to the *Law Journal* but also to other practitioner and academic journals and publications.

Bernard Robertson came to New Zealand at the beginning of 1989 after a varied law-related career. After taking a degree in Law at Oxford and being called to the Bar of the Inner Temple, Mr Robertson joined the Royal Navy in the Supply and Secretariat Branch, the branch that does the Navy's legal work. His period in the Royal Navy included periods of legal administration, prosecution at Courts Martial and "clerking" at Captain's Table (or summary trial) in addition to the tasks of a service officer. After spending too long in the Dockyard rather than at sea Mr Robertson joined the Metropolitan Police as a Graduate Entrant, rising to the rank of Inspector and attending the year long Special Course at the Police Staff College, Bramshill. Prior to the creation of the Crown Prosecution Service Mr Robertson prosecuted in Magistrates Courts and as an Inspector investigated and prepared fatal road traffic accident cases for Court.

While serving as a police officer Mr Robertson took a Masters Degree in Law at the London School of Economics and subsequently applied for and was appointed to a post as a Lecturer in Law at Victoria University of Wellington. In 1993 he moved to Massey University as a Senior Lecturer.

Since settling in New Zealand Mr Robertson has been involved in a variety of activities including the founding of the Law and Economics Association. He has been Book Review Editor for *New Zealand Universities Law Review*, a Reporter for the *Procedure Reports of New Zealand*, the author of a NZLS Continuing Legal Education seminar on case preparation and fact analysis and a contributor to *Trapski's Family Law* and to the *Manual of Armed Forces Law* as well as the author of numerous academic articles and the co-author of a book on the interpretation of forensic scientific evidence. He is well known to Wellington law firms and to police prosecutors as a teacher and trainer.

Mr Robertson is determined that *The New Zealand Law Journal* should retain its position as New Zealand's premier legal periodical, a task all the more challenging today because of the several newcomers on the block. Mr Robertson will be attending the New Zealand Law Society Conference in Dunedin and will be visiting the main centres over the next few months. He is keen to hear from lawyers, in person, by letter, telephone or electronic mail what they want from NZLJ over the next few years.

P G Kirk
Managing Director
Butterworths of New Zealand

Recent Admissions

Barristers and Solicitors

Kalapu LM	Wellington	19 December 1995	Moe SR	Wellington	19 December 1995
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Le Cren C	Christchurch	18 December 1995	Olliver RW	Christchurch	18 December 1995
Long E	Wellington	19 December 1995	Ongley CM	Wellington	19 December 1995
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McKendrick P	Auckland	15 December 1995	Orr JA	Wellington	19 December 1995
Mallett MG	Wellington	19 December 1995	O'Sullivan SA	Wellington	19 December 1995
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The law of restitution and the principle of unjust enrichment: an introduction to their significance for the law

By Struan Scott, Senior Lecturer in Law, University of Otago

Over the last few years the principle of unjust enrichment and the law of restitution have gained recognition and acceptance. Yet as an American commentator has observed, "[i]n the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground" (Laycock, "The Scope and Significance of Restitution" (1989) 67 Texas LR 1277, 1277. In this article Mr Scott provides both an introduction to the principle of unjust enrichment and considers some of the potential which it has to influence the development of the law.

Introduction

Who would have thought, some 60 years ago, that a snail, a bottle of ginger beer, and a requirement "not to injure your neighbour" (*Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin) would have the impact upon the development of the law which they subsequently have had? While some concepts are relatively quick to bear results, others, while landing in potentially fertile ground, have to wait until conditions are more favourable. This is what has occurred with the principle of unjust enrichment. The 1930s also witnessed the publication of the views of the American Law Institute, as contained in the *Restatement of the Law of Restitution, Quasi-Contract and Constructive Trusts* (1937), that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other" (at 12). Notwithstanding the 1966 publication of the seminal work of Professor Jones and Lord Goff of Chievely, *The Law of Restitution*, (now in its fourth edition), it is only now in the 1990s, that English and New Zealand lawyers are beginning to realise fully the potential of this principle of unjust enrichment. This article indicates some of the potential which it has to influence the development of the law. But first, what is this principle of unjust enrichment and what is the law of restitution?

The principle of unjust enrichment

As Professor Birks has recently reminded us, proponents of the law of restitution, as do all proponents irrespective of their particular calling, have certain "articles of faith" ("Civil Wrongs: A New World", Butterworths Lectures 1990-1991 (1992), 55). For proponents of the law of restitution, a fundamental article of faith is that one of the core principles of justice which motivates the Courts and the legislature in the development of the law, is that of "unjust enrichment".

So what does this principle of unjust enrichment entail? Common with other core principles, for example those of honouring one's agreements and respecting other's property rights, it is difficult, if not impossible, to provide a conclusive answer. Nevertheless, as Edmund Davies LJ commented in *Carl Zeiss Stiftung v Herbert Smith (No 2)* [1969] 2 Ch 276, while unjust enrichment "may defy definition, ... [its] presence in or absence from a situation ... may be beyond doubt" (at 301).

An example of the conferral of an unjust enrichment is a better start. This is the payment of money under the mistaken belief that it is owed to the recipient. You forget that you have already paid the subscription to this publication and, with the intention of discharging your liability, pay it again. Relief, pursuant to the claim for money had and received, is available (*Kelly v Solari* (1841) 9 M & W 54; 152 ER 24). But why? Clearly the fact of (and perhaps nature of) your mistake is a relevant consideration. But is it the only one? Proponents of the law of restitution believe that the underlying judicial motivation for relief in this situation is one of unjust enrichment. As a result of your mistaken payment, the publisher has been enriched.[1] The enrichment is at your expense, and, because of the nature of your particular mistake, the retention of the money is regarded as being unjust. Aristotle considered that one of the fundamental purposes of justice was corrective (*Nicomachean Ethics*, 1132a-1132b, translated by HG Apostle (1975)). The principle of unjust enrichment can be seen as embodying this view. In the above example, the principle responds to your loss of wealth and another's acquisition of that wealth by requiring the restoration of your mistaken payment. Your loss of wealth and another's acquisition of that wealth provides not only the case for relief but also the explanation for that relief.

In addition to believing that the principle of unjust enrichment explains why relief is available in this situation, its proponents also believe that this principle provides a rational basis, both for extension to the situations where relief should be

available and for the recognition of defences. Consider the availability of relief for mistaken payments. The orthodox view, derived from the judgment of Bramwell B in *Aitken v Short* (1854) 1 H & N 210; 156 ER 1180, has been that relief should be available only for the so-called "liability" mistakes (ie mistakes which led the payer to believe that he or she is liable to pay the money to the recipient). But is not the recipient of a mere causative mistake (as opposed to a liability mistake) similarly enriched? Given the intuitive reaction to this question, it is not surprising that some theorists (eg Jones, *Goff and Jones, The Law of Restitution* 4th ed (1993), 109-112) and Judges (eg Turner J in *Thomas v Houston Corbett & Co* [1969] NZLR 151 (CA), 167; Goff J in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] 1 QB 677; and the members of the High Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353) have suggested that relief should also be available for causative mistakes.

Turning to the recognition of new defences, until recently, Courts applying common law principles considered that it was immaterial whether the recipient had innocently deprived himself or herself of the initial enrichment. The highwater mark of this view was *Baylis v Bishop of London* [1913] 1 Ch 127 (CA). Unless the recipient could point to a specific defence (eg estoppel), he or she was required to repay in full the initial enrichment. Commensurate with the above extension to liability, however, has come the acknowledgment by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 1 WLR 10 and the High Court of Australia in *David Securities Pty Ltd*, that the principle of unjust enrichment demands that a change of position defence should be available. This defence is available for the innocent recipient, who, in reliance of the payment, has so detrimentally changed his or her position that he or she will suffer an injustice if called upon to repay all or part of the money so received (*Lipkin Gorman* at 34 per Lord Goff). In some respects, this judicial development was foreshadowed in New Zealand through s 94B of the Judicature Act 1908.

The law of restitution

While the recovery of mistaken payments may form an important part of the law of restitution, this law extends beyond such relief. Indeed, the law of restitution can be regarded as the collection of existing claims (often previously regarded as anomalies) which, after analysis and reflection, can be seen as being founded upon or influenced by the principle of unjust enrichment. Apart from the influence of this principle, the existing restitutionary claims are highly diverse. They range from claims arising from explicit transactions between the parties (eg remedies where one party has either failed to perform his or her part of a contract or honour his or her fiduciary obligations), to claims between complete strangers (eg the mistaken improvement of another's chattel or the receipt of a third party's money). From the accidental (eg money paid under mistake), to the deliberate (eg contractual variations entered into under economic duress). The classic text on the law of restitution (Jones, *Goff and Jones, The Law of Restitution*), with its coverage of seemingly diverse topics, can be likened to a text on the law of torts (such as Fleming, *The Law of Torts* 8th ed (1992)) and contrasted with a text on the law of contract (say Burrows Finn and Todd, *Cheshire & Fifoot's Law of Contract* 8th NZ ed (1992)).

This process of classification has revealed that the influence asserted by the principle of unjust enrichment has not been restricted to common law claims. Continuing the earlier focus on the impact of the principle of unjust enrichment upon the law relating to the recovery of money paid pursuant to a mistake, an example is the personal claim of legatees to recover money mistakenly paid by an executor which was recognised by the Court of Appeal and House of Lords in the Diplock litigation (*In re Diplock* [1948] Ch 465 (CA), *Ministry of Health v Simpson* [1950] 2 All ER 1137 (HL)). Indeed, the principle of unjust enrichment has been seen as one of the means by which the common law and equity can be unified. Professor Birks goes so far as to suggest that this belief in unity is another "article of faith" shared by proponents of the law of restitution ("Civil Wrongs: A New World" at 55).

Influence upon the law

Two areas, that of the recovery of mistaken payments and the change of position defence, in which the principle of unjust enrichment has influenced the development of the law have been noted. Not only has the principle of unjust enrichment provided assistance to the Courts for the classification and extension of existing grounds for relief, it has also justified the recognition of relief in new situations. A recent example is the decision of the House of Lords in *Woolwich Equitable Building Society v IRC (No 2)* [1992] 3 WLR 366. Woolwich had paid taxes under a regulation which was subsequently held to be ultra vires. While the IRC had agreed to return the payments, it denied liability for interest, some £6,730,000. The dispute was in respect of the interest. To recover it Woolwich had to show that it had a legal right to recover the payments. The difficulty with this claim was that it did not come within the recognised situations where relief (pursuant to the claim for money had and received) was available; Woolwich had not been mistaken (throughout it had questioned the validity of the regulation), nor had it acted under compulsion. Nevertheless the House of Lords, by a majority, agreed with counsel for Woolwich, that it should "reformulate the law so as to establish that the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a prima facie right in restitution to the repayment of the money" (at 390 per Lord Goff). The majority (Lords Goff, Browne-Wilkinson and Slynn), considered that the injustice of an unlawful demand for tax, associated with the subsequent enrichment of the IRC, justified the availability (subject to defences) of a remedy.

The law of restitution has also played a major role in questioning the universal application of our existing rules for the distribution of an insolvent's assets. Indeed, in *Re Goldcorp Exchange Ltd (In Rec)* [1994] 3 NZLR 385 the Privy Council appears to accept that the Courts can create "a remedial restitutionary right" which is superior to a pre-existing security and pursuant to which the plaintiff is "deemed to have retained equitable title" to property in the defendant's possession (at 404 per Lord Mustill). While the Privy Council expressly refrain-

ed from commenting upon its correctness, *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 may provide an example of this remedial restitutionary right.

In that case a payment was mistakenly made twice. The defendant being insolvent, the plaintiff sought to trace the mistaken payment. While Goulding J acknowledged that the Court of Appeal in *Re Diplock* had considered that "an initial fiduciary relationship is a necessary foundation of the equitable right of tracing", he concluded that the mistake was sufficient to create this relationship (at 119). In *Hongkong and Shanghai Banking Corporation Limited v Fortex Group Limited (In Rec and In Liq)*, (High Court, Christchurch, CP 147/94, 11/4/95) Master Hansen (as he then was) adopted the reasoning that "it is the payment by mistake that creates the fiduciary obligation, and brings the fiduciary relationship into existence" (at 13). Nevertheless, a restitutionist wonders whether or not the motivation for relief in such cases is not the fact of the defendant's unjust enrichment.[2] Subject to the physical ability to trace the money, it seems that to deny preferential recovery in this situation will result in a windfall for the defendant's creditors. It appears to be a situation where, to use the words employed by Goff and Jones, "it is just to allow [the plaintiff] the additional advantages which flow from the creation of [a] ... right of property" (*The Law of Restitution* 3rd ed at 55).

The remedial restitutionary remedy displays a strength and two limitations of the principle of unjust enrichment. Its strength is that the principle provides a means by which one can reconsider existing rights and remedies. In this context it is encouraging a reconsideration of the division of the insolvent's assets.

One limitation is that it may be unable to provide an answer by itself. In the context of the remedial restitutionary remedy this manifests itself in the question: "in what circumstances should a personal restitutionary remedy be elevated to a proprietary remedy?" There is at present a diverse range of opinion on this. More generally this limitation becomes apparent when considering whether restitutionary relief per se should be available. The significance of this limitation depends on the emphasis one places on the fact of an enrichment. Unless one takes the view that the fact of an enrichment per se, subject to appropriate defences and limitations, should be sufficient to motivate judicial relief, a plaintiff must still identify a ground which makes the enrichment unjust, for example a mistake.[3]

The second limitation is that the principle of unjust enrichment may come into conflict with another principle of our law. Which principle is to prevail? In *Re Goldcorp Exchange Ltd (In Rec)* for instance, a group of customers thought that they had purchased bullion which was to be stored by the company on their behalf. Following the discovery of: – the defendant's insolvency; that bullion had never been allocated to these contracts; and that the stock of bullion had always been insufficient to honour the sale agreements; – the customers sought a measure of preferential recovery. In rejecting the argument that the purchasers had a remedial restitutionary right, Lord Mustill was influenced by the existence of the contract and the associated contractual remedies (at 403).

Conflict with other principles

It is where unjust enrichment comes in conflict with another principle that it may ultimately have the greatest impact upon the development of the law. Consider a second example of a conflict between contractual and restitutionary principles, that of a deliberate breach of contract motivated by profit taking. The orthodox view is that the rationale for contractual damages at common law is to compensate the injured party for the non-performance of the contract. As McKay J recently reiterated in *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39, "the overriding principle" is that "as far as [is] possible the injured party is to be placed in the position [he or she] would have been in if the breach of contract had not occurred" (at 49). Inherent in this approach is a recognition that the defaulting party can profit from his or her breach of the contract. Indeed, supporters of the efficient breach theory, for instance Professor Posner (*Economic Analysis of Law* 4th ed (1992), 117-120) would argue that a breach of contract which is economically efficient (by which they mean that the profits derived by the defaulting party exceed the compensation payable to the innocent party), should be encouraged.

Opponents of this theory, for instance Professor Friedmann ("The Efficient Breach Fallacy" (1989) 18 *Jo of Legal Studies* 1), question whether a compensatory approach is the appropriate legal response to a deliberate and cynical breach of contract, motivated by profit taking. They suggest that in those circumstances the profit derived from the breach should be regarded as an unjust enrichment and the so-called restitutionary damages should be available to divest the wrongdoer of this unjust enrichment. Views differ as to whether such damages should be available and if so in what circumstances. The significance of the principle of unjust enrichment upon the law, however, is that it encourages a consideration of the continued application of existing legal principles.

A third example of conflict occurs with respect to the improvement of another's property. Sections 129 and 129A of the Property Law Act 1952 provide a legislative solution for the situation where my building encroaches on to your land or in some situations where it has been built entirely on your land. Nevertheless, other situations which fall outside the ambit of these sections can be envisaged. An example. I live in a rented flat and misappropriate some $20,000 of trust money which I spend on renovating the kitchen. As a consequence the market value of the flat has increased from $150,000 to $165,000. In such circumstances, should the law recognise that the "trust" has a potential remedy against the landlord; the quantum of relief sought being the increase in market value attributable to the renovations? If one employs an objective test of enrichment and focuses upon the increase in market value, relief may appear appropriate so as to restore an enrichment which was conferred and is now being retained at the expense of the "trust".

Balanced against this conclusion, there are at least two inter-related and intuitive reactions. First there is that of freedom of choice. Put simply, why should the landlord have to pay for a new kitchen which he or she did not solicit and may not have even desired? The second of these reactions is that of security of

ownership. Put simply, the concern is that the imposition of an obligation upon the landlord to disgorge the enrichment may force him or her to sell the property.

Such concerns may be seen as present in the orthodox response of the law, as displayed in the rules as to fixtures and the conclusion of the English Court of Appeal in *Re Diplock* (that trust money could not be followed into improvements on land (at 545-548)), that relief is not available. But should the fact of the enrichment[4] outweigh them? It does when the improved property is a chattel.

You buy an old computer from a friend. The friend turns out to be a rogue who had stolen it from me. I seek its return from you, but in the meanwhile and in the mistaken belief that you are the owner you have spent some $500 on non-removable improvements. The computer is now worth some $750 as opposed to its pre-improvement value of $400. If I sue you for conversion, *Nash v Barnes* [1922] NZLR 303 is authority that the damages will be assessed at the computer's pre-improvement value. You therefore get the benefit of the increase in value. Should I recover possession of the computer, *Greenwood v Bennett* [1973] 1 QB 195 (CA) is authority that you can recover the increase in value from me.

So why the difference? Perhaps the answer lies in the fact that the law has traditionally regarded land as unique. As such, specific performance is potentially available when there is a contract for its sale. Similarly, specific recovery, as opposed to just a judicial sale, is available to remedy wrongful possession. While this view of land may remain true in certain circumstances (eg one's home), when land is just regarded as an investment (eg the investment flat), is such an immunity from a restitutionary claim warranted? Why should a block of flats acquired as an investment be treated any differently from say a relatively common "classic" car? The significance of this for practitioners, is that immediately one concludes that this general immunity is no longer warranted (or even if one questions its existence), then a body of existing law ranging from such diverse topics as fixtures to co-ownership becomes open for re-evaluation.

Conclusion

Like most overviews, this one skims over disagreements between proponents of the law of restitution as to both the content of the law of restitution and the application of the principle of unjust enrichment in specific situations. Nevertheless, through its examples, it demonstrates both the impact which that principle has had on the law and the significant impact which it may have in future years. The law of restitution is another of the dynamic areas of the law which practitioners should keep a watching brief on. ❑

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1 Because of the role of money as a medium of exchange, its receipt is generally regarded as enriching the recipient. (*BP Exploration Co (Libya) Ltd v Hunt (No 2)* 1 WLR 783 (QBD), 799 per Goff J.)

2 Professor Birks has offered the following comment upon the reasoning in *Chase Manhattan Bank NA*:

> "In *Chase Manhattan* ... Goulding J moved the instrumental invocation of a fiduciary relationship to its proper place, in the conclusion. Because, owing to the mistake, the plaintiffs ought to be allowed to trace their assets into its proceeds, they could for that purpose use the tracing techniques worked out by equity, and therefore it followed that, tracing being proper, the relationship was fiduciary. Analytically otiose, the final characterisation satisfies the *Diplock* requirement in the manner warranted by *Sinclair v Brougham* [[1914] AC 398 (HL)]." ("Restitutionary Damages for Breach of Contract: *Snepp* and the fusion of law and equity" [1987] LMCLQ 421, 437.)

3 In *The Law of Restitution* 3rd ed, at 29 Lord Goff and Professor Jones suggested that the law might now have developed sufficiently so as to recognise a generalised right to restitution arising from the receipt of an enrichment. Professor Jones may have since resiled from this, preferring to focus his attention on identifying substantive categories in which it will be unjust for a defendant to retain an enrichment. (*Goff and Jones, The Law of Restitution* 4th ed at 39.)

4 On orthodox restitutionary theory, freedom of choice (and its associated contractual overtones) plays an important role in determining whether a non-monetary benefit, such as the improvement of one's kitchen, constitutes an enrichment. Advancing the argument of "subjective devaluation", Professor Birks suggests the general rule that whether a party has been enriched depends, not on the retention of "some marketable residuum", but on whether he or she "chooses to give [the benefit] value"; "[w]hat matters is his [or her] choice". (Birks, *An Introduction to the Law of Restitution*, Revised Edition 1989, 109-114.) For this reason, not all proponents of the law of restitution would agree with the conclusion that the landlord was enriched. For a contrary view see Scott, "Restitution and the Argument of Subjective Devaluation: When is an enrichment not an enrichment?" (1993) 15 NZULR 246.

Nations co-host first combined Insurance Law Conference

Australia and New Zealand are co-hosting the nations' first ever, joint insurance law conference.

The combined Australian Insurance Law Association and New Zealand Insurance Law Association Conference will be in Wellington, from October 2 to October 4, 1996.

The Conference theme is Claims, Compliance and Consumers – The Current Issues.

The Conference will highlight trans-Tasman insurance issues at a time when the Australian and New Zealand governments are committed to closer economic relations, said John M Morrison, Chairman of the joint AILA-NZILA sub-committee organising the conference.

Mr Morrison said the conference was an opportunity to forge links between the two associations, both of which are chapters of the international insurance law association, AIDA, and allow members to develop closer personal networking opportunities.

For information on the Conference, please contact Michelle Wickens, Conference Organiser, Conference Consultants & Management Ltd, Wellington, New Zealand.
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Domestic violence and children: More mud in cloudy waters?

By Professor Frank Bates of the University of Newcastle, New South Wales, Australia

It is ironic that the category of law known as "Family Law" is really concerned with the breakdown of the family relationship. One of the sadder aspects of it of course is the problems that arise regarding the relationship between parents and children in these circumstances. In this article Professor Bates considers the decision in the New Zealand case of Clough v Greene *and the decision of the High Court of Australia in* M v M. *Both of these cases dealt with the question of risk as an aspect of domestic violence. Professor Bates expresses concern that in this area of law the degree of unpredictability and uncertainty is becoming greater, rather than the law becoming clearer. The author sees an acute paradox in that there is a strongly argued view that contact between child and the non-custodial parent is at the very least highly desirable, and on the other that notions of "risk" can lead to a complete break in the relationship being ordered by a Court. This of course can have a variety of consequences where the break is brought about by the "evidence" of one of the interested parties, namely the other parent. No matter how well intentioned they may be, not all Family Court Judges are blessed with the wisdom of Solomon.*

The recent decision of Judge von Dadelszen of the New Zealand Family Court in *Clough v Greene* [1995] NZFLR 653 raises a number of important issues in relation to the effects of domestic violence generally on children and the application of the landmark decision of the High Court of Australia in *M v M* (1988) 166 CLR 69.[1]

The facts in *Clough v Greene* were that the unformalised relationship between the parties had ceased at the end of 1991. Since 1993, the six-year-old daughter of the parties had lived with her maternal grandparents, though she spent weekends with the mother, who was the respondent in the present case. The applicant father continued to have regular access at the grandparents' home after school hours during the week. He proposed that he would exercise access fortnightly, away from the grandparents' home and during the day. He also agreed to supervised access, at least initially, with his mother as supervisor.

The mother, on the other hand, totally opposed access of any kind and asked that it be suspended until the father could demonstrate that there would be benefit to the child in his having access. The mother opposed access on two grounds: first, the violence which the father had exhibited towards her and, on two occasions, towards the child. Second, it was argued that the father's parenting skills were deficient. In evidence, the mother described a number of violent incidents which, to some extent, were corroborated by her own mother. A psychologist's report tended to support the description of the father as violent and unpredictable and had concluded that supervision of access was an option to be considered. In addition, the father had also failed to undertake an anger management counselling course which had been recommended by the Court. The Judge suspended the father's access until further order of the Court.

The first point to be made is that the Judge did not consider it necessary ([1995] NZFLR 653 at 661) to make specific findings of fact in relation to various incidents of violence which had been alleged and preferred, for various reasons,[2] to accept the version of events offered by the mother rather than that offered by the father. Not needing to make findings of fact is, of course, nothing new in Antipodean family law; thus, in *In the Marriage of Chandler* (1981) FLC 91-008 at 76,107, Nygh J had commented that

> It is a fundamental principle in this Court that where it is clear from the evidence that the relationship between the children and each of the parents is going to continue, the Court should refrain from making findings of fact, unless absolutely necessary, which adversely reflects upon the self-esteem or integrity of each of the parties.

Chandler is of relevance in many ways to any discussion of *Clough v Greene* in that there was some evidence that the husband had corporally punished the children excessively. However, Nygh J did not accept that evidence as establishing a consistent pattern of child abuse and, at the same time, specifically did not comment on the application of physical punishment. That general approach was not wholly followed by Chisholm J in *In the Marriage of J G and B G* (1994) FLC 91-008 at 76,107[3] who took the view that where allegations were made which had an important effect on the children's welfare it would be necessary for appropriate findings of fact to be made. This was especially true where those allegations had been strenuously denied and the Court, in effect, was asked to find that the allegation had been concocted. That was not apparently the case in *Clough v Greene*[4] but Chisholm J in *J G and B G* considered that findings of fact in cases involving domestic violence – so that *J G and B G* is immediately in point in discussion of *Clough v Greene* – might be impor-

tant in relation to the determination of other issues.

The major issue, as Judge von Dadelszen himself pointed out ([1995] NZFLR 653 at 661), was the relevance of the violent relationship between the parents to the issue of access. Initially, the Judge noted article 9(3) of the United Nations Convention on the Rights of the Child[5] which states that:

> State parties shall respect the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

That view is reflected in a significant report by the Australian Family Law Council, *Patterns of Parenting After Separation* (1992) which concludes (at 17), after a review of social science literature, that most children want[6] and need contact with both parents. Their long term development, education, capacity to adjust and self esteem can be detrimentally affected by the long term or permanent absence of a parent from their lives. The wellbeing of children, the Council states, is generally advanced by their maintaining contact with both parents as much as possible.

More controversially, however, the Judge went on to refer to the test propounded by the High Court of Australia in *M v M* (1988) 166 CLR 69 at 78 that access should be denied in cases where there was an *unacceptable risk* (author's italics) of sexual abuse. Judge von Dadelszen was emphatically of the view that there was no reason why that should not apply in all cases of abuse. The present writer finds this comment somewhat disturbing. First, it is suggested that the test is itself flawed in that it is so patently subjective and is not tied to any generally recognised standard of evidential proof. From the point of view of the New Zealand reader, its application as it refers to child sexual abuse in that jurisdiction has been hard to evaluate accurately because of the difference in approach which New Zealand Judges have taken towards it. Without seeking to rehearse the various attitudes demonstrated by the Judges in *Y v M* [1993] NZFLR 609 (HC; sub nom *M v Y*[1994] NZFLR 1 (CA)) and *S v S* [1993] NZFLR 657 (HC); [1994] NZFLR 26, (CA), as that has attempted elsewhere,[7] but it should be said that the discrepancies which are demonstrated by the decisions in both the High Court and Court of Appeal are such as to cast doubt on the *M v M* test itself. Thus, it is submitted that any extension of it to areas not directly concerned with child sexual abuse is undesirable.

Of course that does not mean that domestic violence is an irrelevant factor in making custody or access determinations. In *Clough v Greene*, Judge von Dadelszen noted ([1995] NZFLR 653 at 663L) that Courts in New Zealand were substantially mindful of the effects of violence and what is required to be done to protect victims who are unable to protect themselves. The issue, though, in *Clough v Greene*, as it was in *In the Marriage of J G and B G*, is not the effects of directly inflicted violence, which are readily assessable, but the indirect effect. These effects have been addressed by a United States commentator, Walker, who comments that:

> ... children who live in a battering relationship experience the most insidious form of child abuse. Whether or not they are physically abused by either parent is less important than the psychological scars they bear from watching their fathers beat their mothers. They learn to become part of a dishonest conspiracy of silence. They learn to lie to prevent inappropriate behaviour, and they learn to suspend fulfilment of their needs rather than risk another confrontation. They do expend a lot of energy avoiding problems. They live in a world of make believe. (L Walker, *Battered Women* (1979) at 46).

More specifically, children's reactions to their parents' violent relationship seem to be similar to those children who have themselves been physically abused.[8] Infants who witness violence are often characterised by poor health, poor sleeping habits and excessive screaming – all of which may well contribute to further violence towards the mother.[9] As children become older, further symptoms tend to develop: younger children *appear* to be more likely to experience somatic complaints and regress to earlier stages of functioning. Still more disturbing is the finding[10] that such children, whilst initially sympathetic to their mother's plight, sometimes replace that sympathy with anger and overt hostility as they mature. In turn, adolescents may become manipulators of the family system,

> ... not allowing mother to leave and disrupt the accustomed routine. Mother's suffering is part of the daily routine, and teens may depersonalise her and blame her for the family problems. Sadly, both boys and girls have been known to participate in the beating of their mother after having witnessed such behaviour over many years. (see fn 9, below.)

There may also be gender-related difficulties in the reaction to the phenomenon: males have been reported (see fn 8, below) as being disruptive, acting aggressively towards people and objects and throwing severe temper tantrums. Conversely, females are more likely to develop various somatic complaints and to display withdrawn, passive and dependent behaviour. (see fn 9, below.)

Judge von Dadelszen has commented that:

> All the research in the world cannot provide the particular answer for the particular facts. All that I can do is to frame the appropriate answer, bearing in mind what the research tells me but adopting a commonsense approach to the question: what access is appropriate, bearing in mind that the welfare of the child is the Court's first and paramount consideration? ([1995] NZFLR 653 at 665.)

This part of the judgment causes the writer some concern: first, as I have pointed out[11] in another context, one person's common sense is another person's idiocy. Adding the aspect of common sense to the *M v M* test is likely to lead to an even greater degree of unpredictability and uncertainty. Second, the Judge referred to a statement by Jeffries J in *R v C* (1985) 2 FRNZ 8 at 12, to the effect that a parent was entitled to access unless there were grave and

weighty reasons why it should be denied. Throughout the common law world, there has been a move away from that school of thought. In Australia, particularly, that notion has largely been rejected. Thus, in *In the Marriage of Brown and Pederson* ((1992) FLC 92-271 at 70,001 per Ellis, Nygh and Bell JJ) the Full Court of the Family Court of Australia took the view that free access was not a right of a parent for which she or he should be deprived for good and compelling reasons. It is a question, in each case, of determining whether the paramount interest of the child indicates, one way or another, the desirability of access.

At the same time, Judge von Dadelszen did refer to the unreported decision of Judge Inglis in *Y v Z* (Family Court, Palmerston North, FP 054/180/92, 27 July 1994) in which it was said that:

> A child's welfare and interests therefore depend on the parent's own responsibility and obligation to nurture and protect in the widest sense. The true emphasis in a disputed access case, will lie in the ability or willingness of the parent who wishes to have access to discharge that obligation appropriately and in the welfare interests, not of the parent, but of the child.

The Judge's reaction to these apparently contradictory dicta was to say, in support of the latter, that to speak of a "right" assumed some kind of presumption which, in turn, was not especially helpful. ([1995] NZFLR 653,657) That is in the mainstream of contemporary thought; thus, for instance, the High Court of Australia in *Gronow v Gronow* ((1979) 144 CLR 513 particularly at 522 per Stephen J) rejected an apparently entrenched presumption that young children, especially girls, were better in the custody of their mothers.

Judge von Dadelszen then turned his attention to the immediate applicability of the *M v M* test to the facts of *Clough v Greene*. In so doing, the Judge made reference to the decision of the Full Court of the Family Court of Australia in *In the Marriage of B* (1993) FLC 92-35y.[13] That case is of interest in relation to *Clough v Greene* because the Court firmly set its face against the use of supervised access where there was an unacceptable risk of child sexual abuse. It will be remembered that the father was prepared to accept supervised access. It should be said that *In the Marriage of B* has not been uniformly accepted; thus in *K v B* (1994) FLC 92-478, Ray J in a dissenting judgment, was critical of the decision in *In the Marriage of B* on the grounds that it tended to preclude contact between a child and the non-custodial parent.

On the specific issue, the Judge found ([1995] NZFLR 653 at 668), that unsupervised access would in, all the circumstances, represent an unacceptable[14] risk to the child. The father had proposed that access take place at the home of his mother: that was an issue which had specifically been addressed in *In the Marriage of B* (1993) FLC 92-357 at 79,780, where the Court, reinforced by both experience and social science,[15] took the view that it was normally inappropriate to have friends and relatives of the access parent supervise the access where any risk existed. The reasons why that stand was adopted was that those people could not be neutral and would have already formed an opinion as to whether any abuse had, in fact, occurred or whether any risk existed. It followed that they might believe that close observation of the children was not necessary. In addition, Judge von Dadelszen referred ([1995] NZFLR 653 at 670) to the view which had been expressed by Caldwell[16] that supervision of access necessarily introduced an element of artificiality into access strategies which did not help their purpose and justification. Accordingly, access was suspended, although it was provided ([1995] NZFLR 653 at 670-671) that telephone contact was permitted and, were the father to undergo anger management counselling and parenting tuition, access could be recommended by a named family centre.[17]

Clough v Greene represents a very acute paradox in family law issues. On the one hand, there is the continually expressed view that contact between child and non-custodial parent is, at the very least, highly desirable and, on the other, that ephemeral notions of "risk" are sufficient to deprive a non-custodial parent of all access. It may well be that the present writer, whose other major interest is in evidence law, is the wrong person to comment on the case, because he believes that supposition and suspicion ought not to replace accepted standards and burdens of proof. There can be no doubt that abuse can have lasting consequences for the child victim but, at the same time, there may be similar consequences, for the alleged perpetrator, as indeed for the child, of an erroneous finding. Given the proper community revulsion towards child sexual abuse, perhaps the "unacceptable risk" test was an inevitability. However, it is submitted that it may be seriously inadequate, especially when the matters noted in the *Patterns of Parenting* report are taken into account. Put another way, it may be that more, rather than less, traditional legal safeguards are needed to protect the interests of all concerned. ❑

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1 For critical comment on this decision, see F Bates, "Evidence, Child Sexual Abuse and the High Court of Australia" (1990) 39 *ICLQ* 413.

2 The reasons given by the Judge, ibid, were as follows: "(1) The evidence given by the mother and her own mother had the ring of truth about it. It was given calmly and in a matter of fact way. It might be said that the very lack of emotion in itself lends credence to what I heard. (2) On the other hand, the father's evidence was not as convincing. On a number of occasions he was unable to recall specific incidents but said that matters could not have happened as described. His demeanour while giving evidence was not always helpful to his case. (3) I would have expected that father to have remembered his conviction for assault on an earlier girlfriend even though this occurred about ten years ago. At first he said he had no convictions for assault but a Wanganui Computer printout (obtained during the hearing with his consent) showed that not to be the case. Even then, the father minimised the offence, saying it was "not vicious" or "intentional", "just one of those things". (4) To give him credit, the father did acknowledge that, while he could not recall it, the mother's evidence could be correct when she told of the late night phone call about 18 months ago, as a result of which she left her home with Jessica. (5) The mother gave evidence (which the father agreed was correct) of trying to persuade him to have anger management counselling and she brought home information about this for him to read. (6) The mother's evidence that she was fearful of the father was largely accepted by him. (7) The father admitted losing control."

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Religious practices and beliefs: A case for their accommodation in the Human Rights Act 1993

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The author suggests that the involvement of the law to a continuingly greater degree in areas of religion and private morality – to be distinguished of course from questions of public morality – might cause a clash of a constitutional nature. The paper argues the need for greater legal protection to be available for what he describes as religiously motivated behaviour.

The writer acknowledges the valuable comments made by Mr P Rishworth, Senior Lecturer in Law at Auckland University.

Introduction

New Zealand has had very few major constitutional battles in the past and this is especially true in the area of religious belief and expression. However, this may change for the seeds are present in the Bill of Rights Act 1990 and the Human Rights Act 1993 to precipitate a religious clash that would not otherwise have surfaced prior to the 1990 Act. This paper will examine the clash between these two Acts and after considering whether a further exemption is required in the Human Rights Act 1993 conclude that a general accommodation for religion is necessary.

The writer will argue that there is a dissonance between the guarantees of equal treatment under the Human Rights Act and the religious freedoms granted under the New Zealand Bill of Rights Act. This can best be seen in two areas, namely housing and employment.

An example of the problem

Consider the example of a landlord with strong religious beliefs who may wish to object to renting his/her property to a gay couple on the basis that such behaviour is sinful and to provide rental accommodation is to assist them in their sin. A landlord who discriminated on this basis would face proceedings under s 53 of the Human Rights Act. If the tribunal found that there had been a breach of the Act, would the tribunal in doing so infringe the landlord's Bill of Rights freedom to manifest his/her religious belief (s 15) and also the right to freedom of religion (s 13).

At the same time, the problem similarly arises in the employment situation. Consider the situation of an employer who has strong religious beliefs and refuses to employ persons other than those who hold the same religious beliefs and practices. Similarly, if proceedings were to be brought against an employer under s 22 of the Human Rights Act would the tribunal infringe the employer's rights of religious freedom under ss 13 and 15 of the Bill of Rights Act?

An inconsistency

It is noted under these two Acts that a tenant or employee is protected and may be able to express his or her religious views and a landlord or employer will be required to permit this. Yet, the Human Rights Act does not treat the religious landlord or religious employer the same, or give him or her the same recognition as the religious employee or tenant. While the Human Rights Act purports to ensure everyone is treated the same, it in fact tends to overlook religious landlords and religious employers. In legal parlance, the Human Rights Act would be said to be under-inclusive.

This paper will look at the impact of the religious freedoms under the Bill of Rights upon the Human Rights Act. It will be concluded that the Human Rights Act in its present form does not truly accommodate religion and further an exemption is required to give effect to the rights of religious freedom under the Bill of Rights Act.

Attention will now be turned to consider how the New Zealand Courts will implement the rights to religious freedom under the Bill of Rights Act. Since there is no significant New Zealand case law history in religious matters attention will be given to the law of religious freedom in the United States of America. Religious freedom in American law has a long history and the problems that are being dealt with in this paper have been extensively canvassed during this history. The Canadian religious freedom under the Charter of Rights and Freedoms is still in its infancy and from the writer's perusal of their law, does not consider that their principles are well enough developed and tested to deal with the problems being considered in this paper.

An historical perspective on religion in society

The right to freedom of religion under the Bill of Rights is an important fundamental constitutional right. Because of the lack of political religious history in New Zealand and the lack of overt opposition to religious practices in New Zealand, the concept of religious freedom has not been one that has been contested. However, if one looks to the United States it is seen that the right to religious freedom has been carved out with much controversy and argument. The United States' history is based on one of migration of people from Europe and Great Britain who

sought to escape the persecution in their own countries. For them their right of religious freedom was one of the most important rights to be secured and this became enshrined in the first amendment to the Constitution of the United States which states "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof ...."

Men and women throughout early American history strove to preserve their religious freedoms and prevent interference and persecution. This idea became very important to the development of the Constitution in the United States.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property, free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend on the outcome of no election. (Salhany, Hon RE *The Origin of Rights* 1994, 21.)

This background to religious freedom in the United States contrasts quite strikingly with the New Zealand situation where the colony was not populated by migrants who had strong beliefs seeking escape from persecution but rather by adventurous persons seeking to improve their lives. At the time that people were immigrating to New Zealand, religious persecution was not a predominant concern to them.

In Canada the right to religious freedom which is guaranteed in the Charter of Rights and Freedoms was like New Zealand, a very recent step born out of a nation's growth and maturity. In order to strengthen the principle of democracy undergirding these countries, it was considered that greater protection of fundamental rights and freedoms is essential and accordingly, the New Zealand Bill of Rights and the Canadian Charter of rights and freedoms were enacted.

In the Canadian case of *Regina v Big M Drugmart Limited* Chief Justice Dickson stated:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of taste and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s 15 of the Charter. Freedom must surely be found in respect for inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practise or by teaching and dissemination .... Freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and cannot be said to be truly free .... Or what may appear good and true to the majoritarian religious group or to the state acting at the behest, may not, for religious persons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority". ((1985) 18 DLR (4th) 321, 353-354.)

While the United States right to freedom of religion evolved out of a history of religious fervour and similarly in Canada, although to a much lesser extent New Zealand by contrast is not known for religious political controversy. This is not to say that there is no great religious community in New Zealand, but rather that there has been no great entanglement between the state and religion, until now anyway. However, the seeds for such a clash are now present in the New Zealand statute books.

The writer's following characterisation of New Zealand society is an attempt to give some indication of New Zealand society's view of religion. Society at one time considered divorce an undesirable practice and it was strongly frowned upon. Divorce proceedings required cogent evidence and blame was attributed to one of the parties. Now in the 1990s, divorce, or more politically correct dissolution of marriage, is simpler and not frowned upon. Society has turned 180 degrees in this regard.

Similarly, in regard to religion which was once accepted and played an important part in daily living, it is now frowned upon and in general ignored as perhaps silly nonsense of the feeble-minded.

What we take from these brief historical ramblings is that New Zealand does not have a strong religious background undergirding its Bill of Rights protection of religion, unlike the United States and Canada. This must be kept in mind when a religious contest arises in legal proceedings in such areas as housing or employment in the problems mentioned above. The lack of a historical background may result in a weak view being taken of religious freedoms.

The New Zealand Courts' view of religious freedoms

If a clash were to arise about the right to religious freedom under the Bill of Rights and the requirement for non-discriminatory activity under the Human Rights Act what would be the outcome if the matter reached the Court of Appeal under s 124 of the Human Rights Act? Of course, one can only speculate at this time for there has been no judicial decision on religious freedom argued before the Court of Appeal. Most of the Bill of Rights cases to date, have arisen in criminal proceedings. However, one can glean something from the approach taken by the Court of Appeal in how the Bill of Rights is going to shape up under its judicial hand.

It is noted that in 1985, one academic writer after surveying New Zealand Court of Appeal decisions found that the Court of Appeal viewed itself as the guardian of New Zealand's fundamental freedoms and would override Parliament if it were necessary despite the doctrine of parliamentary sovereignty. This academic writer said:

> Notwithstanding this traditional understanding, the New Zealand Court of Appeal lead by Cooke J has suggested as obiter dicta in a

> series of recent decisions, that if parliament were to enact legislation purporting to take away certain common law rights, that legislation would not be upheld by the Courts. For example, Parliament may not be able to take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights. (Harris BV "Bill of Rights Redistribution of Power" [1985] NZLJ 49, 51.)

While the Court of Appeal's intention concerned fundamental rights one wonders whether it would consider religious liberty as such a right over which it is worth opposing Parliament. This can only be surmised from non-religious cases. When the Bill of Rights Act clashes with another statute how has the Court of Appeal in the 1990s responded? Since the Bill of Rights is an affirmation of fundamental rights and freedoms has the Court of Appeal lived up to its earlier intentions. Some indication of the Court's approach can be seen from the case of *R v Laugalis* in 1993. In this case a clash arose over a warrantless search under s 18(2) of the Misuse of Drugs Act 1975, which required as a condition to such search a reasonable ground of belief, and s 21 of the Bill of Rights Act which states everyone has a right to be secure from unreasonable search and seizure. The Court stated that there would be instances when what is unlawful is not necessarily unreasonable and conversely what was lawful was not necessarily reasonable. The Court after considering the nature of s 21 and the specific facts, in particular that there was no urgency and resort to the s 18(2) power was unnecessary and so unreasonable for the purpose of s 21 of the Bill of Rights was to ensure that a lawful power was not exercised unreasonably.

Will the Court similarly read down the Human Rights Act in regard to the issue of employers and landlords claims to religious freedom? It is hard to see how this could be done on the face of the current wording of ss 22 and 53 of the Human Rights Act. Maybe the only possible angle that could be explored by the Court would be a s 97 Human Rights Act exception for a "genuine justification". At this time there is no indication as to what is meant by a "genuine justification". Will it be construed to mean any justification that a proponent puts forward based on reasons genuinely held by the party, the emphasis being on the party's sincerity? Or will it be viewed as any necessary qualification required to properly deliver the good or service or whatever? It is most likely that the term is bound to take colour from the earlier term "genuine occupational justification" as prescribed by the ejusdem generis rule.

Also as the "genuine justification" is confined to ss 42 to 60 of the Act it will only impact on landlords.

The provisions relating to employers are in the earlier sections. Accordingly the exception in s 97 is unlikely to be given any significance by a Court in the context of the problems raised by this paper and it is submitted to be of no benefit to those claiming a right to religious freedom.

Clearly, the Court of Appeal will not quickly dilute the fundamental rights and freedoms contained in the Bill of Rights, for to do so would be to undermine the premise in the White Paper introducing the Bill of Rights in 1985 wherein the Minister of Justice, Geoffrey Palmer, stated that:

> A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multi-cultural society. The adoption of a Bill of Rights in New Zealand will place new limits on the powers of government. It will guarantee the protection of fundamental values and freedom. It will restrain the abusive power by the executive branch of government and parliament itself ... a Bill of Rights is a mechanism by which governments are made more accountable by being held to a set of standards. (House of Representatives White Paper. A Bill of Rights for New Zealand, A6.)

However the final form of the Bill of Rights Act did not reflect the proposals in the White Paper and ended up significantly departing from it. The Bill of Rights was not enacted as the supreme law of New Zealand as proposed. Instead it is merely an ordinary statute outlining certain principles to be observed.

While the case of *Laugalis* indicates the Court can and will read down statutes conflicting with the Bill of Rights this is probably unlikely in the context of employer's and landlord's claims to breach of their religious freedoms by the Human Rights Act.

While the Court of Appeal will affirm the Bill of Rights freedoms they will not be viewed as absolute rights and freedoms and this does raise some concerns for a religious landlord or employer who wishes to discriminate when letting property or employing staff.

In the United States the Court's view the right to religious freedom under the first amendment as inviolable and will strike down legislation which is inconsistent with this right. For example, in the case of *Evelyn Smith v Fair Employment and Housing Commission 1994*, the Californian Court of Appeal ruled that the Californian Fair Employment and Housing Act prohibiting a landlord from discriminating against an individual on the basis marital status infringed the applicant's first amendment rights of religious freedom. The writer's view is that the judiciary in New Zealand is unlikely or unable to take such steps to protect the right to religious freedom. Part of the reason may be because the New Zealand Bill of Rights Act is not entrenched. The White Paper provided under article 28 that the Bill of Rights could not be amended or appealed without a majority of 75 per cent of the House of Representatives or a majority of electors' votes cast at a poll. This was not implemented in the Act. This is significant and will have an effect on the upholding of the right to religious freedom in New Zealand.

It is interesting to note that although the New Zealand Bill of Rights was modelled upon the Canadian Charter of Rights and Freedoms, the New Zealand Bill fails to recite reliance upon the principle of the supremacy of God, unlike the Canadian Charter which clearly recognises this as its basis.

The New Zealand Bill of Rights' omission of this statement perhaps gives some indication of the low status placed upon religious freedoms. Parliament would appear to view religious freedoms no differently from any other freedoms under

the Bill of Rights Act. This is a striking contrast to the views taken in the United States and Canada as discussed above.

The New Zealand Courts are unlikely to take affirmative action to accommodate religion in the face of inconsistent legislation. However, this may be the more prudent approach for the question arises whether the judiciary should be involved in policy matters of accommodating religious matters. Rolf Martin, a Canadian lawyer in regard to Canadian freedoms argues that the Charter transfers too much power to the Courts and that this should be reclaimed by the people through the House of Representatives. ("A bad idea to give Judges wide Charter Powers" [1987] NZLJ 136, 136-137.)

While it seems unlikely that the New Zealand Courts will assert themselves to rigorously protect religious freedoms under the Bill of Rights, it may also be argued that it is undesirable for them to do so. The Courts may be responsive to the individual needs of minority religions but this only will benefit parties on a case to case basis. For a religious person or group to establish it has a right to do something that would otherwise amount to discrimination under the Human Rights Act, they will in each instance be required at considerable financial cost to wend their way through the Court system. This is unsatisfactory. Also to have the Courts granting exemptions would pre-empt the Government's role in legislating and its intention to deny religious exemptions. The idea here is that the government is in a better position than the Courts to determine the nature of its policies. Nevertheless, in New Zealand it seems unlikely that the judiciary will take affirmative action and grant judicial accommodation.

The United States Courts' view of religious freedoms

When surveying the American case law and the Courts' application of the rights to religious freedom, one notes very quickly an ambivalence of judicial opinion to granting accommodation to religious freedom. Generally, exemptions sought for religious reasons have not succeeded in American Courts. The various religious exemption cases are inconsistent. The likely outcome of a religious exemption claim to the Supreme Court of the United States is generally unpredictable.

There are a number of recent American decisions in the lower Courts which consider a landlord's claim to religious freedom to discriminate and refuse to rent housing to parties on the basis of their marital status. The objection is that they live together in a de facto relationship without the sanction of marriage. In three of these decisions, various lower Courts upheld the landlord's first amendment to claim to an exemption for religious freedom. These cases are *State v French* 1990 in the Supreme Court of Minnesota, *Evelyn Smith v Fair Employment and Housing Commission* 1994 in the Court of Appeal of California, 3rd Appellant District and also *Attorney General v Paul Desilets* 1994 in the Supreme Court of Massachusetts. It was decided in these cases that the state did not have a compelling interest to protect unmarried couples living together. In the case of *State v French* there was a provision on the statute books prohibiting fornication and this obviously played some part for the Court could not punish French so as to cause her to disregard a statute prohibiting fornication.

At the same time as these decisions were given, the Supreme Court of Alaska in 1994 in the case of *Swanner v Anchorage Equal Rights Commission* refused to grant a religious exemption considered Swanner's first amendment defence of religious freedom to uphold discrimination against potential tenants who were unmarried couples living together. The Court held that the state had a compelling interest in supporting prohibitions on marital status discrimination.

The Supreme Court has upheld claims for religious exemptions in the case of *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v Amos* in 1987. In this case the Mormon Church owned and operated a public gymnasium. Amos, who had been the assistant building engineer for many years was fired for refusing to join the Mormon Church. The Church claimed a religious exemption and this was upheld by the Court. Similarly, in the case of *Wisconsin v Yoder* in 1972, the Court accommodated an old order Amish religious group by granting an exemption to allow them to withdraw their 14- or 15-year-old children from school on religious grounds, even though the state's statute required children to attend school to the age of 16.

While the above cases of *Amos* and *Yoder* indicated the American Court's potential openness to accommodating religious freedoms, the previous principle of heightened scrutiny was dashed in the 1990 Supreme Court case of *Employment Division, Department of Human Resources v Smith*. In this case, the majority of the Court limited the application of the accommodation principle in free exercise cases. In this case, two members of the native American Church had been dismissed from the job for ingesting peyote, a controlled substance. Because they had been dismissed for alleged work related conduct, they were disqualified for an unemployment benefit. In their argument against their disqualification, they claimed the right to religious freedom under the free exercise clause because they had used peyote as part of a religious ritual. The Court would not accept this and the religious exemption was not granted. This decision has been extensively discussed and criticised in the legal literature and for our purposes this case highlights the uncertainty and inconsistency with regard to judicial accommodation of religious freedom.

The uncertainties and inconsistency in the judicial application of the first amendment resulted in the United States Congress passing the Religious Freedom Restoration Act in 1993, which provides that government must not substantially burden a person's exercise of religion unless it can be demonstrated that the application of the burden to the person concerned is in furtherance of a compelling government interest. (*Swanner v Anchorage Equal Rights Commission* 1994 Alas Lexis 40, 1994 US Lexis 7499.) Clearly, this move indicates society's concern with the judicial approach to religious freedom and sent a clear message as to what was expected. The writer considers that the New Zealand Courts will similarly not necessarily take a strong lead in accommodating religious freedom

particularly in light of the limitations contained in the Bill of Rights Act, namely ss 4 and 5. This points the way to the need for religious accommodations to be more adequately dealt with by Parliament.

Religious landlords and employers cannot confidently rely on the New Zealand Court of Appeal to accommodate their religious beliefs in employment and housing matters. Accordingly, attention will now be given to legislative accommodation of religious beliefs in such situations.

It is the writer's submission that there is a case for the New Zealand Government to include within the Human Rights Act further exemptions to accommodate the religious beliefs of landlords and employers. In the absence of a compelling state interest, the government must also exempt these people from general laws that would otherwise burden their religious beliefs and practices. The constitutional right of religious freedom under the Bill of Rights Act necessitates such an approach. However, the political theory that underlies and motivates our society says that society should interfere as little as possible with an individual's activities, for individuals must retain their status as free, choosing, rational planners as far as possible and for government to legislate for particular groups would be to upset and interfere with this proposed order of things in society.

The liberal state is characterised and committed to the concept of neutrality and accordingly, committed to maximising the liberty of citizens to ensure an equal claim to such liberty by all as far as possible. New Zealand is currently in the grips of such a minimalistic view of society as seen by the various government withdrawals from parts of society that it had earlier regulated.

Nevertheless the principle of neutrality would propound an equality between religious belief and practice and non-religious belief and practice. Religious believers and non-believers would be treated as equal subjects. However, the formal concept of equality requires that similar individuals be treated similarly and different individuals treated differently. Religion is differently situated from non-religious practices and accordingly, entitled to be fully accommodated by government and its legislation.

Before discussing some of the reasons supporting accommodation, the discussion will turn to outline the difficulties faced by religious people in society.

Difficulties faced by religious people

Stephen L Carter in his book *The Culture of Disbelief* outlines how American society is one of the most religious nations in the world, yet, its religion is not taken seriously. He cites an example of society's attitude to religion when he says

> One good way to end a conversation – or start an argument – is to tell a group of well-educated professionals that you hold a political position (preferably a controversial one, such as being against abortion or pornography) because it is required by your understanding of God's will. In the unlikely event that anyone hangs around to talk with you about it, the chances are that you will be challenged on the ground that you are intent on imposing your religious beliefs on other people. In contemporary political and legal culture, nothing is worse. (S L Carter *The Culture of Disbelief* 1994, 23.)

This example highlights a certain indifference to religious beliefs as a valid contribution to politics and society. Stephen L Carter suggests that society views God as a hobby and not to be taken too seriously. Another academic writer, Frederick Mark Gedicks, goes further and says that public life is hostile to religion. (in (1992) *Virginia Law Review* 671.) Religious arguments are not taken seriously in contrast to secular ones which are. The above comments are interesting in light of the proposition that America is a religious society. Stephen L Carter quotes a survey conducted by a national magazine into prayer where it considered how many people prayed, how often, why, how and for what purpose. The survey indicated that 9 out of 10 Americans believe in God and some 4 out of 5 pray regularly. (*The Culture of Disbelief*, 4.) The writer expects that if a similar nationwide survey were conducted in New Zealand that the results would be far less impressive and indicate that a much smaller proportion of population believe in God, let alone pray regularly. As the academic writer, Paul Rishworth states, "religion and religious belief have a low profile in New Zealand". (Human Rights Act 1993 Seminar Proceedings, 12.) Given that American society is ostensibly religious and yet not willing to take religion seriously does not augur well for the future of religious freedom in New Zealand society where there is less interest and general practice of religious beliefs.

Recent examples in American society of its failure to take religious freedom seriously can be seen in the abovementioned case of *Employment Division, Department of Human Resources v Smith* where the Court rejected a claim for a free exercise exemption to the use of peyote. The two dismissed employees claimed they used this substance as part of a religious ritual and were entitled to a free exercise exemption. The Court was rightly concerned that to grant an exemption may open the door to other claims for the use of marijuana, cocaine and such and it was society's job to avoid harm to individuals, stamp out violence and criminal activity and such. However, the use of peyote is different from other substances for it is not an addictive drug and so abuse is unlikely to increase. Interestingly enough, it does not produce a pleasant experience and will generally leave a severe nausea and vomiting. While it is a hallucinogenic drug it would clearly seem not one about which to be concerned. Its use is probably restricted to a religious group using it in its ritual.

There would seem to be no serious health or social problem that would arise from its use yet the Court was clearly not prepared to entertain the possibility that a religious exemption was warranted in this situation. One may ask why would the Court take this view in such an innocuous situation. It would seem that even though the peyote use had religious significance, the Court considered it irrelevant and was not interested in protecting unusual or "off beat" religious groups. Stephen L Carter in response to the claim of the first amendment as a defence says that

> the majority scoffed at this claim, not so much disbelieving it as disregarding it. The fact that peyote use had religious significance, the Court said, was irrelevant as long as the state law was not an attempt to regulate religious belief ...

and went on to say "the judgment against the native American church however, demonstrates that the political process will protect only the mainstream religions not the many smaller groups that exist at the margins". (*The Culture of Disbelief*, 128.) It is generally the unusual or "off beat" religious groups that have practices that do not accord with the norms of society. Mainstream religions on the other hand, will often have their practices built into society's conventions and will often be un-noteworthy.

Another example where society was unwilling to recognise the religious practices of a group was in the case of *Lyng v Northwest Indian Cemetery Protective Association* where the Supreme Court in 1988, had to consider a claim for an exemption by a group of native Americans who objected to a logging road being constructed in a national forest through ancient worship sites. While the Court acknowledged that the logging road would destroy the Indians' ability to practise their religion, the Supreme Court nevertheless permitted the logging road to be constructed.

Why did the Court not consider other options of logging so as to preserve the worship site? Once again, there seems to be a reluctance to accommodate religious belief and take it seriously. It is interesting to note that the claims for religious exemption in America (where very few have succeeded) have been made by minority and "off beat" religious groups, rather than the mainstream and orthodox religions.

An early New Zealand case where a religious exemption would have saved an employer the embarrassment and cost of a human rights prosecution, was that of *Human Rights Commission v The Eric Sides Motor Company Limited* in 1981. In this case, Mr Eric Sides, an evangelical Christian, who owned a Christchurch garage, advertised for a forecourt attendant, stating that he required "a keen Christian person". A Mr Robinson contacted Mr Sides and during a telephone discussion it was clear that Mr Robinson was not a practising Christian and Mr Sides advised that there was no need for him to go in for an interview. Mr Robinson's mother lodged a complaint with the Human Rights Commission that Mr Sides had discriminated on religious grounds by refusing to employ Mr Robinson and also the advertisement had been discriminatory.

The case gained national attention and the National Party and others expressed concern at the interference of bureaucracy in the operation of private enterprises. The Prime Minister of the day, the Right Honourable R D Muldoon, reacted stating "the law is an ass". (*The Press*. Christchurch. 13 May 1981, p 1.) There was a move to provide an exemption to s 15 of the Human Rights Act 1977 for employers of six or fewer persons. While the proposed amendment would provide for greater flexibility and allow for preferential treatment, it was not done to protect religious freedom but rather for economic reasons. However, the bill that was brought before Parliament did not provide a general exemption to small firms but was finally enacted in a more diluted form and became known as s 15(7a). The amendment did not provide an exemption, per se but rather put the onus upon the employer to show that he or she had special circumstances that required the duties to be carried out in a particular manner so that preferential treatment based on religious grounds was necessary. The amendment that came out of the *Eric Sides* case indicates a reluctance to fully accommodate religious belief. Only if an employer can show that the religious discrimination is a necessary requirement to carry out the job would the exemption be available.

Certainly, for such religions as the Moslem faith where the preparation of food must be carried out in a particular way by adherence to the Islam faith, then discrimination for hallal slaughter would be exempt. However, it is said that it is not a religious requirement for a Christian businessman to have his or her employees conduct certain rituals before they carry out their work, such as praying over the clutch repairs or whatever.

This approach to religion highlights the lack of seriousness that the secular community has towards religious beliefs. For it may be that it is not an essential ritual that one pray over the clutch repairs before a garage mechanic commences. Nevertheless it may be that many religious believers take the view that a certain heart attitude is an important part of their religious practice and having an attitude of prayer throughout the day is important when going about one's daily activities. In such a case, a religious employer may want to employ somebody with similar religious views. This was borne out in the 1994 decisions of *The Proceedings Commissioner v Neville Boakes* where Mr Boakes, who was an exclusive Brethren church member in Dargaville, purchased an auto electrical business which provided that the existing staff member, Mrs Mclean was to be retained. Sometime after having worked with her, Mr Boakes dismissed her on the basis that his religious beliefs did not permit married women to work. Mr Boakes was found to have discriminated upon a prohibitive ground, namely, marital status, and various orders were made against him. Had religious practices been taken more seriously and accommodated in the Human Rights Commission 1977, then Mr Boakes' religious beliefs would have been able to be taken notice of. It seems ironical that a religious employer can be punished and ordered to pay certain damages when expressing his or her religious belief while an employee will not and is given an exemption.

This failure to protect certain persons' religious beliefs was seen again recently when the Human Rights Commissioner wrote to a religious book binder advising that he could not refuse his binding services to another person upon religious grounds. The book binder had been requested to do work in regard to blasphemous material which he found offensive. While the matter did not go to a hearing as the complaint was withdrawn the Commissioner's view that in this situation the Human Rights Act would be contravened again highlights the lack of genuine recognition of religious beliefs in our society. The religious book binder is precluded from living out his Christian life in his business activities by being required to be involved in

certain activities (that is binding blasphemous material) contrary to his religious beliefs and practices. Apparently it was irrelevant that the same binding service could be offered elsewhere by another binder who had no religious concerns over the material. Why should the public have unconditional access to the religious book binder's services regardless of the impact upon him. This results in treating the book binder unequally with the added insult that his religious beliefs do not matter.

Perhaps another reason for society's lack of interest in accommodating religious practices is the distinction between public and private matters. This idea also springs out of liberal political theory where it is considered that matters of the private life are a threat to political institutions and accordingly must be kept within the confines of the private. The public realm is to do with the collective interests of society and it is the government's role to serve this interest rather than the individualistic pursuits of the private realm.

One of the reasons for this is the fear of anarchy. It is considered that religious-based exemptions from general laws will result in legal instability and unpredictability. As one writer has said "to protect the exercise of conscience in all things would effectively render every citizen, at his own option, a law unto himself". However, such a criticism of religious exemptions is ill-founded for there have been exemptions in the New Zealand Human Rights legislation albeit limited and this has not shown any indication of destabilising New Zealand society. A religious exemption will not produce anarchy in the sense of disorder and lawlessness. Rather it enables the religious believer the right and freedom to obey a different law in the matter in issue, rather than the State law. The religious employer or landlord is not arguing that they be a law unto themselves but rather have the right to obey a higher law because of their religious beliefs.

Another reason for rejecting the private/public distinction is that it is not acceptable in a modern society with a high degree of state regulation which may unintentionally impact upon religious practices. If society is going to regulate human behaviour it must ensure this does not undermine fundamental freedoms and if necessary provide exemptions to ensure this.

One of the other concerns that is raised regarding religious exemptions is that it is a matter outside the boundaries of normal state activity. Religion is about spiritual and theological matters which as the writer has stated, is a private matter. The difficulty raised in this situation is that religion is regarded as a subjective matter not easily open to examination and verification according to the objective scientific principles upon which Western society relies. As a result religious beliefs are marginalised and secularism becomes the dominant approach.

The scientific approach requires objective proof. To say that "God requires is" or "God did it" is rejected by society as being unhelpful. However, this approach amounts to not taking religion seriously, for religion is important to the people who adhere to it for it affects their daily life. If the Human Rights Act is predicated on the notion that everyone should be treated equally, then clearly, religious beliefs must be accommodated by the Act, even though they may be subjective and unable to be rationalised. The private/public distinction can no longer be said to be valid in the 1990s approach of equality of treatment.

The reason for legislative accommodation

The corollary of the above discussion is that accommodation is important to protect religious liberty. Accommodation has social value of constitutional importance. In this regard accommodation provides protection to religious liberty from state interference or state indifference. Such accommodation should be undertaken by the legislature rather than by the Courts. Unlike the United States, the New Zealand Bill of Rights does not have an anti-establishment built into its provision. Nevertheless, it may be possible that the New Zealand Court would read the religious freedom sections in the Bill of Rights as prohibiting the establishment and endorsement of certain religious views by government.

While anti-establishment is not an issue in this paper, it does provide some insight into the idea of religious freedom. This is an assurance of equal liberty to practise one's religion. Accordingly, the state must treat all religious persons with equal respect. However, the Human Rights Act narrow exceptions such as s 28(3) indicate a disregard for the religious liberties of employers and landlords. Thus, in the writer's view, a further accommodation must be made in the Human Rights Act to protect the religious liberty of employers and landlords.

A complaint that could be directed at legislative accommodation for landlords and employers is that it may result in a form of discrimination that is undesirable. That is, religious landlords who are offended by couples living together outside of marriage or same sex couples living together may refuse to let or rent their flat or unit to such people. However why should such discrimination be a problem in the context of religious landlords who are offended by such behaviour. Why should such landlords have to choose between honouring a law that prohibits discrimination and abandoning his or her religious beliefs that find such behaviour sinful. Society has traditionally not given any recognition to unmarried couples whether of the same sex or opposite sex. For example unmarried couples do not have the same rights of equal property division on separation. Similarly unmarried couples are viewed differently for the purpose of the welfare benefits. Another area readily noted is that unmarried couples do not have the same rights for adoption of children as married couples do and so on. This idea that society has not intended to protect unmarried couples was discussed in the American cases of *Evelyn Smith v Fair Employment and Housing Commission; State v French* and *AG v Desilets* mentioned above. In the *Evelyn Smith* case and the *Desilets* cases it was stated that the protection of unmarried couples was ranked as very low. The state's interest lay in promoting the marriage relationship. In the case of *French* a statute prohibiting fornication was still in force and the Court seized this as an indication that there was no intention to give unmarried couples equal status with married couples in the area of discrimination.

While New Zealand's law prohibiting fornication was abandoned

some time ago the law still treats unmarried couples differently from married couples in such matters as property, benefits, adoption and so on. This may continue until 31 December 1999 when s 151 of the Human Rights Act shall be deemed repealed. At such time all such discrimination against unmarried couples will be unlawful. In the meantime this remains a germ of an argument in regard to support for religious accommodation in the Act. While the American cases have no direct part to play in the New Zealand judicial system they do lend moral weight to providing protection for religious landlords and employers. The long history of dealing with religious freedom in the United States will give significance to such cases for the New Zealand judiciary.

Another ground of objection that may be raised to legislative accommodation of religious practices and beliefs is that it may open a floodgate of discriminatory behaviour claiming exemption. However this is most unlikely in a country like New Zealand where religion is a minority practice. For as it was stated in the *Evelyn Smith* case there is no evidence to indicate landlords will suddenly experience religious conversions in order to obtain the exemption. (*Evelyn Smith v Fair Employment and Housing Commission* 1994 Cal App Lexis 517 at 17.) This can clearly be guarded against by the accommodation containing an objective test to be applied when the exemption is claimed.

A powerful reason to accommodate religious beliefs of employers and landlords, is based on the special status of religion. The government can accommodate religion providing that it does not establish one particular religion above all others. The concept of special status turns on the idea that religious practices and beliefs are unlike other beliefs and practices. Michael W McConnell puts it cogently when he said

> By contrast, religious claims – if true – are prior to and of greater dignity in the claims of the state. If there is a God, his authority necessarily transcends the authority of nations; that, in part, is what we mean by "God" for the state to maintain that its authority is in all matters supreme, would be to deny the possibility that a transcendent authority could exist. Religious claims thus differ from secular moral claims both because the State is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests. (1985 *The Supreme Court Review* 1, 15.)

The state is unable to challenge such beliefs and viewpoints. In general, it is impossible to logically dispute with a person who says "God told me to do it". A liberal state as discussed above is based on the notion of neutrality and so has no basis to refute religious claims and must accommodate them.

The Honourable Geoff Braybrooke argued for the principle of secular respect for religion when he stated in parliamentary debate over the Human Rights Bill 1993 that

> there are people in our community who have very, very sincere religious views and convictions .... They believe passionately that homosexuality is a sin. ... I respect the rights of employers, based on sincere religious convictions to say whether or not they should employ or have a person. I use the word "sincere". It is not to be used by indiscriminate employers as an easy way of getting rid of somebody whom they do not particularly like .... The last thing that we in this Parliament want to do is to make people go to jail for strongly held religious beliefs. (*NZ Parliamentary Debates*, 27-7-1993, p 16934.)

Accommodation would need to extend beyond religious duty to include also religiously motivated conduct. This will be controversial but as stated above religion is important to a religious person and extends beyond mere ritual to the person's lifestyle.

It may be contended that when a religious person enters the marketplace and engages in business for profit then he or she must do so on the same terms as everyone else. To allow an exemption for religious landlords and employers would give them an advantage. But would it? Even so this misses the point that religion is different and worth accommodating. In a prosperous modern society where housing and work is plentiful the cost to society of religious accommodation will be minimal and worth permitting even for some slight inconvenience or cost to the non-religious as in the *Boakes* case where Mrs McLean found it hard to find another job in the small provincial town of Dargaville. However why should an employer have to compromise his or her religious practices because of poor employment prospects. Surely the essence of a truly democratic society is all citizens should share in the cost of this principle. The marketplace objection is in the writer's view of little merit.

It is submitted that accommodation of religious employers and landlords is an affirmative action. One problem for minority religious groups is they do not have the political clout in politics to bring about the rectification of discrimination against themselves. A truly democratic society will want to ensure everyone's interests are protected, even the religious minority. Affirmative action in this situation is to lift a burden from a group that is hit harder by legislation than other sections of the community.

Failure to accommodate can stigmatise religious individuals or groups. For instance, a religious employer as in the case of *Boakes* who is compelled to employ a married woman may result in the employer's co-believers stigmatising him as "fallen" and be caused to be held in lower esteem by his co-believers. Being required to obey the law and not discriminate against a married woman will be anathema and offensive to such a person's religious conscience. The burden upon the employer necessitates affirmative action. Accommodation in this instance, does not act with the purpose of advancing religion but rather of accommodating religious beliefs that would otherwise be burdened by the law.

Also it is of concern that the Commission in the *Boakes* case would order him to provide Mrs McLean with an apology. Did the Commission go too far in making this order? The writer submits that the Commission was wrong to do this for it makes Mr Boakes an instrument of state conformity and infringed his rights of free speech under the Bill of Rights.

Surely the essence of the freedoms in the Bill of Rights is the notion "that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state". (*Evelyn Smith v Fair Employment and Housing Commission* 1994 Cal App Lexis 517 at 10.) It is state tyranny to require Mr Boakes to apologise for his behaviour when he did it in reliance on his religious beliefs and practice. To be ordered to apologise for something that is offensive to one's religious belief smacks of a totalitarian mentality that requires conformity rather than accommodating difference.

For the Commission to impose an obligation of a written apology on Mr Boakes indicates its indifference to the fundamental rights of religion and free speech in the Bill of Rights. This highlights a need for a clear exemption that the Human Rights Commission will be bound to apply. Not to include accommodation for religious beliefs and practices will allow the Commission to ignore the mandate of the Bill of Rights. As the Hon J K McKay stated in parliamentary debate in 1981 "one criticism of the way in which the Human Rights Commission works at the moment, is that it tends to carry out its task far too much by the book". (*NZ Parliamentary Debates*. 28-8-1981 p 3034.) This observation will in the writer's view still hold today.

Government entanglement by *advancing religion*

It is submitted that in part a government must become "entangled" with religion. This is contrary to the secular purpose approach of the Lemon Test (*Lemon v Kurtzman* 403 US (602 1971)). The writer contends that the Lemon Test should not be applied in New Zealand because the protection of the right to freedom of religion is about advancing religion contrary to the thrust of the Lemon Test. The Lemon Test appears to devalue the seriousness of religious practices and beliefs. The first limb which requires a secular legislative purpose can undermine religious practices when the predominant secular culture has practices which have religious significance to a religious group. In such a case, the state's due regard for the religious group should result in accommodation to take into account the religious needs of the group. For example, it cannot be a religious establishment in industrial law for the hard hat rule to be waived in respect for the religious dress of Sikh workers.

The second limb of the Lemon Test does not acknowledge that accommodating religious freedom does not amount to advancing a particular religion. There is a distinction between advancing religious freedom and advancing religion per so.

The third limb of the Lemon Test which prohibits excessive entanglement of government with religion is inadequate. A government that is protecting the right to religious freedom cannot be indifferent to religion and must to some extent become entangled and involved in the practice of religion by making accommodation. Just what "excessive" entanglement means will be relevant here and is likely to prohibit accommodation of religion. Accordingly, it is the writer's view that the Lemon Test is an unsatisfactory approach and if it were to be adopted in New Zealand, it would stand in the way of any formal effort to accommodate religious groups. It is submitted that it is unlikely to be followed as the New Zealand Bill of Rights does not have an overt anti-establishment clause.

Legislative capture

The thrust of this paper is that accommodation of religious belief is necessary and should be undertaken by the legislature rather than by Courts where it would only occur on a one to one basis and at considerable cost to the parties concerned. However, objections can be raised to accommodation being the responsibility of the legislature. One such objection is the danger that legislature is open to capture. This is especially a concern in the United States where there are large lobby groups. One notes the recent rise of the formidable conservative Christian coalition under the leadership of Ralph Reed which was recently noted in *Time Magazine*, May 15th, 1995, where it said:

> Its 1.6 million active supporters and $25M annual budget, up from 500,000 activists and a $14.8M budget just 2 years ago, holds a virtual veto on the Republican President and will exert an extraordinary influence over who will occupy the Oval Office beginning of 1997. In fact, Reed's success represents the most thorough penetration of the secular world of American politics by an essentially religious organisation in this century. (*Time International*, May 15, 1995, No 19, p 22.)

The influence of mainstream religions could result in concessions being made to them and in addition could adversely affect the minority and "off beat" religious groups. Since New Zealand does not have the same powerful lobbying groups as exist in the United States this concern is not great. However this may change with the introduction of MMP. Certainly MMP will colour the situation.

Nevertheless, in response it is suggested that this need not be a concern for the legislature is in a better position to evaluate the practicality providing for accommodation of religious beliefs than are the Courts. In addition, the legislature is accountable for the effect of religious accommodation. While mainstream and influential religious groups will fare better in the political environment than minority religious groups in seeking exemptions, this need not be detrimental where the requirement of heightened scrutiny is required for legislative acts that burden religious beliefs. This will be covered in the discussion below on the form of accommodation to be incorporated in the Human Rights Act.

In passing, one can only raise the question whether the s 97 of the Human Rights Act 1993 "genuine justification" to an otherwise unlawful act moves the burden to the state to show a compelling interest why the act was unlawful. This would be of assistance to religious persons claiming a s 15 Bill of Rights freedom. However as discussed above the benefit to the religious will depend upon what is meant by the words "genuine justification". Explication of the term is required by either a further amendment to the Human Rights Act or accordingly, judicial interpretation. The writer does not consider the outcome will be favourable to the religious members in the community.

If the legislature is going to accommodate religious beliefs, the

question arises what sort of exemption and on what basis is this to occur.

An accommodation provision

It is the writer's submission that the provisions for accommodating religious beliefs should be broad and if there is any doubt then the accommodation should be over-inclusive rather than the converse. The academic writer, Frederick M Gedicks states that:

> One could argue with equal plausibility that we should grant exemptions even to the undeserving ... these kinds of overbroad constitutional rules preserve that the values of the rules are so important that it is worth the risk of protecting some undeserving people precisely to ensure that deserving people are never denied protection. There is a cost to this, to be sure, but it is not the breakdown of political order into violence and chaos. Indeed, the choice is not between order and chaos, but between different conceptions of order. ((1992) *Virginia Law Review* 671, 692-693.)

The writer's proposed form of accommodation to be included in the Human Rights Act for religious employers and landlords is modelled on the exemptions from statutes in the United States and also the United States Religious Freedom Restoration Act 1993. In the case of *State v French* 1990 a four-part test was discussed. The elements of the test were, (1) whether the objective religious belief is sincerely held, (2) whether the state regulation burdens the exercise of this religious belief, (3) whether the state interest in this regulation is overriding or compelling and (4) whether the state regulation uses the least restrictive means. It would seem that an accommodation based on aspects of this test would serve to recognise the seriousness of religious beliefs. A New Zealand exemption could be drafted as follows:

> Nothing in Part 2 of the Human Rights Act shall apply to a person who holds a sincere religious belief, where that part of the Act shall burden the exercise of the religious belief, unless the Proceedings Commissioner shall show that there is a compelling reason to disregard the burden placed upon a person's religious beliefs and the burden is in the least restrictive form possible to meet the compelling reason for it

While the proposed exemption is very wide, it accords with the writer's argument that society should take religious beliefs and practices seriously and not in any way attempt to limit them either directly or indirectly.

Conclusion

This paper has analysed the application of religious freedom in the New Zealand Bill of Rights to the Human Rights Act. It has been the writer's contention that religious beliefs are not going to be fully protected under the New Zealand Bill of Rights where it conflicts with other statutes, in this case the Human Rights Act. Accordingly, a general exemption should be included in the Human Rights Act to avoid marginalising religious persons. The discussion has been partly speculative in nature. Protection of religious belief is in its infancy and undeveloped in New Zealand. Accordingly it was necessary to look at an overseas jurisdiction, namely, the United States where they have a long history regarding the constitutional protection of religious beliefs. It was noticed that religious beliefs would be exempt from neutral, generally applicable laws in some instances. However the judiciary exhibited considerable ambivalence to providing an exemption to protect religiously motivated behaviour and this resulted in the passing of the Religious Freedom Restoration Act 1993. In a similar vein the writer has argued that the New Zealand judiciary is unlikely adequately to protect religiously motivated behaviour under the Bill of Rights Act when it clashes with the Human Rights Act and accordingly a provision should be included in the Human Rights Act providing an exemption for religiously motivated behaviour. ❑

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1 Steinberg D E. Religious Exemptions as Affirmative Action (1991) *Emory Law Journal* 77, 128.

continued from p 105

3 For more detailed comment on that case, and others, see F Bates, "Domestic Violence and Children – Some New Developments" (1995) 10(4) *Aust Family Lawyer* 24.

4 Above n 2.

5 For a view of the influence of this Convention in Australian law, where it had been notified, but not formally incorporated into municipal law, see the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

6 See, for example G Ochiltree and P R Amato, *The Child's Eye View of Family Life* (1985).

7 F Bates, "Child Sexual Abuse and the Fact-Finding Process – Some Thoughts on Recent Developments" (1994) 1 *Canberra L R* 181 at 186ff.

8 See D A Wolfe, L Zak, S Wilson and P G Jaffe, "Child Witnesses to Violence between Parents: Critical Issues in Behavioural and Social Adjustment" (1986) 14(1) *Journal of Abnormal Psychology* 95.

9 P G Jaffe, D A Wolfe, S K Wilson, *Children of Battered Women* (1990) at 40.

10 E Hilberman and K Munson "Sixty Battered Women" (1978) 2 *Victimology* 460.

11 F Bates, "Psychiatric Evidence of Character" (1976) 5 *Anglo-American Law Review* 99 at 103.

12 For a history of this presumption see F Bates, "The Changing Position of the Mother in Custody Cases: Some Comparative Developments" (1976) 6 *Family Law* 125.

13 For detailed comment on this case, see F Bates, "Access Where Allegations of Child Sexual Assault Are Made: Who Are We Protecting and From What?" (1994) 13 *U Tas LR* 237.

14 These were, in the Judge's own words,
(a) That there was an unacceptable level of violence in the relationship between her parents.
(b) That she must have been aware of that violence, to some extent at least:
(c) That she herself has been exposed to her father's anger;
(d) That there is a lack of recognition by the father of the violence.

15 See, for example, B James and C Gibson, "Supervising Visits Between Parent and Child" (1991) 29 *Family and Conciliation Court Review* 73.

16 J L Caldwell, "Disputes on Child Access: Judicial Decisions in New Zealand" (1990) 4 *Canterbury LR* 246 at 253.

17 In addition, Judge von Dadelszen, at 671, reserved access to the paternal grandmother on the condition that the father not be present when access was taking place.

A theory for a more coherent approach to eliciting the meaning of the principles of the Treaty of Waitangi

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This short article is a further continuation of my assault on the underlying implicit logic, and methodology, presumably accompanying the elucidation of the meaning of the principles of the Treaty of Waitangi ([1995] NZLJ 168, [1996] NZLJ 28). *I declare bluntly my interests from the outset. At the risk of sustaining extreme social opprobrium I largely disagree with the current approach taken by the Court of Appeal,*[1] *especially, and academics and politicians to a lesser extent, to the meaning of the social, political and legal significance of the Treaty. I feel that the current approach, which is rapidly attaining the status of conventional wisdom, is arguably both misplaced and cavalier. I am very concerned about the validity of some of the purportedly enlightened social commentary, political policy and apparently "just" case law on the principles of the Treaty. I question whether the necessary preceding dialectic has been canvassed and the legitimacy of all potential political and legal options thoroughly considered before decisions have been made. In my opinion, for the most part well-meaning*[2] *but arguably misdirected case law, political policy and general commentary is currently being developed. Further, any continuation of this trend should be discouraged until some of the fundamental, hitherto ignored, debate on the merits of the underlying principles in justification of the new rubric has been thoroughly addressed.*[3]

The focus and theme of this article is a general consideration of the current approach to the determination of the meaning of the principles of the Treaty of Waitangi. I am particularly interested in the role of the Courts in the development of these principles. Such questions that include whether the participation of the Court is appropriate, whether Courts make the right decisions and what reception and effect do judgments have on the formation of broader principles and policy on the principles of the Treaty of Waitangi will be briefly considered in this article.

Discourse and the Treaty of Waitangi

The term "discourse" has assumed an increasingly popular usage in the literature and general discussion on the meaning of the principles of the Treaty of Waitangi. A very brief, and probably simplistic, explanation of the concept of discourse is offered here.

Habermas says that discourse serves the justification of problematic claims to validity of opinions and norms. Discourse is a specialised form of communication that focuses on the search for arguments and which attempts to offer justifications for the agent's opinion and beliefs. As a method, discourse guarantees the possibility of attaining a consensus discursively by which the consensus itself might then be subsequently recognised as rational (J Habermas, *Theory and Practice*, 1974, pp 18-19).

The key element to discourse is the search for justification. Theoretically the logical step involved in justifying the formation of some posited rule, making of a decision or completion of some action depends upon deductive reasoning. A rule, decision or action is justified if and only if the specific rule or particular decision or action conforms to a wider underlying principle or general law. Rules, decisions or actions that are inconsistent with some underlying abstract principle are unjustified because they are logically invalid. If any rule, decision or action violates the "principle of validity" then it is wrong.

Legal discourse is a subset of general discourse but is, in ways, a marked exception to it. Legal discourse is a rhetorical genre that consists of a language of power. It employs a specialised text that is intentionally directed at the pursuit of control over meaning and which is utilised as an instrument and expression of domination. Legal language and legal discourse is the idiom by which interests and claims are enforced ultimately as rights. Arguably the vocabulary and application of legal discourse is an inevitable incident of the adversarial method of dispute resolution. Consequently,

the principles governing general discourse must be adjusted to reflect the more technical, specialised and self-interested motivations of legal discourse. Legal jargon and legalese – notably antiquated Latin words and phrases – may be used by lawyers as a means of intimidating non-lawyers and of persuading decision-makers of the validity or merits of claims and actions. Thus, unlike the province of logic, legal discourse is not necessarily concerned with the revelation of the truth. Its main, perhaps only, function is to persuade. (In fact, legal discourse is more precisely called eristic reasoning.)

Historical injustice and the Treaty of Waitangi

Should historical accounts of perceived injustices perpetrated on Maori have any persuasive influence on the formation of modern Treaty policy and the resolution of Treaty-related disputes? History is essentially a descriptive discourse which may incidentally have a normative function. Perhaps the most important function of history is its educative value: an awareness of former mistakes and injustices may provide the enlightenment necessary to avoid repetition. However, it is a moot issue whether historical material is vitally relevant to the resolution of contemporary political and legal issues. The primary importance of history depends upon the factual context within which it is used. If similar social conditions obtain then historical accounts may be of more relevance. If the social context has significantly evolved, that is changed, since the days the reliant history was made then the converse conclusion would hold.

Arguably the current New Zealand social, political and economic environment is entirely different to those conditions that prevailed before, say, 1939. Consequently, it is suggested that care should be exercised when historical reasons are cited as grounds in support of claims made pursuant to the principles of the Treaty of Waitangi.

Further, it is argued that the onus of proving the relevance of this historical evidence as the grounds for the assertion of current interests and claims should be reposed on those who rely upon it to justify such interests and claims. Thus, perhaps claimants should be required to convince their opponents that the cited historical injustices are unattenuated by time and that they are still valid. This would effectively mean, of course, proving that the historical social and political conditions are indistinguishable from contemporary social and political conditions. It is suggested, without further elaboration, that this might be very difficult to prove. If so, the substance of any interest or claim arising from the principles of the Treaty of Waitangi that significantly relies upon historical fact must be subject to intense scrutiny. In final comment I affirm my belief in the broad proposition that history is contextually defined. The reality of life is that human society is dynamic and always changing. Therefore history should not be permitted to dictate the outcome of current disputes and to determine the substance of Treaty of Waitangi policy.

Precedents and the emerging discourse on the principles of the treaty

Much of the discourse on the Treaty of Waitangi, whether expressed in the general literature, law review articles, public policy or within the growing body of case law tends to dwell on the analysis of case law precedents. Case law propositions are cited in support of general principles about the principles of the Treaty of Waitangi. Normally this practice would pass without comment. Judges cite precedents in their judgments and all law review articles and legal textbooks consist of an analysis of case law. However, arguably this is an unsatisfactory method of constructing an emerging discourse on the meaning of the principles of the Treaty of Waitangi. There are at least two objections to this quasi-discursive approach, one of which is largely methodological and the other logical.

First, the discourse on the principles of the Treaty of Waitangi presumes that the underlying case law propositions are correct. Thus, according to my reading, much of the discourse seems to consist of the recitation and limited evaluation of the cases in a continuous narrative. If there is disagreement over the decisions reached in the cases then, by implication, any literature that relies upon this material must also be challenged. Second, incorrect case law assumptions and presumptions are infiltrating the general and impliedly accepted literature on the Treaty of Waitangi. Arguably, therefore, contestable or incorrect rationale employed in the resolution of case law is escaping evaluation and potential analytical censure and is, instead, establishing itself as the conventional wisdom on the subject.

In legal theory there are two competing approaches to the nature of law and adjudication. First, there is the **Social Thesis**. This thesis holds that law is a social fact or construct which depends upon underlying social relations for its existence and validity. Thus legal relations directly reflect social relations because they institutionalise those social relations that are accepted by officials as essential for the survival and integrity of society.

In contrast, the **Normativity Thesis** holds that law is a form of practical reasoning. Under this analysis law has a more prescriptive and directive function. Law consists of rules and principles that have been established by controlling officials. Theoretically these rules and principles should reasonably conform to social expectations and demands. It is trite reflection that the failure of any legal system to satisfy the generally accepted requirements of society in a democratic body-politic invites the prospect of civil disobedience. Positive law tends to dominate conservative societies with a strong interventionist government (a la New Zealand society under Muldoonism?). Under these conditions the law tends to be more restrictive about the scope and substance of personal liberties.

These two doctrines have direct relevance to the preceding discussion on the New Zealand Court of Appeal's approach to the meaning of the Treaty of Waitangi. Which theory is the New Zealand Court of Appeal, in particular, using to resolve Treaty-related disputes? Presumably it cannot be the Social Thesis. If so, it seems that there are many unanswered issues facing this Court for future examination and explanation. Just how great is the demand of the "ordinary person" for changes to the meaning of the status of the Treaty of Waitangi? Does the Court know and, if so, how so? It is suggested that

judicial suppositions are inadequate proofs of any such demands. It is further suggested that reliance upon arguably distorted and self-interested advice of "experts" such as general academics and academic historians is insufficient persuasive grounds for change. It is suggested that the voice of the people, however measured, must determine how the Treaty should be treated. If the general, discursive, consensus is that this country is not yet ready for radical change then this view must prevail despite the personally different views of the Court of Appeal Judges. Arguably this is the essence of good judgment.

The Normativity Thesis also poses problems to the Court of Appeal. It seems to me that the Judges are undertaking a leading and innovative role in changing the law in this area: the establishment of the "partnership principle" is a classic example of this general proposition. (*New Zealand Maori Council v Attorney-General* [1987]1 NZLR 641, 651.) The obvious question, however, is what justification is there for this radical development? I doubt whether it was public demand or social expectation, especially given that this case was decided in 1987. There is not any local or overseas precedent for any such principle as far as this author is aware. Thus, arguably this judgment was a well-intended knee-jerk reaction to a very uncomfortable dispute.

It would be unfair to leave the discussion here. In defence of the Court of Appeal it might be suggested that it was forced to make a decision by the Crown's apparent failure to fully emphasise a fundamentally important principle of public law: that serious disputes potentially importing collective interests should be deferred to the legislature. Thus, faced with the dilemma of having to reach some decision the Court (probably rightly in the circumstances) chose the partnership fiction. Thus any criticism, if appropriate, should arguably be directed at the Crown for litigating this issue in the first place and for subsequently failing to argue jurisdictional issues during the hearing.[4]

There is a second, related, reason for why the growing literature on the meaning of the principles of the Treaty of Waitangi should be viewed with caution. As mentioned, this narrative seems to depend upon the reasoning of the cases, especially the leading cases of the New Zealand Court of Appeal. Textbook principles tend to be derived from case law propositions, such propositions that are increasingly treated as infallible and forming conventional wisdom. In contrast, this present article maintains that the decisions themselves should be questioned. Also, by implication, the analysis of the precedents, such as it is, should also be examined on logical grounds. If it is true that public policy, textbooks, law reviews and general commentaries on the Treaty are largely reliant both upon case law propositions and the findings of the Waitangi Tribunal then arguably the following logical faux pas is being committed.

A purportedly deductive argument where the premises and conclusion are indistinguishable is called a petitio principii. (The term literally means "begging the question".) It is not a valid and true argument by definition because the conclusions are not inferred. Rather, the conclusion is determined by the carefully selected premises. If the premises themselves are changed then a different conclusion may follow. Therefore, perhaps the biggest issue concerning the meaning of the principles of the Treaty of Waitangi is the issue of reaching consensus about the correct major and minor premises that should be used in any subsequent dialectic.[5] In summary, my criticism of the current approach in the general legal literature and by policy advisers is that case law propositions and the Reports of the Waitangi Tribunal are accepted with little or no comment about their significance to resolving current disagreements. Thus they are beginning to enjoy an axiomatic status which they may not necessarily deserve.

The authors of the "new wave" liberal (and possibly wrong) approach to the meaning of the principles of the Treaty of Waitangi appear to accept freely the validity of existing principles and conclusions. After determining these existing principles, and accepting them as axiomatically just, they are employed as reasons for forming new and broader principles and conclusions on the Treaty. Typically, for example, the Waitangi Tribunal may accept the historical findings of expert historians as evidence that the Crown or some private individual or agent, such as the New Zealand Company, committed some specific wrong to some specific Maori. The current government, with a sympathetic record toward historical Maori grievances, might then use this information as a reason to pay compensation and/or return the land or other property right to the current descendants of the Maori to whom the original wrong was committed. I would respectfully submit that this "nodding donkey" mentality should be stopped immediately.

The government (and Courts) are unquestionably attempting to resolve extremely difficult and sensitive issues as justly as possible. It is respectfully suggested, however, that their approach to these issues is problematic. The presumption of the validity of historical evidence, upon which much of the changes in interpretation to the status and meaning of the principles of the Treaty appears to rely, has yet to be fully analysed and evaluated. Who now are the victims of historical injustices? Conversely, who now are the villains who are accountable for perpetrating such historical injustices? Why, for example, should current taxpayers be held financially responsible for subsidising a fiscal envelope offered in full and final compensation for damages that arguably happened in previous generations? If the current generation of taxpayers must bear the financial responsibility of righting historical injustices via the fiscal envelope then future taxpayers will be subsidised by this sacrifice. Effectively, then, this generation of taxpayers may be held vicariously responsible for the unjust actions of former generations of non-Maori for the ultimate benefit of future generations of taxpayers. Is this a correct, just and, indeed rational, policy?

Which forum: the Court of Appeal or the Legislature?

(i) First principles

Although instituted political policy and case law contribute to social control and regulation, both are distinct entities. The role and character of political action is collective

and public, rather than individual, and it is at least partly deliberate and intentional. Politics has been characterised as the medium through which norms are actively enforced and the potential of deliberate, active and collective innovation or imposition of social patterns may be instituted. In a complex democratic society political discourse, advocating the pursuit of some specified political policy, implies both a plurality of competing legitimate ends of human existence and a kind of authority or organisation. Voters have an (admittedly limited) opportunity to choose the preferred political policy by supporting the individuals and political party who champion it (H Pitkin, *Wittgenstein and Justice*, 1972, pp 210-6). Legislation is the manifestation of political policy. Under the current political regime the type and the substance of enacted legislation reflects the aims and policies of the government in power. Whether this stays the same under MMP remains to be seen.

Judgments, or case law, have a different pedigree to legislation. Although case law, like legislation, is prescriptive it is formed in the Courts. Judgments are the institutional resolution of disputes between interacting agents. They form the constituent part of the doctrine of precedent. Case law is a source of law because the Courts form one of the three agents of government: judicial decisions are state sanctioned and even the decisions of the Disputes Tribunal ultimately may be enforced through the issuing of the appropriate warrant. Thus case law is prescriptive and it also contributes to social control and regulation.

(ii) Functional comparison

A personal thesis, which I am currently developing, is that the Courts and Parliament have distinct and separate roles for making and developing the law. Parliament, through legislation, serves the political agenda of its MPs. Parliament is the forum where legislation is enacted that affects and shapes the broad social, economic and political parameters that govern group social interaction. It is in Parliament that the general conditions for group coherence and coordination is established qua public and political policy. Ideally such policy should be representative of the generally held expectations and demands of society in a democratic society. Theoretically Members of Parliament depend upon electoral support for their continued political survival. It must be noted, however and in contrast, that it has been well documented that theory does not necessarily equate with political reality. Some, usually wealthy, pressure groups wield far more power and influence over politicians than does the "ordinary (unorganised) person". This has been, of course, one of the chief criticisms of the Marxists: in their view the powerful, enfranchised politically elite, such as the Business Round Table, have an unjustified influence on New Zealand laws.[6] The argument is that such undue influence is undemocratic because it does not necessarily correspond to nor reflect the general consensus of the community.

In contrast, it is suggested that case law has a totally different pedigree and function compared to legislation. Case law is derived solely from dispute resolution. Thus it is both fact-dependent and fortuitous as it largely depends upon the decisions of the interacting parties to litigate. Strict rules of evidence and procedure limit the availability of evidence available to Judges and also defines the issues. Eristic reasoning, as previously noted, also reduces the ability of Judges to expound general principles for regulating and controlling future social interaction.[7] The nature of the adversarial system of dispute-resolution is to win cases and not necessarily to reveal the strict truth. It is well known that oratory and persuasive communication techniques are essential features of successful barristers. The art of good Court room presence and general litigation skills is the ability to place selective emphasis on advantageous precedents, to favourably interpret ambiguous precedents and to dismiss and/or distinguish damaging precedents. For a lucid and useful account of legal reasoning techniques the reader is referred to N MacCormick, *Legal Reasoning and Legal Theory* (1978).

In summary, it is respectfully suggested that there are several objections to the development of the principles of the Treaty of Waitangi by the Court of Appeal. Essentially, it is potentially unconstitutional. Court of Appeal judgments do not necessarily reflect the general consensus of the community. This point is particularly salutary given the function of Courts generally to resolve disputes and also the specialised techniques utilised in the Courts to persuade Judges of the merits of counsel's arguments, as discussed. Thus the Court of Appeal is making law that affects the broad parameters of social and political interaction, or collective interests, in a manner that may not necessarily reflect the general consensus of the community.[8] The Court of Appeal has neither the resources nor the constitutional status to attempt to address and resolve such complex issues. Consequently, given these limitations, it is strongly advocated that all Treaty-related disputes should be deferred to the (theoretically) more democratic forum of Parliament for consideration and deliberation.

The general position supported by this writer has already been classically formulated by Mason J in the Australian High Court (*State Government Insurance Commissioner v Trigwell And Other* (1978) 142 CLR 617, 633-4):

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a

view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.

These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule.

I do not agree entirely with this quote. I feel that it should be qualified by the brief comment that this judicial approach is especially relevant to disputes that potentially affect collective interests only. I do not consider it inappropriate for the Courts to reform case law if such reform is justified and provided that this reform does not change broad social, economic and political parameters that govern social control and regulation. This statement itself raises an important incidental issue which is not pursued in this paper, namely, what is the difference between a broad and narrow social, economic and political parameter? To continue, in my opinion case law of the latter type is an arrogation of Parliamentary power. With respect, I further do not think that such intrusions should be tolerated on strict constitutional grounds. It is largely for these reasons that I do not agree with the New Zealand Court of Appeal's decision in the State-Owned Enterprises case not that Court's subsequent involvement in Treaty-related disputes and, also, why I do not concur with the Australian High Court's decision in *Mabo v State of Queensland* (1992) 107 ALR 1).

Conclusion

Over the course of three recent articles in the *New Zealand Law Journal* I have attempted to question the current perceived approach to the elaboration of the meaning of the Treaty of Waitangi. I do so in complete good faith. I admit that I am a non-Maori, assuming that there is any such meaningful description. I also consider myself to be a politically moderate liberal. I have no particular axe to grind except to insist upon the demand that any future "progress" in this area be balanced, enlightened, consensual and justified. I do not think that the substance of some of the current Treaty discourse, as either political policy, case law, or general commentary, has any of these attributes and that other discourse is inadequate in certain respects. I feel that perhaps some of the issues mentioned in these papers should first be addressed before any further consideration to the reform of the status and meaning of the Treaty of Waitangi is contemplated.

If so I, personally, would feel far more confident that a lasting, political, settlement of this most difficult of problems may be reached for the greatest benefit of all. ❑

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1 I am fully aware that the Privy Council is this country's highest Court. However, given the uncertain future of appeal rights to this Court, I have confined discussion to the Court of Appeal. Even if the Privy Council was retained as our final appellate Court I would still argue that there should not be any right of appeal to that Court on Treaty-related issues. With respect, I am not confident that the Law Lords are sufficiently knowledgeable about local social and political conditions to enable them to make informed decisions in this controversial area.

2 However I am not convinced that *all* the agents who have contributed to this debate are acting entirely in good faith. Some of the commentary, especially, is vitriolic and appears to be unbalanced. Also, as an aside, it is interesting to speculate on the possible reasons that motivate radical and opinionated "non-Maori" especially to write on this subject. Perhaps it is because they genuinely believe in what they say. I wonder, however, at the risk of being unkind, if these commentators genuinely believe in their opinions. Do they truly treat Maori as their friends and equals or do they perhaps inadvertently patronise Maori? Do non-Maori commentators regularly socialise with Maori? Do they form stable personal relationships with Maori and have they co-parented children with them? See R Dawkins, *The Selfish Gene* (new ed, 1989), for the significance of this latter remark. In the absence of such evidence of true, rather than purported, commitment then it is suggested that the arguably unbalanced opinions of such non-Maori commentators should be viewed with some suspicion.

3 This article does not set out to be mischievous for its own sake. Rather, it (and the two previous articles written by this author) questions some of the rationale and purpose of the approach to the developing principles of the Treaty of Waitangi: rather than necessarily creating an alternative theory the article is critically focused. It is conceded that this method is inconsistent with the conventional wisdom of encouraging constructive criticism, following the lead of LK Galbraith in *The Affluent Society* (2 ed, 1969), p 18.

4 The decision should be contrasted with the Court of Appeal's decision in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 203 – the "Sealord case".

5 A point made in a previous article ([1995] NZLJ 168). The second paper on the Treaty ([1996] NZLJ 28) erroneously and clumsily refers to the *second* premise in the opening paragraphs.

6 For example, one might speculate upon the effectiveness of the occupation of Moutoa Gardens if the occupiers had consisted less of social welfare beneficiaries trying to prove their point and more of well-intending, reasonable and educated middle class professionals. On this point of principle, only, the occupiers arguably deserve some sympathy.

7 To recap, the Courts are a branch of government because judicial decisions are institutionally sanctioned and enforceable. Also, they are prescriptive by virtue of the doctrine of stare decisis.

8 Of course, it may transpire that the Court of Appeal's rulings and public opinion is essentially convergent. However this point is yet to be proved.

Legal Latin

The Daily Telegraph's City Diarist asked **Stephen Pollard**, the lawyer who tried to prevent the extradition to Singapore of Barings rogue Nick Leeson, what his favourite foreign phrase was. "Res Ipsa Loquitur" he replied, ("Let things speak for themselves"). His curiosity roused, the Diarist asked why this was the case. "It's been my favourite ever since I dictated it to a temporary secretary and she typed it out "Ray's hips were locked together", revealed Pollard.

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